NORTH CAROLINA REPORTS
VOL. 175

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

SPRING TERM, 1918

REPORTED BY

ROBERT C. STRONG

Annotated through Volume 244

RALEIGH
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OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1918

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

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

ATTORNEY-GENERAL:

JAMES S. MANNING.

ASSISTANT ATTORNEY-GENERAL:

R. H. SYKES.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

JOSEPH L. SEAWELL.

OFFICE CLERK:

EDWARD C. SEAWELL.

MARSHAL AND LIBRARIAN:

ROBERT H. BRADLEY.
MARSHALL DELANCEY HAYWOOD.*

*Mr. Haywood succeeded Mr. Bradley, who died 17 May, 1918.

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.
J. Lloyd Horton*	Fifth	Pitt.
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 Schenick	Eighteenth	Henderson.
J. W. Swain	Nineteenth	Buncombe.
G. L. Jones	Twentieth	Macon.

*Succeeded Charles L. Abernathy, resigned.

LICENSED ATTORNEYS

SPRING TERM, 1918

The following were licensed to practice law by the Supreme Court, Spring Term, 1918.

ARTHUR WAYNE BEACHBOARD.....Stocksville, N. C.
ELVIN LOY BUMGARNER.....Hickory, N. C.
HAROLD DUNBAR COOLEY.....Nashville, N. C.
PHINEHAS DAVID CROOM.....Kinston, N. C.
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FRANK DOBBIN HACKETT, JR.....Washington, N. C.
GEORGE OSBORNE HEGE.....Winston-Salem, N. C.
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JESSE ALDON JONES.....Maysville, N. C.
ZORO KNOX JUSTICE (DR.).....Davidson, N. C.
HERCULES LEE KOONTZ.....Greensboro, N. C.
ALONZO GROVER LIVELY.....Honaker, Va.
WALTER RAINE MCCARGO.....Reidsville, N. C.
CHARLES HOWARD REAVES.....Wake Forest, N. C.
WILLIAM FRANCIS SCHOLL(S).....Holly Springs, N. C.
HARVEY HOYLE SINK.....Lexington, N. C.
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SPENCER THEOPHILUS THORNE.....Rocky Mount, N. C.
EDWARD LLEWELLYN TRAVIS, JR.....Halifax, N. C.
HENRY LEE WILLIAMSON.....Elizabethtown, N. C.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE SPRING OF 1919

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 one week before the first Monday in each term.

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

	SPRING TERM, 1919
First District	February 4
Second District	February 11
Third and Fourth Districts	February 18
Fifth District	February 25
Sixth District	March 4
Seventh District	March 11
Eighth and Ninth Districts	March 18
Tenth District	March 25
Eleventh District	April 1
Twelfth District	April 8
Thirteenth District	April 15
Fourteenth District	April 22
Fifteenth and Sixteenth Districts	April 29
Seventeenth and Eighteenth Districts	May 6
Nineteenth District	May 13
Twentieth District	May 20

SUPERIOR COURTS, SPRING TERM, 1919

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

EASTERN DIVISION

First Judicial District

SPRING TERM, 1919—*Judge Devin*

Pasquotank—Dec. 30† (2); Feb. 10† (1); Mar. 17 (1).
Washington—Jan. 13 (1); June 2 (2).
Perquimans—Jan. 20 (1); Apr. 14 (1).
Currituck—Jan. 27† (1); Mar. 3 (1).
Beaufort—Feb. 17† (2); Apr. 7† (1); May 5 (2).
Camden—Mar. 10 (1).
Gates—Mar. 24 (1).
Chowan—Mar. 31 (1).
Tyrrell—Apr. 21 (2).
Hyde—May 19 (1).
Dare—May 26 (1).

Second Judicial District

SPRING TERM, 1919—*Judge Bond*

Wilson—Jan. 13 (1); Feb. 3† (2); May 12† (2); June 23† (1).
Nash—Jan. 20 (1); Feb. 24† (1); Mar. 10 (1); Apr. 28* (1); May 5† (1); May 26† (1).
Edgecombe—Mar. 3 (1); Mar. 31† (2); June 2 (2).
Martin—Mar. 17 (2); June 16 (1).

Third Judicial District

SPRING TERM, 1919—*Judge Connor*

Warren—Jan. 13 (2); May 19 (2).
Halifax—Jan. 27 (2); Mar. 17 (2); June 2 (2).
Bertie—Feb. 10 (1); May 5 (2).
Hertford—Feb. 24 (1); Apr. 14 (2).
Vance—Mar. 3 (2); June 16 (2).
Northampton—Mar. 31 (2).

Fourth Judicial District

SPRING TERM, 1919—*Judge Kerr*

Harnett—Jan. 6 (1); Feb. 3† (2); May 19 (1).
Chatham—Jan. 13 (1); Mar. 17† (1); May 12 (1).
Wayne—Jan. 20 (2); Apr. 7† (2); May 26 (2).
Johnston—Feb. 17† (2); Mar. 10 (1); Apr. 21 (2).
Lee—Mar. 24 (2); May 5 (1).

Fifth Judicial District

SPRING TERM, 1919—*Judge Daniels*

Craven—Jan. 6* (1); Feb. 3† (2); Apr. 7‡ (1); May 12† (1); June 2* (1).
Pitt—Jan. 13† (2); Mar. 17 (2); Apr. 14 (2); May 19† (1); May 26† (1).
Greene—Feb. 24 (2); June 23 (1).
Carteret—Mar. 10 (1); June 9 (2).
Jones—Mar. 31 (1).
Pamlico—Apr. 28 (2).

Sixth Judicial District

SPRING TERM, 1919—*Judge Whedbee*

Duplin—Jan. 6† (2); Jan. 27* (1); Mar. 24† (2).
Lenoir—Jan. 20* (1); Feb. 17† (2); Apr. 7 (1); May 19* (1); June 9† (2).
Sampson—Feb. 3 (2); Mar. 10† (2); Apr. 28 (2).
Onslow—Mar. 3 (1); Apr. 14† (2).

Seventh Judicial District

SPRING TERM, 1919—*Judge Allen*

Wake—Jan. 6* (1); Jan. 27† (3); Mar. 3* (1); Mar. 10† (2); Mar. 31† (3); Apr. 21* (1); Apr. 28† (2); May 19† (2); June 9† (3).
Franklin—Jan. 13 (2); Feb. 17† (2); May 12 (1).

Eighth Judicial District

SPRING TERM, 1919—*Judge Calvert*

New Hanover—Jan. 13* (1); Feb. 3† (2); Mar. 31* (1); Apr. 7† (1); Apr. 14† (1); May 5 (1); May 19† (2); June 23* (1).
Pender—Jan. 20 (1); Mar. 3† (2); June 2 (1).
Columbus—Jan. 27 (1); Feb. 17† (2); April 21 (2).
Brunswick—Mar. 17 (1); June 16† (1).

Ninth Judicial District

SPRING TERM, 1919—*Judge Stacy*

Bladen—Jan. 6‡ (1); Mar. 10* (1); Apr. 21† (1).
Cumberland—Jan. 13* (1); Feb. 10† (2); Mar. 17† (2); Apr. 28‡ (2); May 26* (1).
Hoke—Jan. 20 (1); Apr. 14 (1).
Roberson—Jan. 27* (1); Feb. 3† (1); Feb. 24† (2); Mar. 31† (2); Mar. 12† (2).

Tenth Judicial District

SPRING TERM, 1919—*Judge Lyon*

Durham—Jan. 6† (2); Feb. 24* (1); Mar. 10† (2); Apr. 28† (1); May 19* (1); June 16† (1).
Alamance—Jan. 20† (1); Mar. 3* (1); May 26† (2).
Person—Feb. 3 (1); Apr. 21 (1).
Granville—Feb. 10 (2); Apr. 7 (2).
Orange—Mar. 31 (1); May 5† (1).

WESTERN DIVISION

Eleventh Judicial District

SPRING TERM, 1919—*Judge Ferguson*

Forsyth—Dec. 30† (1); Jan. 6*† (1); Jan. 13*† (1); Feb. 10† (2); Mar. 10† (2); Mar. 24* (1); May 19† (3).
Rockingham—Jan. 20* (1); Feb. 24† (2); May 12 (1); June 16† (2).
Surry—Feb. 3 (1); Apr. 21 (2).
Caswell—Mar. 31 (1).
Ashe—Apr. 7 (2).
Alleghany—May 5 (1).

Twelfth Judicial District

SPRING TERM, 1919—*Judge Lane*

Guilford—Jan. 13† (2); Jan. 27* (1); Feb. 10† (2); Mar. 10† (2); Mar. 24† (1); Apr. 14† (2); Apr. 28* (1); May 12† (2); June 9† (1); June 16* (1).
Davidson—Feb. 24 (2); May 5† (1); May 26 (2).
Stokes—Mar. 31* (1); Apr. 7† (1).

Thirteenth Judicial District

SPRING TERM, 1919—*Judge Shaw*

Richmond—Jan. 6* (1); Apr. 7* (1); May 26† (1); June 16† (1); Mar. 17† (1).
Anson—Jan. 13* (1); Mar. 3† (1); Apr. 14 (1); Apr. 21† (1); June 9† (1).
Moore—Jan. 20* (1); Feb. 10† (1); May 19† (1).
Union—Jan. 27 (1); Feb. 17† (2); Mar. 24 (1); May 5† (1).
Stanly—Feb. 3† (1); Mar. 31 (1); May 12† (1).
Scotland—Mar. 10† (1); Apr. 28* (1); June 2 (1).

Fourteenth Judicial District

SPRING TERM, 1919—*Judge Adams*

Mecklenburg—Jan. 6* (2); Feb. 3† (2); Feb. 17* (1); Feb. 24† (3); Mar. 24* (1); Mar. 31† (2); Apr. 28† (2); May 12* (1); May 26† (2); June 9* (1); June 16† (1).
Gaston—Jan. 20 (2); Mar. 17* (1); Apr. 14† (2); May 19* (1).

Fifteenth Judicial District

SPRING TERM, 1919—*Judge Harding*

Cabarrus—Jan. 6 (2); Apr. 21 (2).
Montgomery—Jan. 20* (1); Apr. 7† (2).
Iredell—Jan. 27 (2); May 19 (2).
Rowan—Feb. 10 (2); Mar. 10† (1); May 5 (1).
Davie—Feb. 24 (2).
Randolph—Mar. 17† (2); Mar. 31* (1).

Sixteenth Judicial District

SPRING TERM, 1919—*Judge Long*

Lincoln—Jan. 27 (1).
Caldwell—Feb. 24 (2); May 19† (2).
Burke—Mar. 10 (2).
Cleveland—Mar. 24 (2).
Polk—Apr. 14 (2).

Seventeenth Judicial District

SPRING TERM, 1919—*Judge Webb.*

Wilkes—Jan. 20† (2); Mar. 10 (2).
Catawba—Feb. 3 (2); May 5† (2).
Alexander—Feb. 17 (1).
Yadkin—Mar. 3 (1).
Watauga—Mar. 24 (2).
Mitchell—Apr. 7 (2).
Avery—Apr. 21 (2).

Eighteenth Judicial District

SPRING TERM, 1919—*Judge Cline*

McDowell—Jan. 20† (2); Feb. 17 (2).
Rutherford—Feb. 3† (2); Apr. 28 (2).
Henderson—Mar. 3* (2); May 26† (2).
Yancey—Mar. 24 (2).
Transylvania—Apr. 14 (2).

Nineteenth Judicial District

SPRING TERM, 1919—*Judge Justice*

Buncombe—Jan. 13 (3); Feb. 3† (3); Mar. 3 (3); Mar. 31,† '18 (1); Apr. 7,† '19 (4); May 5 (3); June 2† (3).
Madison—Feb. 24 (1); Mar. 24 (1); Apr. 21, '18 (2); Apr. 28, '19 (1); May 26 (1).

Twentieth Judicial District

SPRING TERM, 1919—*Judge Carter*

Haywood—Jan. 6† (2); Feb. 3 (2); May 5† (2).
Cherokee—Jan. 20 (2); Mar. 31 (2).
Jackson—Feb. 17 (2); May 19† (2).
Swain—Mar. 3 (2).
Graham—Mar. 17 (2).
Clay—Apr. 14 (1).
Macon—Apr. 21 (2).

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

Compiled from the Calendar of A. B. Andrews, of the Raleigh bar, with his permission.

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, Assitant United States District Attorney, Charlotte.

CHARLES A. WEBB, United States Marshal, Asheville.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1918.

R. M. SUTTON v. M. M. WELLS ET AL.

(Filed 22 December, 1917.)

1. **Evidence—Deceased Persons—Transactions and Communications—Deeds and Conveyances—Creditor's Bill.**

Where a conveyance of land is sought to be set aside as fraudulent against creditors, and there is evidence tending to show that the debtor had conveyed the lands to a third person without consideration, who indirectly conveyed the same to the debtor's sister, the latter claiming that the conveyance was for a loan and the deed was in the nature of a mortgage therefor, the debtor having since died, it is held that it was incompetent for his sister to testify as to any transactions relating to the subject of the action in favor of his estate. Revisal, sec. 1631.

2. **Evidence—Deceased Persons—Transactions and Communications—Independent Knowledge.**

A party in interest may testify to a substantive fact independant of any transaction or communication with a deceased person and existing by independent knowledge, such not being within the intent and meaning of Revisal, sec. 1631.

3. **Evidence—Deceased Persons—Interest—Deeds and Conveyances—Favor of Title.**

A party to a transaction with a deceased person is incompetent to testify thereto when it involves the question of one of several alleged fraudulent conveyances of lands as against the creditors of the deceased

person and in favor of the title which he himself had conveyed. Revisal, sec. 1631.

4. Same—Executors and Administrators—Creditor's Bill.

A defendant administrator of a deceased debtor in a creditors bill to set aside a series of conveyances alleged to be in fraud of his creditors, has antagonistic interests to a defendant grantor in one of the deeds, involved in the controversy, and where the administrator has not testified to a transaction, the testimony as to such by the grantor in the deed is incompetent. Revisal, sec. 1631.

APPEAL by plaintiffs from *Shaw, J.*, at September Term, 1917, of HAYWOOD.

This action in the nature of a creditor's bill was brought by the creditors of M. M. Wells against said M. M. Wells, Maggie R. Treadway and husband, and C. T. Wells, to recover judgment against
(2) said M. M. Wells for the respective amounts due each creditor and to set aside as fraudulent a deed executed by C. T. Wells to Maggie R. Treadway and to have her declared a trustee of the land in said deed for M. M. Wells. The defendants admitted the several amounts alleged to be due each creditor in the complaint and the only issue to be passed upon was, "did Maggie R. Treadway hold the land described in the deed to her from C. T. Wells in trust for the creditors of M. M. Wells?" The latter having died since the commencement of this action, intestate, his heirs and administrator have been made parties.

The facts relied upon by plaintiffs to show the trust alleged were substantially as follows: M. M. Wells was the owner of a storehouse and lot in the town of Canton, described in the complaint, and being heavily indebted on 22 August 1903, he executed a deed for said storehouse and lot and a bill of sale for his stock of goods as merchant to R. Winfield, without consideration. His creditors thereupon put him in bankruptcy. On 30 September 1903, the said Winfield, at the request of M. M. Wells conveyed the storehouse and lot to Maggie R. Treadway, a sister of M. M. Wells, without any consideration from her to Winfield. M. M. Wells continued to control the said house and lot and collected rents therefrom from the time Winfield executed the lot to her, 30 September 1903, down to 1 September 1914. The defendants admitted in the answer that this land was held in trust by her as security for $132, which she had loaned M. M. Wells and was in effect a mortgage.

On 1 September 1914, M. M. Wells and Maggie R. Treadway and husband executed a deed with warranty to C. T. Wells for said storehouse and lot and on the same day C. T. Wells executed a deed to

Maggie R. Treadway for another storehouse and lot at the request of M. M. Wells in exchange for the house and lot that had been conveyed to C. T. Wells by M. M. Wells and Maggie R. Treadway and husband, together with M. M. Wells' one-half undivided interest in a stock of goods. This last piece of land conveyed to Maggie R. Treadway by C. T. Wells is the property sought to be reached by this action.

The jury found that Maggie R. Treadway did not hold the said land in trust for M. M. Wells, and judgment was rendered against the plaintiff and that Maggie R. Treadway was the owner in fee simple of the tract of land in controversy. Appeal by plaintiff (3)

J. T. Horney, T. L. Green, and W. J. Hannah for plaintiffs.
J. Scroop Styles and J. Bat Smathers for defendants.

CLARK, C. J. The assignments of error are all to evidence under Rev., 1631.

Exception 1 was for permitting Maggie R. Treadway to state what transaction she had with M. M. Wells and R. Winfield in regard to the deeds from M. M. Wells to Winfield and from Winfield to her. The exception to this testimony was well taken. While the administrator of M. M. Wells is in form a party defendant the recovery, if made by the plaintiffs, will be in favor of the creditors of that estate and Maggie R. Treadway is testifying in her own interest against the creditors of her brother's estate.

Exception 2. That Maggie R. Treadway was allowed to testify whether M. M. Wells occupied the building any part of the time after she got her deed, to which she replied that he did. This did not relate to any transaction between the witness and M. M. Wells, but was a substantive fact of which she had knowledge independently of any statement by the deceased and the testimony was competent just as she could have proved the handwriting of the deceased, or the value of property owned by him, or any other substantive fact.

Exception 3. That the same witness was allowed to say that she used the money received from the property in improvements thereon and paying the taxes can not be sustained for the same reason that it was a substantive fact and not a transaction with the deceased.

Exception 4. That C. T. Wells, one of the defendants, was allowed to testify that he had a transaction with M. M. Wells, his deceased brother, and Maggie R. Treadway, wherein he exchanged a storehouse and lot and a half interest in the stock of goods with them for the tract of land which was transferred from Winfield to Maggie R. Treadway, which latter was worth $2,000. This evidence should have been ex-

cluded because he was a party defendant and was testifying to a transaction with the deceased and in favor of the title which he had conveyed to the defendant, Maggie R. Treadway.

Exception 5. That the court permitted C. T. Wells to narrate a conversation between him and M. M. Wells, the deceased, and that in consequence of this conversation M. M. Wells went to see their sister, Maggie R. Treadway, and the exchange of lots was made and the double conveyances by C. T. Wells of his own property to Maggie R. Treadway in consideration of her conveyance to him of the property belonging to M. M. Wells in which she had only an interest
(4) of $132. This evidence was incompetent because in favor of a party claiming title under the witness, the validity of which title was affected by his answer.

Exception 6 must also be sustained which was to the court permitting the witness C. T. Wells to testify that when M. M. Wells came back he told the witness that Maggie R. Treadway said that she would agree to this arrangement and that M. M. Wells said that he would keep the difference and would make her a deed to the house and lot for her interest; and further that the proposition she had made was that she was to have the storehouse and lot in settlement between the two. This was objectionable for the same reason also as hearsay. In this case the personal representative of M. M. Wells had not testified in his behalf as to personal transactions or communications with the deceased, nor was his testimony given in evidence concerning the same transaction. Winfield was neither the representative of M. M. Wells or a party to the action and was competent to testify and the door was not shut against him.

In *Hall v. Holleman,* 136 N.C. 35, it is said: "Death having closed the mouth of the deceased, the law closed the mouth of the other except only where the personal representative of the deceased opens up the matter by testifying himself or putting in the testimony of the deceased." To the same effect *McCanless v. Reynolds,* 74 N.C. 301; *Armfield v. Calvert,* 103 N.C. 156; *Blake v. Blake,* 120 N.C. 179.

While the administrator of M. M. Wells was made a defendant in this case his interests and duties were to preserve the estate and property of his intestate, M. M. Wells, and this action being to reach the land for the benefit of the estate of the said M. M. Wells, the interests of the administrator were antagonistic to the defendant Maggie R. Treadway and the administrator, though in form a defendant, was in fact a plaintiff as against Maggie R. Treadway, who sought to hold the land which the plaintiffs were seeking to recover in favor of the estate of M. M. Wells, for the purpose of paying his debts. *Owens v. Phelps,*

92 N.C. 235; *Weinstein v. Patrick,* 75 N.C. 344; *Redman v. Redman,* 70 N.C. 261. Also *In re Worth,* 129 N.C. 223. For these errors there must be a

New trial.

Cited: *In re Will of Saunders,* 177 N.C. 157; *Rudisill v. Love,* 186 N.C. 125; *In re Foy,* 193, N.C. 495; *Jones v. Waldroup,* 217 N.C. 186; *Wingler v. Miller,* 223 N.C. 20; *Hardison v. Gregory,* 242 N.C. 328.

W. S. GIBBS ET AL. V. DRAINAGE COMMISSIONERS OF MATTAMUSKEET DISTRICT ET AL.

(Filed 22 December, 1917.)

Drainage Districts—Assessments—Petition—Judgment.

The State Board of Education, then the owner of certain lake bottom lands, joined in the petition with certain owners of outlaying lands to form Mattamuskeet Drainage District, with provision in the petition that such outlying lands should not be taxed exceeding 15 cents per acre for benefits. The Board of Education afterwards conveyed these lands to a corporation with provision that the outlying lands should only be taxed one-fourth of the necessary assessments for maintenance, etc. The judgment creating the district decreed the establishment of the district under the Laws of 1909, ch. 442, and 1909, ch. 509, which contain no restriction upon assessments, except such as necessary to maintain the district. There was no exception taken to the judgment: *Held,* the failure to except was a waiver of the right of the outlying land owners to claim the limit of the assessment as set out in the petition, which under the judgment, is controlled by the statute and the restriction in the deed of the Board of Education.

ALLEN, J., dissenting.

APPEAL from *Kerr, J.,* at chambers, 12 November 1917, of HYDE. (5)

This is an appeal from an injunction restraining the collection of an assessment for maintenance beyond 15 cents per acre as to lands outside of the lake bottom in Mattamuskeet Drainage District in Hyde.

This district was organized in 1909 by the landowners around and outside of Lake Mattamuskeet in conjunction with the State Board of Education, then the owner of the lands constituting the bed or bottom of the lake, together with some lands not covered by water. *Carter v. Comrs.,* 156 N.C. 183.

The drainage of this lake was undertaken to benefit over 50,000 acres of low lying land owned by individual petitioners lying around the lake and also to enable the State to redeem for arable purposes the bed of the lake of 48,830 acres. The land lying around the lake on an average for two miles in its entire circumference was subject to overflow and after heavy rains was often flooded and was covered by water for considerable periods of time. As recited in the petition, "the lake when very full, as it now is and has been for several years, overflows the adjacent lands and makes a large part of them unfit for cultivation. The lands lying without the bounds of said territory consist of large areas of swamp lands which are almost continually covered by water, and after excessive rains the water from these areas overflows the land within said proposed district, often almost totally destroying the crops and bringing great loss upon the residents and landowners of said proposed district."

In the original petition, section 5, it was recited that the
(6) cost "of maintaining and keeping the drainage in effect shall not exceed 15 cents per acre for each acre included within the bounds of said district." It has been found necessary, in order to properly maintain the drainage system, to levy a larger sum, and the plaintiffs, owners of some of the lands outside the edge of the former lake, seek to restrain the collection of a larger amount. From the judgment of the court granting a restraining order to that effect, the defendants appealed.

Ward & Grimes, H. C. Carter, Jr., and Manning & Kitchin for plaintiffs.

Spencer & Spencer and Small, MacLean, Bragaw & Rodman for defendants.

CLARK, C. J. The original petition, sec. 5, contained a provision that "the cost of maintaining and keeping the proper drainage in effect shall not exceed 15 cents per acre for each acre included within the bounds of said district," but this provision was based upon the sanguine hopes of the petitioners and was omitted in all subsequent proceedings and is not embraced in the judgment creating the district nor referred to in any other proceedings subsequent to the petition. As is not unusual, the cost of constructing the drainage system and of maintenance has exceeded the original estimate, especially since the great increase in the cost of labor and material. Doubtless the fact that original estimates often prove inadequate induced those whose intelligence and public spirit conceived this enterprise from

incorporating such restriction in the judgment which is the charter of the drainage district. Exceptions were filed to the final report but none thereto, nor to the judgment, upon the ground that the restriction of assessments for maintenance to 15 cents per acre was not retained. *Carter v. Comrs.*, 156 N.C. 183.

The judgment creating the district decreed that it was "established under and in accordance with the provisions of ch. 442, Laws 1909, and ch. 509, Laws 1909." Section 29 of the first-named statute gives to the commissioners of drainage districts, created under that act, power, without any other restriction therein than to make such assessments as "may be necessary to maintain" the district after its formation.

In January 1911, the State Board of Education conveyed to the Southern Land Reclamation Company, a corporation, the lands owned by said board and embraced within said drainage district, containing 48,830 acres, and in the conveyance it is specified that the conveyance carries all the rights, privileges and obligations of the State Board of Education under the special proceedings for the establishment of the "Mattamuskeet Drainage District" under ch. 509, Laws 1909, "except the Southern Land Reclamation Company, its successors and assignees is to pay three-fourths of the cost of the maintenance (7) as well as the construction of said drainage district." This stipulation exempted the owners of lands outside of the lake bottom from the equality of assessment per acre according to benefit which would ordinarily lay upon them.

There are over 50,000 acres of lands owned by the other members of the drainage district which lie outside of that conveyed by the State as above. It follows, therefore, that whenever the drainage commissioners levy an assessment for drainage purposes three-fourths thereof must be levied upon the assignees of the State Board of Education, owners of 48,840 acres and one-fourth upon the 50,000 acres outside of the lake bottom, with the result that such outside lands will pay an assessment at a rate of slightly less than one-third of that levied upon the lake bottom lands. This should be sufficient protection for the plaintiffs against any abuse of assessment. It is not alleged herein that the assessment is levied in abuse of the power and discretion vested in the drainage commissioners of districts created under ch. 442, Laws 1909.

If there was any allegation sustained by proof, that the assessment is in excess of what is necessary for maintenance, or in abuse of the powers conferred by ch. 409, Laws 1909, or that the levy was made arbitrarily, or from an improper motive to oppress any of the owners of the lands lying outside of the lake district, an issue of fact would be raised for determination and upon sufficient proof the court would

be justified in granting a restraining order to restrain the levy of such assessment, but even in such case the courts are always slow to enjoin pending such inquiry the prosecution of works affecting the public welfare, as this Court has often held.

The object of the injunction here sought is not to restrain the assessment of the tax for maintenance to prevent oppression to the plaintiffs (for 50 cents per acre per annum can not be oppressive to maintain the drainage of lands much of which will produce 80 to 100 bushels of corn per acre), but relying upon a recital in the petition or prospectus of the proceedings to restrict the taxation of the petitioners who are some of those owning lands outside of the district and thus throw vastly more than the burden, three times as much, which is now laid for the maintenance upon the owners of the lake bottom under the contract they agreed to in taking the conveyance of the State's interest.

It is not alleged nor shown that the assessments are not in the proportion of one-forth on those holding lands outside of the lake bottom and three-fourths on the owners of the lake bottom, nor is it shown (though alleged) that the assessment is in excess of what is absolutely necessary for the maintenance of this great work.

(8) Though there was an expression in the petition that "none of the lands in the district" should be assessed for maintenance more than 15 cents per acre, this was not followed up by any subsequent order in the cause nor by the decree establishing the district. Chapter 509, Laws 1909, provides that the State as owner of the lake bottom should pay only three times as much for establishing the drainage system as the owners of the lands in the rest of the district and should be liable for only three-fourths of the bond issue, but that after the district was established (sec. 4), "the cost of repairs and maintenance shall be *borne equally* by all the lands in said district." The State Board of Education in its conveyance of the State's interests, above set out, generously required that its assignee, the Southern Land Reclamation Company, should pay three-fourths of the cost of maintenance also. This generosity is ignored and repudiated by the plaintiffs who seek to keep down their assessments for maintenance to 15 cents per acre, which would require the assessments levied upon the owners of the lake bottom to become many times triple the assessment upon themselves.

If the assessment upon the lands of those outside the lake should be restricted to 15 cents per acre, according to the stipulated ratio, the assessment upon the lands in the lake bottom would be only 45 cents per acre, and the sum raised from the entire assessment would be totally inadequate for maintenance, and this would cause the destruction

of the work of so much importance to the public and upon which $600,000 have already been spent.

The plaintiffs waived the limit of 15 cents per acre for maintenance by acquiescence in the final report and also in the final decree establishing the district without incorporating such restriction, and by assenting to the issuance of $500,000 in drainage bonds, whose holders, though not parties to this action, will have their rights seriously impaired if there is not a sufficient fund raised for maintenance from time to time. This fund may be less or greater at different times, depending upon the season and the conditions as to labor and material, which will vary. The only restriction as to the apportionment of the maintenance is that the amount assessed shall be necessary and that three-fourths shall be paid, and not more, by the owners of the lake bottom, the assignees of the State's interests and the other one-fourth by the rest of the district.

The plaintiffs have shown no equity which entitled them to the restraining order which besides seeks to disregard the ratio created by the decree establishing the district and the statutes chs. 442 and 509, Laws 1909.

Reversed.

ALLEN, J., dissenting: This is an action to restrain the levy and collection of an assessment of fifty cents per acre on the lands of the plaintiff in the Mattamuskeet Drainage District for maintenance and keeping the proper drainage in effect, the plaintiffs (9) contending that the commissioners have no authority to levy an assessment in excess of fifteen cents per acre.

The State Board of Education was a party to the original petition filed for the fromation and organization of the district, and it joined in the petition upon certain conditions and reservations set forth in a paper filed in the proceeding.

The petition to which the plaintiffs and the State Board of Education were parties, contains the following stipulations and agreements:

"It is understood and your petitioners join in this petition with this condition attached, that the cost of this proposed improvement to the landowners in said proposed district, other than the State Board of Education, shall not exceed $100,000 for preliminary work of completing the drainage of said lake and district.

"It is understood and the petitioners herein join in this proceeding upon the express condition that after the proper drainage of the said proposed district is effected as set out in this petition or as may be adopted by the proper authorities as provided for hereunder and by

the laws authorizing same, then the cost of maintaining and keeping the proper drainage in effect shall not exceed fifteen cents per acre for each acre included within the bounds of said district."

Mr. S. S. Mann, who was the attorney for the petitioners, files an affidavit in this action in which, after stating the conditions above set forth, he says: "That affiant sincerely believes that much opposition to said organization was allayed by the incorporation of the conditions and limitations above set out, and that the organization of said district would have been impossible without these conditions and limitations. Affiant believes that a sufficient number of signatures to petition would never have been obtained without the incorporation of this feature of the organization."

Upon this petition a judgment was entered establishing the drainage district as prayed for in the petition under and in accordance with the provisions of chapter 442 of Public Laws of 1909 and chapter 509 of the Public Laws of 1909.

Thereafter, upon the final report of the viewers being filed, the State Board of Education and other petitioners excepted to the report upon the ground that the estimate of the cost for the drainage of the district exceeded "the limit set in the petition in the cause," and these exceptions were allowed and the viewers ordered to file a supplemental report eliminating some of the canals and curtailing their estimates so as to bring the cost within the limit set out in the petition.

The limitation of the assessment for maintenance to fifteen cents per acre, as set out in the petition, has been observed until recently,
(10) when the commissioners have increased the assessment to fifty cents per acre, and this action has been taken without authority from the court, and without notice to the plaintiffs.

In my opinion, the stipulation and agreement in the petition that the cost of maintenance shall not exceed fifteen cents per acre, is contractual, and as it is not prohibited by any provision in the drainage act, is binding upon the parties, and that this stipulation entered into all subsequent proceedings.

It is certain that this is the construction placed upon the stipulations by the court and by all the parties as otherwise the exception of the State Board of Education and other petitioners to the estimates of the cost of construction would not have been allowed.

The case of *McCracken v. R. R.*, 168 N.C. 62, is, I think, a controlling authority. In that case an election was to be held on the question of voting bonds in aid of a railroad and it was held that an agreement between the railroad company and a trust company as to the conditions upon which the bonds were to be delivered was binding, al-

though there was no provision in the statute, authorizing the holding of the election and the issuing of the bonds, permitting such an agreement.

The judgment organizing the district has nothing to rest on except the petition which contains the limitations of fifteen cents per acre, and instead of assuming that the court disregarded this important provision, it should be presumed that it acted upon it. The limitation was doubtless omitted from the judgment because the petitioners relied on mutual good faith, and if the State Board of Education, then a party to the petition, had retained its interest in the land, instead of selling to the Southern Land Reclamation Company, the agreement of the parties would have been observed, and this controversy would not have arisen.

It is probable the increased assessment is necessary to the success of the drainage district, although this is denied by the plaintiffs; but however this may be, it furnishes no sufficient reason for disregarding an agreement which was the inducement to the plaintiffs to join in the petition.

Cited: *Mann v. Mann,* 176 N.C. 358; *Commissioners v. Davis,* 182 N.C. 142; *Mitchem v. Drainage Commission,* 182 N.C. 515.

EDITH S. VANDERBILT v. S. F. CHAPMAN ET AL.

(Filed 22 December, 1917.)

1. Adverse Possession—Color—Admission of Title—Boundaries—Burden of Proof—Ejectment—Statutes.

Where defendant in ejectment admits plaintiff's paper title to a 465 acre tract of land, but claims title to 169 acres thereof under color, and adverse possession of a few acres with constructive possession to the outer boundaries of his deed, under which he claims as "color," the law presumes the possession to be under the true title, and the burden of proof is on the defendant to show the contrary.

2. Adverse Possession—Intent—title—Color—Ejectment.

Adverse possession to ripen title to lands in the claimant under "color" must be under a claim of right with intent to claim against the true owner, and if it was by mistake, or equivocal in character, or without such intent, it is not adverse within the meaning of the law.

3. Appeal and Error—Instructions—Adverse Possession—Burden of Proof.

Where the defendant in ejectment admits the plaintiff's paper title,

but claims a part of the lands by adverse possession under "color," a charge by the court to the jury that the burden of proof was on the plaintiff is reversible error, though he may properly have placed the burden in another part of his charge, but without having corrected the error; and under such circumstances the trial judge may set aside the verdict as a matter of law.

APPEAL by defendants from *Lane, J.*, at October Term, 1917, of BUNCOMBE.

This is an action to recover land and to remove a cloud from (11) title.

The plaintiff alleges that she is the owner of 465 acres of land particularly described, and that the defendants are in possession of about 169 acres thereof, asserting a claim thereto.

The defendants deny that the plaintiff is the owner of the land described in the complaint, on information and belief, and allege that they are the owners of 169 acres thereof, which is particularly described.

The following issue was submitted to the jury:

1. Are the defendants the owners of the land described in the first paragraph of the answer or any part thereof? Answer:

Upon the trial of the action the defendants made the following admission of record.

"It is admitted by the defendants that State grant No. 251 to David Allison, dated 28 November 1796, registered in Book 2, page 458, containing 250, 240 acres, covers the *locus in quo* and that by connected mesne conveyances passing from the State to Allison and down to the plaintiff, that the plaintiff is the owner of all of the 465 acres described in the complaint, except so much thereof as the jury may find from the evidence that the defendants have acquired title to by adverse possession under color of title for seven years or longer."

The defendants own a tract of land known as the Clapp (12) place, which adjoins the 169 acres, and they offered evidence tending to prove that they had cleared five or six acres, beginning on the Clapp place, and extending over on the 169 acres to the extent of about two acres, and that they had cultivated and were in possession of this two acres under color of title for more than seven years before the commencement of the action.

The plaintiff offered evidence that the clearing on the 169 acres was small and not of sufficient size to attract attention; that it was made by mistake and not under a claim of right and with no intent upon the part of the defendants to claim beyond their boundary.

His Honor charged the jury that the burden was on the defendants on the first issue and he then instructed the jury as follows:

"That if the defendants or those under whom they claim entered upon the land described in said deed, or any part thereof, no matter how small, within the boundaries of the land claimed by the plaintiff and remained in possession of said part of said land so entered upon openly, notoriously and continuously for seven years, then the defendant's title ripened to the entire boundary of the hundred and sixty-nine acres described in the deed, which is the land claimed by them in their answer, and it will be your duty to answer the first issue 'Yes,' unless you shall find that such possession was made and held by defendants by mistake, and was so insignificant as to be insufficient to give notice of the possession. That the burden is upon the plaintiff in this case to satisfy the jury by the greater weight of the evidence that such possession was by mistake and not sufficient to give plaintiff notice."

The jury answered the first issue "Yes," and his Honor set aside the verdict for errors of law in the charge, and defendants excepted and appealed.

J. G. Merrimon and Harkins & Van Winkle for plaintiff.
A. Hall Johnston for defendants.

ALLEN, J. The admission of the defendants that the plaintiff is the owner of the 465 acres described in the complaint, except so much thereof as defendants could show title to by seven years adverse possession under color of title, placed the burden of proof on the defendants (*Land Co. v. Floyd,* 171 N.C. 544), and it was in recognition of this principle that the first issue was framed as it is.

The real controversy, then, between the plaintiff and the defendants on the trial was as to the extent and character of the possession by the defendants of the small part of the land cleared on the 169-acre tract.

Possession which will ripen an imperfect into a perfect title must not only be actual, visible, exclusive, and continued for the necessary period of time, but it must be under a claim of (13) right. "It is the occupation with an *intent* to claim against the true owner which renders the entry and possession adverse" (*Parker v. Banks,* 79 N.C. 485; *Snowden v. Bell,* 159 N.C. 500), and if the possession is by mistake or is equivocal in character, and not with the intent to claim against the true owner, it is not adverse. *Green v. Harmon,* 15 N.C. 163; *King v. Wells,* 94 N.C. 352; *Land Co. v. Floyd,* 171 N.C. 546.

In the last case the Court says, "Plaintiff contends that the evidence shows that defendant occupied only a small strip of the land just across the line, and that possession of this small piece was not sufficient to extend the adverse possession by construction to the boundaries of the deed, which defendant claims as color of title.

This question was discussed by *Chief Justice Ruffin* in *Green v. Harman,* 15 N.C. at p. 162, where he said: "The operation of the statute of limitations depends upon two things: The one is possession continued for seven years, and the other the character of that possession— that it should be adverse. It has never been held that the owner should actually know of the fact of possession, nor have actual knowledge of the nature or extent of the possessor's claim. It is presumed, indeed, that he will acquire the knowledge, and it is intended that he should. Hence, nothing will bar him short of occupation, which is a thing notorious in its very nature, and that must be contained seven years in order to affect him, not that time to bring suit for redress of a known injury, but full opportunity to discover the wrong. To the extent of the occupation there is *prima facie,* no hardship in holding that it is on a claim of title and adverse, and that the owner knew of it. Every man must be considered cognizant of his own title, the boundaries of his land, and of all possessions on it, either by himself or others. Ordinarily, possession taken by one of another's land is of a part sufficient to quantity or value to show the jury that the possession was taken adversely, and also to afford unequivocal evidence to the other claimant of that intention. And so far as the actual occupation goes, it seems to furnish such evidence in almost all cases. If, indeed, two persons own adjoining lands, and one runs a fence so near the line as to induce the jury to believe that any slight encroachments were inadvertently made, and that it was the desire to run on the lines, the possession constituted by the inclosure might be regarded as permissive, and could not be treated as adverse, even for the land within the fence, except as it furnished evidence of the line in a case of disputed boundary. The line being admitted, it would not make a title where a naked adverse possession will have that effect, because there was no intention to go beyond his deed, but an intention to keep within it, which by a mere mistake he has happened not to do." We followed this view of the law in *Currie v. Gilchrist,* 147 N.C. 648.

It is also well established with us that every possession of
(14) land is presumed to be under the true title, and the defendants having admitted that the plaintiff has a paper title which she traces back to a grant by the State, this presumption would impose

the burden upon them of showing that the plaintiff had lost her title by an adverse possession. *Monk v. Wilmington,* 137 N.C. 325; *Bland v. Beasley,* 145 N.C. 168; *Land Co. v. Floyd,* 167 N.C. 687.

If, therefore, the defendants were claiming the 169 acres by adverse possession, if the burden of proving this adverse possession was on them, and if the determination of the question depended on the nature and character of the possession which they had of a small clearing on the 169 acres, it follows necessarily that the burden was on them to prove that they held the land in the clearing openly, continuously and adversely, and with intent to claim against the true owner, and that it was error for his Honor to charge the jury that the burden was upon the plaintiff "to satisfy the jury by the greater weight of the evidence that such possession was by mistake and not sufficient to give plaintiff notice."

The defendants say, however, that this instruction could not have misled the jury because his Honor charged the jury more than once that the burden of the first issue was upon the defendants, and they invoke the rule which we adhere, that a charge must be considered as a whole.

It does appear from the record that his Honor charged the jury several times that the burden of proving adverse possession was on the defendants, but at no time that they must show that the land within the clearing was not occupied by mistake, but dealing with the charge in the aspect most favorable to the defendants, it presents the case of instructions upon a vital question that are inconsistent with each other, and if so, a new trial was properly ordered, as the Court cannot know which instructions a jury followed.

It is said in *Raines v. R. R.,* 169 N.C. 193, "An error in the charge must be eliminated by a retraction of it or a proper explanation which will remove a wrong impression made by it, and the giving of another correct but conflicting instruction does not answer the purpose as it does not produce desired results," and again, in *Horton v. R. R.,* 162 N.C. 455, "In any view of the charge of the court, there are conflicting instructions on material points and under such circumstances this Court should direct another trial. *Williams v. Haid,* 118, N.C. 481; *Edwards v. R. R.,* 129 N.C. 78; *Westbrook v. Wilson,* 135 N.C. 402."

We are therefore of opinion that his Honor properly set aside the verdict on account of the error in his charge.

Affirmed.

Cited: *McNeill v. Manufacturing Co.,* 184 N.C. 423; *Whitten v.*

Peace, 188 N.C. 303; *Penny v. Battle,* 191 N.C. 224; *Wallace v. Bellamy,* 199 N.C. 764; *Gibson v. Dudley,* 233 N.C. 258; *Price v. Whisnant,* 236 N.C. 385; *Memory v. Wells,* 242 N.C. 280.

A. A. WADSWORTH ET AL. V. M. E. COZARD ET AL.

(Filed 22 December, 1917.)

1. State's Lands—Invalid Grants—Cloud on Title—Admissions.

Where the plaintiff claims title to lands under a State grant, which defendant admits, but denies that it covers the *locus in quo,* but assumes to attack the plaintiff's grant under Revisal, sec. 1748, as the party aggrieved and interested in the subject matter of the obnoxious grant: *Held,* the defendant has no interest in having plaintiff's grant declared invalid, as a cloud upon his title, the plaintiff claiming nothing thereunder against the title of the defendant under the latter's grant.

2. State's Lands—Stated Corners—Cotemporaneous Survey—Evidence—Boundaries.

Where lands are claimed under a grant from the State stating the beginning corner, and it is admitted that the *lotus in quo* is covered by the description given in the grant unless the beginning corner is located differently, evidence of a cotemporaneous survey locating the corner otherwise, does not vary the rule that the beginning corner is a matter of law under the call in the grant, in the absence of evidence showing an actual location; and testimony tending to establish certain corners, but not under a cotemporaneous survey, is inadmissible.

APPEAL by defendants from *Ferguson, J.,* at July Term, 1917, of GRAHAM.

This is an action to remove a cloud from title.

The plaintiffs allege that they are the owners of a tract of land particularly described in the complaint and that the defendants claim an interest therein adverse to them.

The defendants deny the title of the plaintiffs and allege that the grant under which the plaintiffs claim is void in that there is no entry on which the grant could issue.

The defendants further allege that they are the owners of about twenty tracts of land specifically described in the answer.

The plaintiffs admit that the defendants are the owners of the land described in their answer, but deny the location of two of said tracts as claimed by the defendants.

There is no exception in the record as to the location of one of these

tracts and the other tract as to which there is an exception is described in the grant of the defendant as follows:

"Beginning on the southeast corner of No. 400 and runs north passing the northeast corner of said number at 10 poles, 170 poles to a hickory; then west 600 poles to a cucumber N. E. corner of 4456; then south 170 poles; then east 600 poles to the beginning."

The defendants claim that the beginning corner of this grant is not at the southeast corner of No. 400, but that it is at a hickory and that there was a contemporaneous survey which located the corner at a hickory. (16)

The defendants offered in evidence the field notes of the surveyor which are as follows:

"Beginning on a hickory and stake, corner of No. 400, runs west 600 poles to a cucumber, northeast corner of 4455; thence south 470 poles to a stake; then east 600 poles to a stake; then north 170 poles to a stake; then east 600 poles to a stake; then north 170 poles to the beginning. 11 April 1856. J. W. C. Piercy, C. S."

They also offered evidence that the hickory was known as the corner of the grant and that on the line from the hickory there were old marks made by the surveyor who originally surveyed the tract.

His Honor charged the jury that the southeast corner of No. 400 was the beginning corner of the grant and the defendants excepted.

The corner was located in accordance with this instruction and judgment was entered thereon from which defendants appealed.

R. L. Phillips and Bryson & Black for plaintiffs.
Merrimon, Adams & Johnson for defendants.

ALLEN, J. The defendants are not in position to attack the grant of the plaintiffs under Revisal, sec. 1748, which gives a right of action against a party holding under a grant improperly issued to the party aggrieved, "inasmuch as none can be aggrieved unless he has an interest in the subject-matter of the obnoxious grant" (*Carter v. White*, 101 N.C. 34), and it appears from the record that the plaintiffs have not only admitted that the defendants are the owners of all the land covered by their grants, but also that in the judgment from which the appeal is taken it was adjudged.

What interest have the defendants in having the grant of the plaintiffs declared invalid when the plaintiffs claim nothing under it as against the title of the defendants?

The language quoted from *Carter v. White* is approved in *Henry v. McCoy*, 131 N.C. 589, the Court adding in the latter case that

the purpose of the statute in permitting an attack on a grant by the party aggrieved is "to remove a cloud overshadowing a previously acquired title."

Here there is no cloud overshadowing the defendants' title because the plaintiffs claim nothing covered by their grants.

The defendants admit that the charge of his Honor as to the beginning corner is correct unless they have offered evidence of a cotemporaneous survey locating the corner otherwise than at the south-east corner of No. 400 and they rely on the field notes of
(17) the surveyor for the purpose of showing such survey.

We do not think these notes have this effect, in the absence of other evidence showing an actual location different from the calls in the grant.

A comparison of the notes of the surveyor and the calls in the grant show that they are substantially alike except that the notes begin at the second corner in the grant instead of the first, and in one the cucumber is said to be the northeast corner of 4456 instead of 4455 in the other, and possibly the course of the last line in the notes should be read south instead of north. The same corners, the same trees, and the same courses and distances are called for in the notes and in the grant.

The evidence of the two witnesses introduced by the defendants, Stuart and Burns, tend to establish certain corners, but not a cotemporaneous survey, and when considered in connection with the notes of the survey was not sufficient to change the rule that the court must declare what are the boundaries and the jury must locate them.

We have dealt with the notes of the surveyor upon the supposition that they represented a survey made about the time of issuing the grant but the dates given in the record, if correct, do not show this to be true.

The date of the notes is April 11, 1856, and the grant is of date 1850 and is signed by Ellis, Governor, who did not enter upon the duties of his office until 1 January 1859. The reference to the Declaration of Independence would indicate that the last date ought to be in 1860.

No error.

J. E. CRAYTON v. CITY OF CHARLOTTE.

(Filed 22 December, 1917.)

1. Statutes—In Pari Materia—Municipal Corporations—Bonds.

Chapter 131 Laws of 1915, limiting a municipal bond issue to 10 per cent of the assessed value of its real and personal property, should be construed with the provisions of ch. 138, Laws of 1917, and the two acts being upon the same subject-matter and *in pari materia.*

2. Same—Property Values—Limitation—Issuance.

Chapter 131, Laws of 1915, limits the issuance of municipal bonds to 10 per cent of its assessed real and personal property valuation, and ch. 138, Laws of 1917 to 10 per cent of the net valuation of the property, etc., the later act expressly not requiring the passage of an ordinance, under the circumstances, for the submission of the question to the voters; and where a municipality has passed the ordinance required by the act of 1915, for an election to be held on the proposition, which is held and the bonds approved after the enactment of the later act, and it appears that the property valuation was sufficient thereunder, the further proceedings being under the act of 1917, are valid, and the bonds are a valid municipal indebtedness.

APPEAL by plaintiff from *Webb, J.,* at November Term, 1917, of MECKLENBURG. (18)

This is a controversy without action, under section 803 of the Revisal to restrain the issue of $250,000 in bonds by the city of Charlotte for purchasing sites and building the necessary buildings for the public schools of the city.

The ordinance of the city of Charlotte calling the election on the bonds in question was passed on 23 February 1917. The election was called and held on 26 April 1917. This election was called by the ordinance of 23 February, under chapter 131, Public Laws of 1915. Section 6 of this chapter limits the right to issue bonds thereunder to 10 per cent of the assessed value of the real and personal property in the city. At the time the ordinance was adopted the entire bonded indebtedness of the city of Charlotte, including assessment and waterworks bonds. was $2,523,100, and the assessed value of the property for taxation at said time was $24,500,000.

On 5 March 1917, the General Assembly passed the Municipal Finance Act, which became effective and the law of the State on 8 March 1917. This law was effective at the date of the election above mentioned on 26 April 1917. The said Municipal Finance Act provides for the issue of bonds, upon the favorable vote of the people, up to 10 per cent of the *net indebtedness* of the city upon the assessed value of the property therein for the three previous years. The

net indebtedness of the city of Charlotte at the time of the subsequent resolutions of the governing body of the city of Charlotte directing and providing for the issue of the bonds was $1,903,000, and the average assessed value therein for three years was $24,475,519. The difference between the limitation as prescribed in chapter 131, Laws of 1915, and chapter 138, Laws of 1917 (being the Municipal Finance Act), is that the Municipal Finance Act, in computing the indebtedness of the city, provides for a deduction of outstanding bonds secured by collateral as street improvement bonds and revenue producing bonds—as waterworks bonds, and striking the balance of what is called the *net indebtedness* of the city. The net indebtedness of the city, the resolutions of the governing body of the city at the time of the proposed issue of bonds was, and is, less than ten per cent of its assessed taxable property for the period mentioned in the act for 1917, under the rule of computation prescribed in said act.

Upon these facts his Honor held that the defendant had the right to issue said bonds, and that the plaintiff was not entitled to the relief prayed for and the plaintiff appealed.

(19) *Thaddeus A. Adams for plaintiff.*
Pharr & Bell for defendant.

ALLEN, J. There are many subdivisions of the argument of the plaintiff attacking the proposed bond issue, but they all depend on the proposition that the election purporting to authorize the issue of bonds was called and held under chapter 131, Laws 1915, which provides that "No bonds shall be issued which together with all other bonded debt of the municipality shall exceed 10 per centum of the assessed valuation of the real and personal property situated in said municipality," and as the resolution was adopted calling the election, and the election held when the bonded indebtedness exceeded 10 per cent of the assessed valuation, there is no authority to issue the bonds.

The question has been presented earnestly and forcibly in the briefs filed in behalf of the plaintiff and defendant, but the diligence of counsel and the researches of the Court have not discovered any authority directly in point, and we must turn to the language of the statutes and the evil intended to be remedied to find the Legislative intent and the effect of the limitation on the power to issue bonds.

The act of 1915 confers the authority to issue bonds on the govern-

ing body of the city or town, but requires the approval of the qualified voters before issuing. The language is the "board of commissioners, council, or other governing body is hereby authorized to issue bonds of such municipality in all respects as provided in the foregoing section, but before issuing said bonds the question of their issuance shall be submitted to the qualified voters of such municipality."

The limitation in the act is on the power to issue bonds, and not on the right of the voters to approve, and as the power to issue is conferred upon the governing body, it is a limitation on the power of that body and not on the right to hold an election.

The distinction between the limitation on the right to issue bonds and the holding of an action to ascertain the will of the voters does not rest on mere conjecture or on a technical and strained construction of the act, but, on the contrary, is clearly recognized by the General Assembly in the act of 1915 and in the act of 1917, ch. 138, superseding it, which, being related and dealing with the same subject-matter, should be construed together, because in the act of 1915 the limitation is on the right to issue bonds—"No bonds shall be issued"—while in the act of 1917, after requiring that all bonds shall be authorized by an ordinance, it is provided in section 19, subsec. 2, that "The ordinance shall not be passed unless it appears from said statement either that the net debt does not exceed 10 per centum of said average assessed valuation or that the net increase does not exceed *three* per centum of the assessed valuation."

Why this change in language, placing a prohibition on the first step to be taken in the issuance of bonds, unless it was in the mind of the General Assembly that the limitation in the act of (20) 1915 related to the time of issuing the bonds?

This is also in accord with the principle generally prevailing that "The time of the actual issue of municipal bonds is the time for determining whether the debt limit is exceeded" (28 Cyc., 1584), and it has been held in the application of the principle that "An ordinance is not void which provides for a contract when financial condition will permit" (28 Cyc., 1540, and note), which is the legal effect of the resolution of 23 February.

If it be objected that this construction attributes to the General Assembly the purpose of permitting an election to be held when no bonds can be issued, the answer is that authority must precede the issuing of the bonds, and time is required after authorization before issue, and frequently the retirement of a part of the municipal indebtedness or an increase in valuations may be foreseen, sometimes

much in advance of the event. And no injury can befall the taxpayer, as he becomes interested only when the bond is issued or the taxes collected for the payment of principal and interest.

We are, therefore, of opinion that under the act of 1915 the relation between the indebtedness and the valuation of the property is to be ascertained as of the time of issuing the bonds. This does not, however, establish the right of the defendant to issue the bonds in controversy, because under the act of 1915 the indebtedness, computed as required by that act, without allowing certain deductions in the act of 1917, exceeds 10 per cent of the valuation.

How is the question affected by the act of 1917?

The act of 1917, ratified 7 March, known as the Municipal Finance Act, provides in section 38 that "All acts and parts of acts, general or special (including acts passed at this session of the General Assembly prior to the passage of this act), to the extent that they relate to the subject-matter of this act, are superseded by this act: *Provided, however,* (*a*) That acts and proceedings heretofore done or taken by any municipality or the voters thereof, or any board or officers thereof, pursuant to acts or parts of acts superseded by this act shall not be affected by this act, but all such acts or proceedings similar to any acts or proceedings provided for in this act shall have the same force and effect as if done and taken pursuant to this act, and only subsequent proceedings shall be taken as provided in this act: *Provided, further,* (*b*) That in all cases where, pursuant to acts or parts of acts so superseded, an ordinance or resolution has been heretofore passed authorizing the issuance of bonds or notes or calling an election for such purpose, nothing in this act shall prevent the issuance of the bonds or notes in accordance with the terms of such ordinance or resolution, and it shall not be
(21) necessary to pass the ordinance provided for in section 17 of this act, and no vote of the people shall be necessary for the issuance of such bonds or notes unless they are for purposes other than the payment of necessary expenses, or unless such vote shall be required by the terms of the acts or parts of acts so superseded or by the terms of the ordinance or resolution so passed."

It supersedes the act of 1915 but validates proceedings already taken under the act and provides that bonds may be issued pursuant to ordinances and resolutions calling for elections passed prior to the ratification of the act, and that subsequent proceedings shall be as prescribed in the act of 1917. If so, the resolution of 23 February calling for the election on the question of issuing bonds is valid under the act of 1917, and as the ordinance required by the latter

act is dispensed with by section 38, subsection (*b*), the election of 26 April was regularly called under the act of 1917; and if regularly called, it was a valid election, as no other irregularity has been pointed out.

If this conclusion is sound, the governing body of the defendant has called an election at which the voters have given their approval to the proposition to issue bonds, and as the subsequent proceedings are to be taken under the act of 1917, the ascertainment of the proportion between the indebtedness and the assessed valuation of property must be under that act, and as it is conceded if this be done the indebtedness does not exceed 10 per cent of the assessed valuation, the defendant has the right to issue the bonds in question, and the same, when issued, will be binding obligations of the defendant.

Affirmed.

ATTAS BRADSHAW ET AL. v. THE CITIZENS BANK OF BURNSVILLE ET AL.

(Filed 22 December, 1917.)

Former Actions—Pleas in Bar—Actions—Executors and Administrators—Fraud.

Pendency of proceedings brought before the clerk wherein the executors of a deceased person are sought to be disallowed a credit for the amount of a certain note alleged to have arisen out of transaction with a bank, involving fraud on the deceased, and transferred to the civil issue docket, to which the bank was not a party, cannot successfully be pleaded in bar to another action wherein the heirs at law are parties, joining the executors for conformity, brought against the bank to recover moneys it had wrongfully received on acount of the alleged fraud.

CIVIL ACTION tried before *Carter, J.*, at July Term, 1917, of MITCHELL.

In the answer defendants pleaded the pendency of another action pending in the Superior Court of Yancey County in (22) bar of the prosecution of this. The court sustained the motion to dismiss the action upon the fact of the pleadings, and plaintiffs appealed.

Pless & Winborne, W. C. Newland, W. L. Lamber, and S. J. Ervin for plaintiffs.

Merrimon, Adams & Johnston, J. Bis Ray, Hudgins & Watson, and Charles Hutchins for defendants.

BROWN, J. The action which the defendants plead in bar of the prosecution of this action is entitled *Lillie Phillips et al. v. J. B. Hensley et al.*, Executors of B. S. Hensley, and was decided in an opinion by the writer at the present session of this Court. The opinion is referred to for a statement of the facts as explanatory of this case.

It will be seen that the aforesaid case was a proceeding instituted before the clerk of the Superior Court of Yancey County for the purpose of passing upon and auditing the final account of the executors of B. S. Hensley. The proceeding was brought in the Superior Court by appeal, and heard and determined therein upon the sole question as to whether the executors were entitled to a credit for $14,000, being a note they claimed to have paid in full to the Citizens Bank of Burnsville. The defendant was not a party to that proceeding and had no interest in it.

The plaintiffs in this action are the distributees and devisees of B. S. Hensley, and the defendants are his executors and the said bank. The executors are made parties as the personal representatives of the estate.

The complaint alleges that the executors wrongfully paid said $14,000 note, that such payment was induced by the fraud, collusion, and conspiracy of the officers of the bank with J. B. Hensley, the managing and controlling executor, who had been chashier of said bank and as such had embezzled large sums of the bank's money. The complaint alleges:

"That the said bank, in this conspiracy to take the property of the distributees and heirs at law of the said B. S. Hensley, and in the execution of said conspiracy so entered into with James B. Hensley, took property of the estate of B. S. Hensley of which the said bank then had possession and control in connection with the said James B. Hensley which was of at least the value of $20,000, but which amounts and values were arbitrarily fixed by the said bank at $12,710.08, well knowing at the time that the plaintiffs and other children of B. S. Hensley were the owners of and entitled to said property. This amount arbitrarily fixed by the said bank as (23) the value of the property converted, which property these plaintiffs allege consisted of notes, bank stocks, other commercial paper and other personal property and lands, were incorrect and were of much greater value that that allowed by the said bank as hereinafter alleged; that James B. Hensley and Molton Hensley have been made parties defendant herein as executors for the reason that the plaintiffs are advised and believe that this action cannot be

maintained against the defendant, the Citizens Bank of Burnsville, in the absence of such executors, and not for the reason that plaintiffs are asking any judgment against said defendant's executors."

It is thus seen that this action is brought against the bank to recover a large sum of money alleged to have been obtained from the executors illegally. The plaintiffs are but following the funds and property to which they aver they are entitled and which have been turned over to the bank in violation of their rights. The judgment in the proceeding in the Superior Court of Yancey County above referred to can in no way affect the determination of this action. The causes of action are not the same and the bank is no party to that proceeding. *Emery v. Chappel,* 148 N.C. 327; *Woody v. Jordan,* 69 N.C. 189; *Swepson v. Harvey,* 69 N.C. 387.

It is manifest that plaintiffs can have no relief against the defendant bank in the proceeding in Yancey. The Court erred in sustaining the plea.

Reversed.

Cited: *Cameron v. Cameron,* 235 N.C. 85; *McDowell v. Blythe Brothers,* 236 N.C. 398.

LILLIE PHILLIPS ET AL. v. J. B. HENSLEY ET AL., EXECUTORS OF B. S. HENSLEY.

(Filed 22 December, 1917.)

1. Bills and Notes—Negotiable Instruments—Blank Amount—Principal and Agent.

A note signed by the maker with blank left for amount, and intrusted by him to another for use, gives implied authority to the one to whom it is delivered to fill in the amount, and in the hands of an innocent purchaser constitutes the one to whom it was delivered the agent of the maker, and is valid and binding upon him.

2. Same—Banks and Banking—Executors and Administrators—Accounting.

A bank is responsible for the conduct of its cashier in having a note signed by a third person as maker, in blank amount, and in wrongfully filling in the blank for a larger sum that intended and misappropriating the surplus to his own use, and where the maker has since died and the transaction is an item of the account with his administrator, the full amount thereof will not be allowed as a credit.

PHILLIPS *v.* HENSLEY.

CIVIL ACTION tried before *Ferguson, J.*, at June Term, 1917, of YANCEY.

This proceeding was instituted before the clerk of the Superior Court of Yancey County for the settlement of the estate of B. S.
(24) Hensley, and involves the auditing of the account of his executors, J. B. Hensley and Moulton Hensley. The final account of the executors was approved by the clerk, and the heirs at law and distributees, who are the plaintiffs, appealed to the Superior Court. The cause was referred to W. M. McNairy to state the account and find the facts and render judgment.

Upon the coming in of the report the plaintiffs filed exceptions thereto. Upon the hearing before Ferguson, judge, a judgment was rendered June 1917, from which defendants appealed.

R. W. Wilson, W. C. Newland, S. J. Ervin, W. L. Lambert, Pless & Winborne for plaintiffs.

Merrimon, Adams & Johnston, Charles Hutchins, Hudgins & Watson, J. Bis Ray for defendants.

BROWN, J. The controversy centers around a note for $14,000 for which the executors claim credit. In reference to this note, the referee finds these facts, which are adopted by the judge:

On the 24th day of October, James B. Hensley owed the Citizens Bank of Burnsville four notes amounting to $10,600; in order to pay same, he secured one Carter Higgins to take a blank bank note to his father, B. S. Hensley, for his signature, leaving the amount of said note, the time of its maturity, and the party to whom payable blank, and the said testator upon receipt of this blank note signed his signature to same and returned it to J. B. Hensley, leaving the amount of said note, the time of its maturity, and the party to whom payable blank, and the said J. B. Hensley inserted the sum of $14,000 payable to the Citizens Bank twelve months after date.

The cashier of the bank, J. B. Hensley, discounted the note, deducting as discount $840, and out of the proceeds paid a note of $4,000 B. S. Hensley owed the bank, credited B. S. Hensley's account with $1,100, and deposited to his own credit $1,460, and then with the remainder paid four notes aggregating $10,600 that the cashier himself owed the bank.

The executors claim to have paid to the bank the $14,000 in full, and ask credit for that sum. It is contended by plaintiffs that the note is not a valid indebtedness of B. S. Hensley, and that if the executors are not entitled to credit for the whole $14,000 as upon

a proper adjustment, B. S. Hensley did not owe the bank that much on the note.

There is no doubt that the note, although signed in blank, is a valid obligation binding upon the estate of the testator. It is well settled that if the maker of an instrument intrusts it to (25) another for use with blanks to fill up, such instrument so delivered carries on its face an implied authority to fill up the blank spaces and deliver the instrument.

As between such party and innocent third persons, the person to whom the installment is intrusted is deemed the agent of the party who committed the instrument to his authority. The ruling is founded upon the principle that where one of two persons must suffer by the bad faith of another, the loss must fall upon the one who first reposed the confidence and made it possible for the loss to occur. This subject is fully discussed and the authorities cited in *Rollins v. Ebbs*, 138 N.C. 144.

When the $14,000 note was discounted it was the cashier's duty to place the net proceeds, after paying the $4,000 note, to B. S. Hensley's credit; whereas he placed only $1,100. The remainder he wrongfully abstracted and applied it to his own debts and to his own credit.

It is evident that upon the facts found the cashier should have placed $9,160 to B. S. Hensley's credit, instead of $1,100. He wrongfully converted the balance to his own use. That the bank is liable for the conduct of its cashier in appropriating a customer's funds to his own use is plain. *LeDuc v. Moore*, 111 N.C. 518. So when B. S. Hensley died the bank owed him $8,060 and he owed the bank $14,000, leaving a balance due the bank of only $5,940. The executors were not authorized to pay any more, and are therefore not entitled to any larger credit. When the matter was heard by Judge Ferguson he came to the same conclusion and made a very clear statement of his findings, but he inadvertently overlooked the $1,100 placed to B. S. Hensley's account and which it appears he had drawn out.

The costs of this Court will be taxed against defendants and their appeal bond.

Modified and affirmed.

Cited: *Williams v. Bank*, 188 N.C. 200.

ANTHONY S. DAVIS AND WIFE, KATE S. DAVIS, v. CHAMPION FIBER COMPANY.

(Filed 22 December, 1917.)

Injunction — Title of Lands—Admission—Partial Recovery—Damages—Principal and Surety.

Where defendant, enjoined from cutting timber on the lands on controversy, admits the title of the plaintiff to the lands covered by his grant or deed, but the location of the lands thereunder is the disputed question, upon order dissolving the injunction as to a part of the *locus in quo*, the defendant is entitled to the damages he may have sustained by reason of having been wrongfully enjoined from cutting the timber, etc., on that part and to judgment accordingly against the plaintiff and his surety on the injunction bond. Revisal, sec. 818.

MOTION in the cause for judgment against plaintiffs and the United States Fidelity and Guaranty Company for damages upon two
(26) undertakings in injunction proceedings, in the aggregate sum of $5,000, entered into in this cause by plaintiffs with the said Guaranty Company as surety, before *Harding, J.*, at Fall Term, 1917, of JACKSON.

The matter was referred to Fred S. Johnson, who made a report assessing defendant's damage at $10,000, but concluding, as matter of law, that defendant was not entitled to recover. Defendant filed exceptions, which were overruled by the court, *Harding J.*, presiding, and the report confirmed. Defendant appealed.

Walter E. Moore, Alley & Leatherwood for plaintiffs.
Smathers & Ward for defendant.

BROWN, J. This action brought by the plaintiffs to recover certain tracts of land described in the complaint, and for damages, is now before the Court to determine the right of the defendant, the Champion Fiber Company, to recover damages sustained by it by reason of the alleged illegality of the injunction issued by the court at the instance of the plaintiffs, all the other matters in controversy between the parties hereto raised by the pleadings having been settled and finally adjudicated by a judgment of the court below.

It is admitted by defendant that plaintiffs are the owners of the grants of land set out in complaint, and that the defendant was restrained from entering upon and carrying on its timber operations on the lands therein described. By reason of such admission, plaintiffs contend that defendant was not wrongfully restrained, and therefore cannot recover damages. That seems to have been the opinion of

the able and painstaking referee as well as of the judge of the Superior Court. It appears, however, to us that while the title to the lands was admitted, the location of them was in dispute. That this was the real matter in controversy is shown by the following findings of the referee:

I find that according to the final judgment made by his Honor, E. B. Cline, judge, at February Term, 1915, of Jackson County Superior Court, the plaintiffs were declared to be the owners of the *land in controversy* of about 200 acres lying between the W. F. or Floyd Cook line and the Cook and Hargrove line shown on the map, and that the defendant, the Champion Fiber Company, was the owner of the timber on the McAden Balsam timber tract lying to the north of said grant 586, as per survey and location made by W. F. Cook, as shown on said map, and which included the strip of land lying in between the John H. Smith line and (27) the W. F. or Floyd Cook line, and by the order made by his Honor, E. B. Cline, judge, on 11 March 1915, aforesaid, the restraining order and injunction was dissolved as to the strip of land lying between the John H. Smith and the W. F. or Floyd Cook lines of about 500 acres, after the said defendant had been restrained from felling, cutting and removing the timber, etc., from the lands described in plaintiffs' complaint, for a period of more than six and one-half years, and was made permanent and continued in full force as to the strip of land of about 200 acres lying between the W. F. or Floyd Cook line and the Cook and Hargrove line.

The referee further finds that the defendant was adjudged to be in contempt and fined for violating the restraining order in continuing to conduct its timber operations on the land that was finally adjudged to belong to defendant.

The contempt proceeding was brought to this Court (150 N.C. 85), and that the real controversy is the location of the division line between the lands of plaintiff and defendant clearly appears in the opinion of the Court, which is referred to for a statement of the case.

It now appears that some 700 acres of land lay between the Smith line claimed by the plaintiffs and the Cook Hargrove line claimed by defendant, the title to which depended upon the location of the true dividing line. That has now been established, and by reference to the final judgment it will be seen that the plaintiffs were declared to be the owners of the strip of land on the north side of grant 586 lying in between the Floyd Cook and Hargrove lines containing about 200 acres, and the defendant, the Champion Fiber Company, was declared to be the owner of the timber on the McAden Balsam

timber tract lying to the north of said grant 586, as per survey and location made by W. F. or Floyd Cook, as shown on said map, which included the strip of land lying on the north side of grant 586 and including the land lying in between the J. H. Smith and Floyd Cook lines, containing about 500 acres, and it is on this latter strip of land that the defendant, the Champion Fiber Company, is seeking to recover damages of the plaintiffs by reason of the stoppage of its timber operations thereon by injunction.

The contention that the restraining order did not include the 500 acres is untenable. It extended to all the land in controversy, and that embraced the 700 acres, of which plaintiffs recovered only 200.

By reference to the consent judgment of 11 March 1915, it will be seen that the parties and the court treated the restraining order upon the idea that the same had been operative upon the strip of land lying in between the J. H. Smith and the W. F. or Floyd Cook
(28) lines shown on the map. The language used in the first paragraph of the restraining order being that the restraining order and injunction heretofore granted in this cause in favor of the plaintiffs against the defendant, the Champion Fiber Company, be and the same is hereby dissolved as to that part of the land included in said restraining order and injunction embraced in the tract of land conveyed by John H. McAden, executor, and others, to J. W. Ferguson lying to the north and outside of Welch grant 586.

It is manifest that the injunction was operative and enforced not only as to the 200 acres, but also as to the 500 acres lying between the John H. Smith and the W. F. or Floyd Cook lines.

Our statute, Rev., 818, provides that "A judgment dissolving an injunction shall carry with it judgment for damages against the party procuring the injunction and the sureties on his undertaking without the requriement of malice or want of probable cause in procuring the injunction, which damages may be ascertained by a reference or otherwise, as the judge shall direct, and the decision of the court thereupon shall be conclusive as to the amount of damages upon all the persons who have an interest in the undertaking." This statute has been construed in several cases. *Timber Co. v. Roundtree,* 122 N.C. 45; *R. R. v. Mining Co.,* 117 N.C. 191; *Crawford v. Pearson,* 116 N.C. 718.

The contention that, because plaintiffs recovered a part of the land in dispute, they are exempt from all liability for damages by reason of the injunction cannot be sustained. It is now well settled that when an injunction is wrongfully issued as to any part of the plaintiff's

demand, and is partially dissolved to that extent, the party enjoined will be entitled to such damages within the limit of the penalty of the bond as he may have sustained by reason of the issuing of the injunction. A. & E. Enc. of Law, vol. 16, pp. 464, 465, and cases cited; *Rice v. Cook,* 92 Cal., 144.

Upon the findings of fact the defendant is entitled to judgment against plaintiffs and surety, the United States Fidelity and Guaranty Company, for the sum of $5,000, the aggregate penalties of the two undertakings.

Reversed.

Cited: *McAden v. Watkins,* 191 N.C. 108.

F. H. PARKS v. BURK TANNERY COMPANY AND SOUTHERN RAILWAY COMPANY ET AL.

(Filed 22 December, 1917.)

Master and Servant—Employer and Employee—Pleadings—Negligence—Railroads—Demurrer Ore Tenus—Car Couplings.

Where the complaint in an action to recover damages for a personal injury alleges that the defendant employer, an industrial enterprise, owned and operated cars on a railroad siding, also so used by the railroad company, and while coupling cars, in the course of his employment, furnished with a defective coupler, the plaintiff was compelled to kick the coupling with his foot, which was caught by a splinter and crushed, when his position rendered it impossible for him to signal the engineer of the railroad company to stop, etc.: *Held,* contributory negligence does not appear as a matter of law, and a demurrer *ore tenus* on the ground that the complaint does not set out a cause of action is bad.

CLARK, C. J., concurring.

APPEAL from *Justice, J.,* at October Term, 1917, of BURKE.

The defendants, having filed answers to the complaint as (29) amended by leave of the court, demurred *ore tenus* upon the ground that it does not set out a cause of action. The demurrer was sustained and the action dismissed. Plaintiff appealed.

W. A. Self and Spainhour & Mull for plaintiff.
Avery & Ervin and S. J. Ervin for defendants.

BROWN, J. The pleadings disclose that the plaintiff seeks to recov-

er damages for a personal injury for negligence, against the Tannery Company for requiring plaintiff, its employee, to couple up a car with defective coupling, and against the Southern Railway for delivering such a car to the Tannery Company.

The complaint alleges that the defendant Tannery Company had tracks on which it kept engines and rolling stock in constant use in connection with the operation of its business in moving cars of its own as well as those delivered by the railway company. It is alleged that a car which plaintiff was directed to couple had a defective coupling, so that the same would not couple by impact, and was otherwise defective and dangerous; that such coupling was out of alignment, and that it was necessary for plaintiff to push the same into alignment before it could couple, and that he put his foot on it to push it into alignment, when his foot was caught by a splinter and held so that he could not extricate himself nor signal to the engineer, and that his foot was crushbetween the couplings of the two cars.

Taking the allegations of the complaint to be true, as we must when a demurrer is interposed, we are of opinion that there was error in sustaining it. It is probable that the learned judge based his ruling
(30) upon the idea that it appears in the complaint that the plaintiff contributed to his injury by putting his foot on or kicking the coupling and, therefore, could not maintain his action for damages.

It appears that plaintiff is not an employee of the Southern Railway, and it is assumed, we presume, that the Tannery Company is not such a common carrier as comes within the purview of the act of the General Assembly of 1913, abolishing contributory negligence as a defense in actions by employees of railroads for personal injuries, and allowing evidence of it only in diminution of damage.

It is true that where the contributory negligence of a plaintiff is patent upon the face of his complaint and it is of that kind which bars his recovery, it may be taken advantage of by demurrer. *Burgin v. R. R.*, 115 N.C. 674.

But we do not think that is the case here to the extent that the question may be determined upon demurrer *ore tenus*. Whether such defense is open to either or both of defendants and whether plaintiff's negligence was the proximate cause of his injury are matters that can be more properly determined when pleaded in the answer and after the facts are found.

Reversed.

CLARK, C. J., concurring. While Laws 1913, ch. 6 (Gregory's Supp., 2645a), provide that in case of contributory negligence, damages may

be apportioned between the corporation and the employee in proportion to the negligence of each, it must not be overlooked that the *proviso* to section 2 thereof specifies, "No such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

This is an express adoption of the doctrine first laid down in *Greenlee v. R. R.*, 122 N.C. 977, and *Troxler v. R. R.*, 124 N.C. 191, before the passage of any statute, that when the employee of a railroad is injured or killed by the failure of the company to use safety appliances contributory negligence could not be pleaded either in defense or in mitigation of damages to any extent whatever. Both the State and Federal governments later passed statutes to that effect; and in adopting the doctrine of comparative negligence since that time, the statutes, both State and Federal, have been careful to prevent the inference that contributory negligence to any degree can be a defense or mitigation of damages where the company has failed to conform to the requirement of the statute in regard to safety appliances.

As there are in North Carolina over 40,000 railroad employees, of whom a large part are employed in the operation (31) of trains, it is all-important to them that the above *proviso* in the statute should not be lost sight of, even when the matter is not directly brought up by an appeal, when an adverse inference might be drawn if the distinction is not adverted to.

Cited: *Ramsey v. Furniture Co.*, 209 N.C. 169.

IRA HARGIS v. KNOXVILLE POWER COMPANY.

(Filed 22 December, 1917.)

1. Negligence—Imminent Peril—Contributory Negligence.

Where one is employed in a tent on a mountainside as a blacksmith with other employees of defendant cutting trees thereon, and the evidence shows that one of these trees came down and a broken limb pierced the tent, broke the anvil, and another employee therein across from the anvil, which was in the way of the plaintiff, safely escaped by running; that a limb struck the ground at a place from which the plaintiff had jumped; that he only received warning when the tree was a distance of about 20 feet, and that he was running away so fast he could not turn, and his

impetus carried him over a railroad dump, which caused the injury: *Semble*, the plaintiff, under such circumstances, could not be considered guilty of contributory negligence.

2. Same—Rule of Prudent Man—Instructions.

A charge of the judge to the jury must be construed as a whole, and, if so construed, it is a correct statement of the law applicable to the evidence arising under the pleadings, it will not be held as erroneous because unconnected fragments thereof, taken separately, may appear to be erroneous; and where exception is taken to a fragment of the charge, because of the judge's failure to charge the rule of the prudent man, this fragment will be construed with a preceding action, with which it is connected, and which states the rule of law contended for by the appellant.

3. Negligence—Measure of Damages.

The rule for the measure of damages for a personal injury negligently inflicted was correctly charged by the judge to the jury under the decisions of *Wallace v. R. R.*, 104 N.C., 442; *Rushing v. R. R.*, 149 N.C., 162.

4. Mental Anguish—Negligence—Physical Injury.

Under allegations of the complaint in an action to recover damages for a physical injury caused by defendant's negligence, that plaintiff suffered certain serious injuries, from which he continues to suffer, etc., "great pain and distress," he may recover for actual suffering, both of mind and body, when they are the immediate and necessary consequence of the negligent injury.

ACTION, tried before *Webb, J.*, at May Term, 1917, of JACKSON, upon these issues.

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

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

3. What damage, if any, is the plaintiff entitled to recover? Answer: "$1,250."

From the judgment rendered, defendant appealed.

Walter E. Moore, J. J. Hooker, Alley & Leatherwood for plaintiff.
Bryson & Black, Sherrill & Harwood for defendant.

BROWN, J. There are no exceptions to the evidence, and the exceptions to the charge on first issue have been abandoned, and on the argument in this Court the evidence of negligence of defendant is admitted. The assignments of error relied upon are directed to the charge on the second and third issues.

The testimony tends to prove that plaintiff was a blacksmith in the

employ of defendant, and at time of the injury at work with one Norton at his forge in a tent on a mountainside. The woods force of defendant were cutting down timber trees just above the tent. A tree was cut down and rolled down the mountainside on the tent and smashed it and broke the anvil.

The plaintiff testified: "On the 19th day of May, 1916, I was working on the railroad grade in a temporary shop. This shop was located on the grade of the railroad that comes up the Tennessee River about 100 feet over the river. The shop in which I was at work was a tent. I supposed I was placed there by Mr. Ashworth, the superintendent on the job. I was engaged in doing the work, and the negroes were upon the cliff and cut a tree into the shop. Mr. Norton, my helper, hollered to me to look out, or to get out, and I heard the tree coming and I jumped off over the dump where they had bridged the road. When I ran out of the shop to this corner, Norton was near this end and ran down the grade. I was back in the back end, near the vise. The tree struck on the right-hand side and a limb about 6 inches through broke in two and ran into the ground near where I was standing, and a limb hit the anvil and broke it. I had no time to consider what to do. The tree was within 20 feet of the shop when the boy hollered, and by the time I hit the ground when I made the first jump, the tree hit the ground where I had been standing. I first received warning from Norton, my helper. I ran and jumped off the dump. The tree was within 20 feet of the shop when Norton hollered to me."

Norton testified that there was a hole in the tent and he looked out and saw the tree coming about 20 feet above. He was near the door and plaintiff was on other side of forge. Norton ran out and down the grade and was unhurt. He says that "if Mr. Hargis had followed me and went the way I did he would not have been hurt, but he could not go that way because the anvil and forge were between us. He came out the door the same way I did, but instead of going down the grade as I went he went over the bank. He was running so fast he could not turn. The grade in front of the shop was between 3½ and 4 feet. He ran directly across the grade and jumped over the rocks down the bank. If he had stopped at the door of the tent he would not (33) have been hurt. If he had gone down the grade he would not have been hurt."

We doubt if the plaintiff can be held guilty of contributory negligence in any view of the evidence. Suddenly he was confronted with imminent danger of death or seriously bodily injury. He had not a moment for reflection. Frightened by his desperate plight, he ran out of the tent and jumped over the dump. He could not follow Norton on

account of the position in which he was placed, and, according to Norton's evidence, he ran so fast that he could not turn, and was thus carried by the impetus over the dump.

Under such circumstances, the law does not hold men to that degree of responsibility it does when there is time for reflection. The danger was so imminent that plaintiff had to act on intuition. He had no time to do otherwise. *Dortch v. R. R.*, 148 N.C. 575; *Hinshaw v. R. R.*, 118 N.C. 1047. But it is not necessary to rest our opinion upon that ground, as we are of opinion that the issue was found for plaintiff under correct instructions as to the law.

The defendant excepts to this part of the court's charge: "If you find from this testimony that the first thing he knew he was notified by his helper, and that he heard the tree coming, and that he was under the tent, and if you find that he was apprehensive that the tree was coming on him, and if you find that he believed that he was going to suffer death or great bodily harm, and acting on the impulse of the moment he ran out of the way of the tree and ran down the embankment, then it will be your duty to answer the second issue 'No.' "

The criticism of the defendant is that the court failed to instruct the jury that the plaintiff, under the trying circumstances in which he was suddenly placed, must, in the opinion of the jury, have acted with ordinary care and circumspection, such as a reasonably prudent man would have exercised under the conditions with which plaintiff was confronted.

We think the court did instruct the jury that under the circumstances in which he was placed the plaintiff must have exercised ordinary care and prudence and that the jurors were to judge of that. Immediately preceding and connected with the portion of the charge except-
(34) ed to the court gave this further instruction:

"If you find from this testimony that this tree was coming down on him, if you are satisfied by the greater weight of the evidence that this plaintiff, after he was notified by his heldper that the tree was coming—if the defendant has satisfied you by the greater weight of the evidence that this plaintiff saw or could have seen this tree coming in time to get out of the tent and avert the injury, and did not do it, he would be guilty of contributory negligence. If you find that he failed to do what a reasonably prudent man would have done under the circumstances, if you find his conduct was not such as a reasonably prudent man would have been under the circumstances, and that that is the reason he got hurt and by that failure he was injured, if you find this to be the fact, by the greater weight of the evidence, you will answer the second issue 'Yes.' "

It is not permissible to take one excerpt from the charge and condemn the whole charge accordingly. *Daniel v. Dixon,* 161 N.C. 377; *Kornegay v. R. R.,* 154 N.C. 389.

As said by *Mr. Justice Walker* at this term in *State v. Orr,* "The charge must always be viewed as a whole and considered in the relation of each part to every other part."

So viewing the charge of the judge in this case, we see no reason to think that the jury failed to comprehend that it was their duty to judge of the reasonableness of plaintiff's conduct. The portion of his Honor's charge complained of relative to the measure of damages is not erroneous. It followed well settled decisions. *Wallace v. R. R.,* 104 N.C. 442; *Rushing v. R. R.,* 149 N.C. 162.

The plaintiff does not set up "mental anguish" as an element of damage as distinct from physical suffering. In fact, there is no reference to "mental anguish" *in ipsissimis verbis* in the complaint. The plaintiff alleges and testifies that he was seriously bruised and suffered great bodily injury, "from which injuries he continues to be sick, sore, maimed, and disordered, and still suffers great pain and distress." As all pain is mental and centers in the brain, it follows that as an element of damage for personal injury the injured party is allowed to recover for actual suffering of mind and body when they are the immediate and necessary consequences of the negligent injury. *Rushing v. R. R.,* 149 N.C. 163; 3 Sutherland, 261.

No error.

Cited: *Keller v. Furniture Co.,* 199 N.C. 414.

H. MATTHEWS v. CAROLINA AND NORTHWESTERN RAILWAY COMPANY.

(Filed 22 December, 1917.)

1. Negligence—Legal Duty—Act of God—Railroads— Cars as Dwelling—Storms—Master and Servant.

A railroad company which has permitted an employee the use of its box cars at a siding as a residence for himself and family owes him no legal duty to have the cars moved to a place of safety upon the approach of a storm which floods the cars with water and destroys his household effects, and consequently is not liable for damages, they being caused by the act of God, for which the company is not responsible.

2. Bailment—Control and Possession—Railroad Cars—Dwelling.

A railroad company is not liable as bailee for the household goods of an employee it permits to use its box car at a siding for a dwelling, possession and control being essential elements in the law of bailment.

CIVIL ACTION tried before *Carter, J.*, at July Term, 1917, of
(35) CATAWBA, upon these issues:

1. Were the plaintiff's goods destroyed by the negligence of the defendant? Answer: "Yes."

2. If so, what damage are plaintiffs entitled to recover? Answer: "$150."

From the judgment rendered defendant appealed.

D. L. Russell and R. H. Shuford for plaintiff.

J. H. Marion, W. C. Feimster, and M. H. Yount for defendant.

BROWN, J. The evidence tends to prove that plaintiff was employed by defendant as an assistant coal heaver at its coal chute at Cliffs, a station on Catawba River. By permission of defendant, plaintiff and his family occupied as a residence two unused shanty cars located on a side track near the chute. They lived in the cars with their household effects from 1 May to 16 July, 1915. On that night an unprecedented flood swept over the banks of the Catawba, submerged the shanty cars and destroyed plaintiff's property therein.

The evidence shows that during the day of the 16th, before the water reached the track on which the shanties were located, a freight train in charge of Conductor Winkler passed Cliffs going towards Hickory. Nothing was said to Winkler by the plaintiff Matthews or by Askew, his foreman, about moving the cars. After the freight train passed in the afternoon, Askew, plaintiff's brother-in-law, phoned the defendant's shops at Hickory and requested that an engine be sent out to move the shanty cars. At that time the water had not reached the shanties. He was told that there was only one engine there, and that had to
(36) be held on account of a washout on the line at another point. It had required Winkler from 2:30 until 6 o'clock that same afternoon to get his train from Cliffs to Hickory, a distance of two or three miles.

The Court overruled a motion to nonsuit, which is assigned as error. The exception is well taken. We know of no principle of law that imposed upon the defendant the legal duty to protect and rescue plaintiff's chattels from the destructive consequences of an act of God.

The plaintiff was occupying the shanty cars as a residence by per-

mission of defendant. His relation to defendant was that of a servant who has brought his effects upon the master's premises by his permission, the servant retaining personal control of his property. The law imposes no duty upon the master to rescue his servant's goods from the consequences of a destructive agency for which the master was in no way responsible. The cause of the destruction was the act of God and not that of the master. Labbatt, 15.

The rule is thus stated by the Georgia Court in *Allen v. Hixon,* 36 S.E. 810: "When an employee, without fault on the master's part, becomes placed in a dangerous or painful situation, the master is under no positive legal duty of exercising all reasonable care and diligence to effect such employee's speedy release. Being in no way responsible for the unfortunate occurrence, the master cannot be said to be guilty of a tort if he does not promptly take active steps in coming to the rescue. The only duty arising under such circumstances is one of humanity, and for a breach thereof the law does not, so far as we are informed, impose any liability." 24 Cyc. 1072 and notes, and note to 42 L.R.A., 363 (N.S.).

To illustrate: Suppose plaintiff had been a farmer's tenant residing in a tenant house on the banks of the Catawba, and when the flood began to rise he had telephoned his landlord to bring his team and remove his household goods, and the landlord had failed to do so. Would the landlord be liable? Certainly not. The law imposed no such duty on him, although humanity did. Causes of action arise only for violations of duties imposed by municipal law. Unfortunately for plaintiff, he failed to have his cars attached to Winkler's freight train, as he could have done; and when he phoned to Hickory for help, the defendant's only engine there was necessarily detained to meet another pressing demand. Had this not been so, we doubt not that it would have been sent to plaintiff's relief.

The position that defendant may be held as a bailee of the household goods is untenable. Possession and control are essential elements in the law of bailment. The defendant was not in possession of the goods simply because they were in its shanty cars any more than a landlord would be in possession of his tenant's household effects simply because he had furnished the tenant a house to live in. 6 Corpus Juris., 1102.

The motion to nonsuit is allowed.

Reversed.

Cited: *State v. Hall,* 224 N.C. 321.

STANDARD GROCERY COMPANY v. C. D. TAYLOR & CO.

(Filed 12 December, 1917.)

Vendor and Purchaser — Contracts — Interest — Payment — Damages — Statutes.

Where the contract of sale of merchandise provides for the payment of interest on past due bills, the interest is regarded as the same as the principal debt, and a payment of the principal alone will not discharge the claim unless accepted in satisfaction of the entire debt (Revisal, sec. 859), there being a distinction between this and the principle applicable where an interest charge is imposed by way of damages for failure to pay the principal sum when due, and the payment of the principal "will bar an action for the interest." *King v. Phillips*, 95 N.C., 245, cited as controlling.

CIVIL ACTION, tried on appeal from a justice's court before
(37) *Ferguson, J.*, and a jury, at Spring Term, 1917, of WATAUGA.

The action was to recover an amount of interest claimed to be due on an account for goods sold and delivered, the principal money having been closed by defendant's notes, which were subsequently paid. The facts relevant to closing account by defendant's notes for principal are stated in case on appeal as follows:

"On 30 October 1914, defendant owed to plaintiff the sum of $1,-485.96 as the principal on past due bills and two or three bills which would mature some time during the month of November thereafter; and on said 30 October 1914, defendant C. D. Taylor & Co. executed to plaintiff five notes at Valle Cruces, N. C., in the plaintiff's absence, the said plaintiff being at Elizabethton, Tenn.; five notes for the aggregate sum of the principal, $1,485.96, which notes were afterwards paid."

Verdict and judgment for plaintiff for $86.59 and interest accrued on account, and defendant excepted and appealed.

John H. Bingham and E. S. Coffey for plaintiff.
L. D. Lowe and F. A. Linney for defendant.

HOKE, J. The decisions in this State are to the effect that, when interest on a moneyed demand is stipulated for as a part of the agreement, it is as much a part of the debt as the principal money, and a payment of the principal will not annul the claim for the in-
(38) terest unless such payment has been received and accepted in satisfaction of the entire claim as provided for in section 859 of the Revisal. When there is no agreement for interest, and the charge is imposed by way of damages for failure to pay the principal sum

when due, the payment of the principal is held to "bar an action for the interest." This distinction is clearly pointed out and approved in *King v. Phillips,* 95 N.C. 245, and, on the record, we consider that case as decisive of the present appeal.

There was evidence on the part of plaintiff tending to show that this account was made for goods sold and delivered; that the contract between the parties was that on bills paid at maturity there should be a discount of 1 per cent and on bills past due there should be an interest charge at the rate of 6 per cent.

There was evidence of defendant to the contrary, but the jury have accepted plaintiff's version of the matter, and, under the authority cited, the recovery in his favor must be upheld.

No error.

Cited: *Bank v. Insurance Company,* 209 N.C. 19; *Hood v. Smith,* 226 N.C. 574.

MRS. LOUISE DICKS MARSHALL ET AL v. R. P. DICKS ET AL, ADMINISTRATORS OF M. C. DICKS, DECEASED.

(Filed 12 December, 1917.)

1. **Contracts, Illegal—Courts.**

Our courts will not enforce the obligations of an executory contract which is illegal or contrary to public policy or against good morals, or lend their aid to the acquisition or enjoyment of rights or claims which grow out of or are necessarily dependent upon such contracts.

2. **Same—Fraud—In Pari Delicto.**

A conveyance of lands to defraud or avoid creditors is illegal; and where such is made the ground for recovery by an heir at law, contending that it was so made by his mother to the defendant for her benefit during her life and then in trust for her heirs at law, he and the defendant are *in pari delicto,* and the law will leave them *in statu quo.*

3. **Contracts, Illegal—Fraud—Pleadings—Allegations—Courts.**

Where the plaintiffs claim land as heirs at law of a deceased grantor who had made a conveyance of the same with intent to defraud his creditors, and their right to recover is made to depend upon the illegal transaction, it is not necessary that they allege fraud on the part of the defendant, the grantee in the deed, for the court to deny a recovery.

CIVIL ACTION, tried before *Cline, J.,* and a jury, at July Term, 1917, of RANDOLPH.

The action was instituted by plaintiff, two of the children,
(39) heirs at law and distributees of M. C. Dicks, deceased, to enforce the payment of $5,600, being balance due on a note and mortgage executed by G. F. Hankins to Mrs. M. C. Dicks (now deceased) and transferred by written assignment absolute in terms to defendant R. P. Dicks, a son of Mrs. Dicks, such transfer and assignment alleged by plaintiffs to have been in trust to collect the proceeds and pay to said M. C. Dicks if living, and if collected after her death to pay same to her heirs at law, etc. H. M. Worth, administrator of M. C. Dicks, having failed to sue for or collect said amount, was made party defendant, the other defendant being the son, R. P. Dicks, and two daughters, also distributees and heirs at law of said M. C. Dicks.

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

Walser & Walser and Brittain for plaintiff.
W. C. Hammer, R. C. Kelly, and King & Kimball for defendant.

HOKE, J. The evidence on the part of plaintiff tended to show that during her lifetime, Mrs. M. C. Dicks, now deceased, holding a note and mortgage on which there was a balance due of $5,600, transferred same by written assignment absolute in terms to her son, defendant R. P. Dicks, and at the time of the transfer there was an agreement by parol that the assignee should hold and collect the note in trust for his mother; that at such time the said M. C. Dicks was involved in debt and the transfer was made by her with the intent and purpose to avoid payment of her debts. Said M. C. Dicks thereafter died, and the present action is instituted by plaintiffs, two of her children and heirs at law and distributees, against R. P. Dicks to enforce an accounting of the proceeds alleged to have been collected and now held under and by virtue of said assignment, the other children of deceased being made parties defendant, and also the administrator of M. C. Dicks, he having declined to join in said litigation.

Upon these facts, we concur in the view of his Honor below that the plaintiff should be nonsuited.

It is the fixed principle with us and, so far as we are aware, of all courts administering the same system of laws, that when the parties are *in pari delicto* they will not enforce the obligations of an executory contract which is illegal or contrary to public policy or against good morals. Nor will they lend their aid to the acquisition or enjoyment of rights or claims which grow out of and are necessarily de-

pendent upon such a contract. *Fashion Co. v. Grant,* 165 N.C. 453; *Pfeifer v. Israel,* 161 N.C. 409; *Lloyd v. R. R.,* 151 N.C. 536; *Edwards v. Goldsboro,* 141 N.C. 60; *Culp v. Love,* 127 N.C. (40) 457; *King v. Winants,* 71 N.C. 469; *Blythe v. Lovinggood,* 24 N.C. 20; *Sharp v. Farmer,* 20 N.C. 255; *McMillan v. Hoffman,* 174 U.S. 639-654; *Battle v. Nutt,* 29 U.S. (4 Pet.), 184; *Armstrong v. Toler,* 24 U.S. 258 (11 Wheat.); 1 Waites Act. & Def., 43.

In *King's* case, *supra,* it is held as follows: "The law prohibits everything which is *contra bonos mores,* and, therefore, no contract which originates in an act contrary to the true principles of morality can be made the subject of complaint in courts of justice." In *Blythe v. Lovinggood:* "An executory contract, the consideration of which is *contra bonos mores,* or against the public policy or the laws of the State, or in fraud of the State, or of any third person, cannot be enforced in a court of justice." And in *Sharp v. Farmer:* "No action can be sustained in affirmance and enforcement of an executory contract to do an immoral act, or one against the policy of the law, the due course of justice, or the prohibition of a penal statute." And in *Battle's* case (4 Peters), *supra:* "The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis,* it is but a just infliction for premeditated and deeply practiced fraud. He must not expect that a judicial tribunal will degrade itself by an exertion of its powers to shift the loss from one to the other, or to equalize the benefits or burthens which may have resulted from the violation of every principle of morals and of law." And in *Armstrong v. Toler* (11 Wheat.), *supra:* "Where a contract grows immediately out of and is connected with an illegal or an immoral act, the law will not lend its aid to enforce it. So if the contract be in part only connected with the illegal considerations and growing immediately out of it, though in fact a new contract, it is equally tested by it."

The cases in this jurisdiction hold further that a conveyance or contract made between the parties with the intent to delay, hinder and defraud one's creditors comes directly within the principle. *Pass v. Pass,* 109 N.C. 484; *York v. Merritt,* 80 N.C. 285.

It is urged in behalf of plaintiffs that the position is not open to defendants on the record, for the reason that there are no allegations of fraud in the pleadings, but this, too, must be resolved against the appellants. Where a litigant is making a fraud perpetrated on him the basis of his claim, or is seeking to set aside deeds or contracts on that ground, then the fraud charged must be averred and ordinarily the essential facts must be set forth with sufficient fullness and accuracy to indi-

cate the fraud charged and to apprise the offending party of what he will be called on to answer (*Mottu v. Davis*, 151 N.C. 238); but the principle has no application to cases like the present, and, so far as examined, the Courts have uniformly held that wherever it appears, and with or without averment in the pleadings, that a litigant (41) is asking the aid of the Court in the enforcement of rights growing out of an illegal or immoral transaction and dependent upon it, relief or recovery is denied. As said in some of the cases, it is not that the Courts favor the one or the other, but it declines to interfere and leaves the parties where they have placed themselves by the unlawful or iniquitous agreement.

In *Cansler v. Penland*, 125 N.C. 578, it was held in effect that, in such case, the law withdraws its support as soon as the illegality of a contract is discovered, and *Faircloth, C. J.*, delivering the opinion, quotes with approval from *Coppel v. Hall*, of Wallace, 74 U.S. 542, as follows: "The defense is allowed, not for the sake of the defendant but of the law itself. It will not enforce what it has forbidden and denounced. . . . Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its violation." And to like effect is *Oscanyan v. Arms Co.*, 103 U.S. 261; *Reid v. Johnson*, 67 Pac. 381; *Sheldon v. Pruessner*, 35 Pac. 201; *Cumberland Tel. & Tel. Co. v. City of Evansville*, 127 Fed. 187-198; *Richardson v. Buhl*, 77 Mich. 632.

In *Richardson's* case, *supra*, it was held: "Courts of their own motion will take notice if illegal contracts which come before them for adjudication and will leave the parties where they have placed themselves." And, in *Sheldon v. Pruessner, supra:* "The courts, in the due administration of justice, will not enforce a contract in violation of law, or permit plaintiff to recover upon a transaction in violation of public policy, even if the invalidity of the contract or transaction be not specially pleaded.

In the present case the owner, having in her lifetime, by written assignment, absolute in terms, transferred the note and mortgage in question to defendant, the plaintiffs claiming as volunteers, can only recover by establishing the agreement as alleged and relied on that the assignee was to hold in trust for the owner, and that the facts showing that this transaction was for the purpose of hindering, delaying and

defrauding creditors of the owner. The law leaves the parties where they have placed themselves in reference to the property and, on the record, we must hold that recovery has been properly denied.

No error.

Cited: *Rush v. McPherson,* 176 N.C. 565; *Price v. Edwards,* 178 N.C. 496; *Finance Co. v. Hendry,* 189 N.C. 554; *Colt v. Kimball,* 190 N.C. 171; *Waddell v. Aycock,* 195 N.C. 270; *Tomberlin v. Bachtel,* 211 N.C. 268; *In re Publishing Co.,* 231 N.C. 398; *Insulation Co. v. Davidson Co.,* 243 N.C. 255.

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(42)

THE OBSERVER COMPANY AND S. J. HOLLAND v. J. H. LITTLE ET AL, RECEIVERS FOR REID LIVERY COMPANY.

(Filed 12 December, 1917.)

1. Deeds and Conveyances—Conditional Sales—Statutes—Registration.

By Revisal, sec. 983, conditional sales reserving title in the bargainor are required to be in writing and registered in the same manner, and have the same legal effect as provided for chattel mortgages (Revisal, sec. 982), and by the latter section "No deed in trust nor mortgage for real and personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor," etc., "but from the registration of the same"; therefore such conditional sales are regarded as chattel mortgages and void as to creditors and purchasers, except from registration.

2. Corporations—Receivers—Title—Creditors—Statutes.

Upon the insolvency of a corporation and the appointment of a receiver under the provisions of Revisal, sec. 1224, the corporate property vests in the receiver from his appointment, and the receiver represents the creditors as well as the owner, excluding the general creditor from taking any separate or effective step on his own account in furtherance of his claim; and the proceedings for the receivership is in the nature of judicial process by which the rights of the general creditors are "fastened upon the property."

3. Same—Conditional Sales.

Where the bargainor under a conditional sale to a corporation has not recorded the instrument, as required by Revisal, secs. 982, 983, and a receiver has been appointed under the provisions of Revisal, sec. 1224, his right to a preferential lien has been lost by his failure to register the instrument, the receiver representing the rights of the other creditors, and he is only entitled as any other general distributee of the funds.

OBSERVER CO. *v.* LITTLE.

CIVIL ACTION heard on case agreed before Cline, J., at May Term, 1917, of MECKLENBURG.

On the hearing it was made to appear that in August 1916, S. J. Holland sold to the Reid Livery Company a pair of horses for $390 and no part of same had been paid; that in January 1917, the plaintiff, The Charlotte Observer, sold to Reid Livery Company an auto truck for $650, and there had been paid thereon the sum of $136.15, leaving a balance due of $513.85; that the property was passed to the Reid Livery Company by written agreement in which title was retained in the respective vendors till the entire purchase price was paid; that subsequently, the Reid Livery Company being insolvent, on proceedings properly instituted, the defendants were appointed receivers of said company for the purpose of converting its assets into cash, paying same to creditors, and winding up the affairs of the corporation; that, by order of court, said property had been sold by receivers and proceeds passed over to the clerk
(43) of the court to be held subject to liens and equities of all parties in interest. On these facts, it was adjudged by the court as follows:

"It is, therefore, considered, adjudged, and decreed that neither petitioners be allowed a specific and prior lien on the property claimed by them, respectively, as against the receivers. It is further ordered that the claim of the Observer Company for $513.85 be accepted, and the receivers are directed to pay the same *pro rata* with other creditors. It is also considered and adjudged that the claim of S. J. Holland for $390 is accepted, and the receivers are directed to pay the same *pro rata* with other creditors."

From this judgment plaintiffs appealed.

Morrison & Dockery for plaintiff.
McNinch & Justice for defendant.

HOKE, J., after stating the case: Our statute, Revisal, sec. 982, provides, in effect, that "no deed of trust nor mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of the same." etc. And section 983, "That all conditional sales of personal property in which the title is retained by the bargainor shall be reduced to writing and registered in the same manner, for the same fees and with the same legal effect as is provided for chattel mortgages," etc.

By the express terms of the law, therefore, and under various de-

cisions construing the same, these conditional sales are to be regarded in this jurisdiction as chattel mortgages and void as to creditors and purchasers except from registration. *Clark v. Hill,* 117 N.C. 11; *Butts v. Screws,* 95 N.C. 215; *Brem v. Lockhart,* 93 N.C. 191.

In order for a creditor to avail himself of these registration statutes, it is very generally understood that he must by some judicial process or method take steps to fasten his claim upon the property. In one or more of the decisions on the subject, it is said that he should be "armed with legal process" for the purpose. Considering the case in recognition of the principle, we are of opinion that the title of defendant is in full compliance with the requirement, they having been duly appointed receivers in a statutory proceeding instituted for the purpose of winding up the affairs of an insolvent corporation and distributing the assets among its creditors.

Under this statute, section 1224, it is provided: "That all the real and personal property of an insolvent corporation, wheresoever situated, and all of its rights, franchises, and privileges, shall, upon appointment of a receiver, immediately vest in him and the corporation shall be divested of the title thereto." In section 1207: "That (44) after payment of all allowances, expenses, costs and the satisfaction of all special and general liens upon the funds of the corporation, *to the* extent of their lawful *priority,* the creditors shall be paid proportionably to the amount of their respective debts," etc.

Under decisions apposite, it has been held here and elsewhere that the receivers in such case are to be considered as representing creditors as well as the owner, enabling him in their favor to avoid fraudulent conveyances by the debtor and otherwise insist on their rights. *Pender v. Mallet,* 123 N.C. 57; *Porter v. Williams,* 9 N.Y. 142. A position that prevails in this jurisdiction both as to trustees and in assignments for the benefit of creditors. *Taylor v. Lauer,* 127 N.C. 157; *Bank v. Adrian & Vollers,* 116 N.C. 537. And it is held further with us that after proceedings instituted and receivers appointed, no general creditor can, on his own account, take any separate or effective steps in furtherance of his claim. *Odell Hardware Co. v. Holt-Morgan Mills,* 173 N.C. 308.

Under these conditions, it is in accord with right reason that a proceeding of this character and the appointment of receivers thereunder shall be considered in the nature of judicial process by which the rights of general creditors are "fastened upon the property," within the meaning of the principle, and avoiding all claims for specific liens which have not obtained legal priority by having the same duly registered as provided and required by law; and well-considered authority is in

full support of the position. *Harrison v. Warren Co., etc.,* 183 Mass. 123; *American Machinery Co. v. New England Buck Co.,* 87 Cam., 369; *Duplex Printing Co. v. Clipper, etc., Co.,* 213 Pa. St., 207; *Receiver of Graham Button Co. v. Charles Spielman, et al.,* 50 N.J.E., 120; *Smith v. Orr,* 224 Fed. 71; *Farmers' Loan & Trust Co. v. Minneapolis Engine Co.,* 35 Minn. 543.

On the questions presented, it was held in the New Jersey case: "A creditor of a mortgagor, to be in position to contest the validity of a chattel mortgagor, must have his debt fastened on the mortgagor's property. By an adjudication of insolvency and the appointment of a receiver, the debts of creditors at large of an insolvent corporation are fastened on its property. A deed or other instrument which is void as against creditors is void also against those who represent creditors. The receiver of an insolvent corporation is the representative of its creditors, and as such may, by suit or defense, avoid any instrument which is void as against them. To successfully contest the validity of a chattel mortgage, the receiver of an insolvent corporation is not required to show that it is fraudulent as to creditors, but all he need do is to show such facts as, under the statute, render it void as against the creditors of the corporation."

And speaking to the reason and justice of the position, in-
(45) terpreting a Missouri statute not dissimilar, *Sandborn, J.,* said:

"At the time this receiver was appointed, the creditors of the furnace company had the right to procure and levy attachments or executions on the property here in controversy. The appointment of the receiver and his seizure of the same thenceforth prevented them from exercising that right. It is just and equitable that the receiver whose appointment prevented the creditors from exercising their right to avoid the condition should exercise that right for them. The Courts of Missouri declare that a creditor armed with process may avoid or disregard the condition of his debtor's unrecorded contract of sale, and they have held a creditor who has sued out an attachment or execution against the property of such a debtor, placed it in the hands of the sheriff and caused him to levy it upon the property sold, is such a creditor. A creditor who has sued out an order of the court of equity that a receiver be appointed, and that he take possession of all the property of the debtor for the purpose of its administration, sale and distribution among the creditors, who has placed the order in the hands of the sheriff and has caused him to seize the property is not less armed with process. Indeed, he is armed with a more comprehensive and effective process—a process by which all the property of the debtor may be seized, administered, sold and distributed.

"In view of these considerations, the conclusion is that a receiver appointed in a suit in equity instituted by a creditor against his insolvent debtor to administer and convert into money the property of the debtor and distribute the proceeds among creditors has the power of creditors armed with process to disregard or avoid, under the statutes, section 2889, Revisal, 1909, the unrecorded condition in a contract of conditional sale," etc.

And to like effect, *Gilfillan, C. J.*, in the Minnesota case, *supra*, said: "The pendency of the proceedings disables the creditors to go on, each in his own behalf, to enforce his claim by action, judgment, execution and levy. So that unless all the rights of the creditors can be enforced in this proceeding, unless their rights to avoid transfers can be made available by means of it, then it is to some extent an obstruction rather than a remedy to them. It is evident that it was intended to facilitate and not hinder a complete remedy; and this it will not do unless its scope is to apply to satisfaction of the creditors all the property of the corporation applicable to that purpose, that is, all the property which, but for the proceeding, they could have so applied. For these reasons, we decide that the receiver may avoid any transfers void as to creditors."

We are aware that there are numerous decisions in other States which uphold the contrary view, and the Supreme Court of the United States, in *York Mfg. Co. v. Cassel*, 201 U.S. 344, in construing the former bankruptcy statute, has approved this position in reference to the title of the assignee, a position that was later (46) changed by legislative amendment. Some of these opposing decisions were in States where contracts of conditional sale were not required to be registered. In others, such contracts were only avoided as against judgment or attaching creditors, etc. But in any event, and notwithstanding the high respect always due these eminent Courts, their decisions on the questions presented here and the principle they support may not be recognized in this jurisdiction where the statute, as stated, confers the title of the insolvent on the receivers from the time of their appointment such receiver is held to represent creditors, and his appointment serves to restrict the general creditors from any resort to other judicial process in special protection of their interests.

We find no error in the disposition of the cause, and the judgment of the Superior Court must be

Affirmed.

Cited: *Starr v. Wharton*, 177 N.C. 324; *Hardware Co. v. Garage Co.*, 184 N.C. 126; *Motor Co. v. Johnson*, 184 N.C. 334; *Douglass v.*

Dawson, 190 N.C. 463; *Trust Co. v. Motor Co.,* 193 N.C. 664; *Acceptance Corporation v. Mayberry,* 195 N.C. 512; *Manufacturing Co. v. Price,* 195 N.C. 604; *Finance Corporation v. Hodges,* 230 N.C. 583; *Mitchell v. Battle,* 231 N.C. 69; *Investment Co. v. Chemicals Laboratory,* 233 N.C. 297; *Sales Co. v. Weston,* 245 N.C. 629.

BETTIE WHITFIELD ET AL V. W. B. DOUGLAS, AGENT, ET AL.

(Filed 22 December, 1917.)

1. **Wills—Interpretation—Intent—Vesting of Estates.**

Subject to the provision that the intent and purpose of the testator, as expressed in his will, shall always prevail except when the same is in violation of law, the rule is that when the will is sufficiently ambiguous to permit of construction, the Courts will lean to that interpretation which favors the early vesting of estates, and that the first taker of an estate by will is ordinarily to be considered as the primary object of the testator's bounty.

2. **Same—Contingent Remainders.**

Upon a devise of lands to one with a limitation over on the death of the first taker without issue, these words will be given their natural meaning and effect the estate with the contingency until such death without issue, unless it appears from the terms of the will that an earlier time was intended when the estate of the first taker should become absolute.

3. **Same—"Children Then Living."**

A devise of lands to testator's children "to have and to hold to them and their heirs in fee simple forever," but upon condition that "no part of said property is to be disposed of until my youngest child then living shall arrive at the age of 21 and until after the death of my husband," with provision for a home for the husband; that when the youngest child shall become 21 and upon the death of the husband, all of the testator's estate be equally divided between the testator's named children, "share and share alike; and should either of them die without issue, then their share shall be equally divided between my other children then living, or should either or any of them die leaving issue, then shall such distributive share go to such issue left": *Held,* construing the will to ascertain the intent, the devise became absolute at the time designated for the division, the expression "then living" referring to that of the arrival of the youngest child of age and the death of the husband.

CIVIL ACTION, heard on case agreed before *Stacy, J.,* holding
(47) courts of the Sixth Judicial District in November 1917, from LENOIR.

On the hearing it appeared that prior to September, 1896, Bettie G. Whitfield died leaving a last will and testament, which has been duly admitted to probate, and the portion of said will material and relevant to this controversy is as follows:

"I give and devise to my children, William Cobb Whitfield, Annie W. Outlaw, Sallie E. Whitfield, Bettie Whitfield, James Richard Whitfield, Harriet Lucy Whitfield, all my real estate, to have and to hold to them and their heirs in fee simple forever, and all my personal property to them and their assigns forever, upon the conditions as follows: No part of said property is to be disposed of until my youngest child then living shall arrive at the age of 21 years and until after the death of my husband, Nathan B. Whitfield. The dwelling-house I now occupy, or such other house as may be hereafter built, shall be a home for my husband during his life; that the annual rents, profits and incomes derived from my plantation shall be devoted to the support and education of my children, to the necessary repairs of the houses and plantations, and the surplus, if any, of such rents and profits shall be used in such manner as my executor hereinafter named may deem best, without being required to give any account of the same. When my youngest child then living, and after the death of my husband, shall arrive at the age of 21 years, it is my will and desire that all my real and personal estate be equally divided between my above-named children, share and share alike; and should either or any of them die without issue, then their share shall be equally divided between my other children then living; or should either or any of them die leaving issue, then shall such distributive share go to such issue left."

The will then appoints the husband executor, to serve without bond, etc. That the husband, executor, has died and all the children mentioned in the disposing clause of the will having become 21 years of age, partition of the real estate, the subject of the devise, was had among the said children, devisees and heirs at law, the present plaintiffs, Bettie and Hattie Whitfield, being awarded their share of the property; that in November 1917, these plaintiffs entered into a contract with defendant, making disposition of their said property for valuable consideration and requiring that a good title be conveyed; that defendants, averring their readiness and ability to comply with the terms of the contract on their part, allege that plaintiffs are not entitled to relief for the reason that they cannot make (48) a good title to the property as they have contracted to do.

His Honor, being of opinion that, on the facts presented, the title

offered was a good one, gave judgment that the contract be enforced according to its terms, and defendants excepted and appealed.

Rouse & Rouse for plaintiffs.

Julius Brown for interveners, N. W. Outlaw and Bettie Cobb Outlaw.

HOKE, J. "Subject to the position that the intent and purpose of the testator as expressed in his will shall always prevail, except when the same is in violation of law, it is a recognized rule with us, when the will is sufficiently ambiguous to permit of construction, the Courts should lean to that interpretation which favors the early vesting of estates, and that the first taker of an estate by will is ordinarily to be considered as the primary object of the testator's bounty." *Citizens Bank v. Murray,* at the present term; *Bank v. Johnston,* 168 N.C. 304; *Dunn v. Hines,* 164 N.C. 113.

Our recent decisions further hold that when an estate by will is left to one with a limitation over on the death of the first taker without issue, these words will be given their natural meaning and effect the estate with the contingency until "such death without issue," unless it appears from the terms of the will that an earlier period was intended when the estate of the first taker should become absolute. *Bizzell v. B. & L. Assn.,* 173 N.C. 158; *Rees v. Williams,* 165 N.C. 201; *S. c.,* 164 N.C. 128; *Smith v. Lumber Co.,* 155 N.C. 389; *Elkins v. Seigler,* 154 N.C. 374; *Perrett v. Bird,* 152 N.C. 220; *Harrell v. Hagan,* 147 N.C. 111; *Whitfield v. Gorris,* 134 N.C. 24; *Williams v. Lewis,* 100 N.C. 142; *Buchanan v. Buchanan,* 99 N.C. 308.

Considering the present devise in view of these principles, we are of opinion that, by the terms of the will, the testatrix intended an earlier period for estate of the first takers to become absolute, to wit, at the period of division had on the death of her husband and the coming of age of her youngest child. She begins the limitations in question with the very significant statement that "No part of my property is to be *disposed of* until my youngest child shall arrive at the age of 21 and until after the death of my husband and executor." Then after directing that the property shall be kept together under the management and control of her husband and until the coming of age of her youngest child, the will provides for a division among her children, share and share alike; and if any of them die without issue, then their share shall be equally divided between my other children then living, etc.
(49) It thus appears that the testatrix desired that the share of a child dying without issue shall be "divided"; and when con-

strued in connection with the former portion of the will, that none of the property be disposed of till the death of her husband and the coming of age of the youngest child, and in reference to the position that the law favors the early vesting of estates, we think it clear that it was the mind and purpose of the testatrix that the devise should become absolute at the time of division had; and the clause that "the share and a child dying without issue shall be divided among my issue then living," the expression "then living" refers to the period of division, and not otherwise. Several recent and well-considered decisions of the Court are in support of this interpretation. *Bank v. Johnston, supra; Dunn v. Hines, supra; Price v. Johnson,* 90 N.C. 593, and many others could be cited.

The case of *Williams v. Lewis, supra,* cited for appellants, is not in necessary conflict with this position. In that case it was held that there being nothing in the terms of the will to indicate that an earlier period was intended, except the mere fact that a partition was provided for, the limitation over on the death of the first taker should be construed according to the natural import of the words used and effect the estate with the contingency until the time designated. A similar decision, and for a like reason, was rendered by this Court in the recent case of *Springs v. Hopkins,* 171 N.C. 486. In the case before us, however, there being additional terms in the will indicating that the estate should become absolute at the time of division had, we concur in his Honor's view that the title offered is a good one and has been correctly adjudged that defendants must comply with their contract.

Affirmed.

Cited: *Hinson v. Hinson,* 176 N.C. 614; *Thompson v. Humphrey,* 179 N.C. 54; *Ex parte Rees,* 180 N.C. 193; *Goode v. Herne,* 180 N.C. 478; *Smith v. Creech,* 186 N.C. 190; *Westfeldt v. Reynolds,* 191 N.C. 806; *House v. House,* 231 N.C. 220; *Elmore v. Austin,* 232 N.C. 19.

J. ROBERT DILLS ET AL v. THE CHAMPION FIBER CO. ET AL.

(Filed 22 December, 1917.)

Removal of Causes—Diversity of Citizenship—Federal Courts—Statutes—Answer—Time to Plead—Extension of Time—Waiver.

The Federal statute regulating the removal of causes from the State to the Federal courts for diversity of citizenship requires that the mo-

tion, supported by proper petition and bond, be made before the time for answering expires as fixed by the laws of the State or by rule of the State courts "in which said suit is instituted and pending," the expression "rule of court" referring to a standing rule having the force of law; and where a general order to plead has been made by the trial judge, without exception by the movant, and he afterwards files his answer in time therein allowed, but after the expiration of the statutory time, he will be deemed to have acquiesced in the order and to have waived his right, and jurisdiction will be retained in the State court.

CIVIL ACTION, heard on motion to remove the cause for di-
(50) versity of citizenship to the Federal court, before *Webb, J.*, at May Term, 1917, of JACKSON.

The facts relevant to the question presented, and the judgment of his Honor thereon denying the motion, are as follows:

1. That the summons in the above-entitled cause was duly issued on 25 January 1917, as appears by the endorsement thereon, and was served upon the defendant company on 26th January and on the defendant W. R. Smith on the same date.

2. That under the rules of court, the next term of the Superior Court of Jackson County convened on 19 February 1917, and was the return term of said summons and the term in which pleadings were by law required to be filed unless time therefore was granted by the court; that the said Superior Court for Jackson County did convene on 19 February 1917, and was in session for almost two weeks.

3. That on 27 February 1917, the following entry was made by the clerk upon his docket, and I take it that it was made by leave of the court or at the direction of the court, to wit: "Upon calling summons docket, the usual order was made allowing plaintiffs and defendants to file pleadings in all cases where no special order has been made." Some of the members of the Jackson County bar construes this order to mean thirty days to file complaint and thirty days thereafter to answer, and others of the bar contend that it means until the next term to file pleadings.

4. That plaintiff filed his complaint in this cause on 17 April 1917, and the defendants filed an answer thereto on 16 May 1917; that the counsel for the defendant attended the said Superior Court, which convened in Jackson County on 19 February 1917.

5. That when the order was made as set out in the third finding of facts, as appears of record, neither the defendant nor its counsel objected or excepted to said order; that some time after the adjournment of the said term of court the defendant's counsel requested the plaintiff's counsel to furnish the defendant with a copy of the complaint

filed in the cause, which was done, and the defendant filed an answer thereto at the time above stated.

6. That the defendant filed its petition and bond in due form, asking a removal of the cause to the District Court of the United States on 15 May 1917.

Upon the foregoing findings of fact by the court, the court is of the opinion that the defendant is not entitled to have its cause removed as petitioned for, and the court so holds and adjudges, (51) and defendant's motion to remove is hereby denied.

It was agreed that the petition for removal contained the necessary allegations of fraudulent joinder, and that the only question for the determination of the court was as to whether or not petition was filed in due time. If it was, then an order was to be made removing the case to the Federal Court; and if it was not, then the case was to be retained.

Defendants excepted and appealed.

No counsel for plaintiff.
Martin, Rollins & Wright for defendant.

HOKE, J. The Federal statute as to a defendant's right to remove a cause for diversity of citizenship (Fed. Judicial Code, sec. 29) requires that such motion shall be made at or before the time for answering expires as fixed by the laws of the State or by rule of the State courts "in which said suit is instituted and pending."

This term "rule of court" appearing in the statute has reference to a standing rule having the force of law (*Mecke v. Mineral Co.*, 122 N.C. 790-97; *Fox v. R. R.*, 80 Fed., 945), and the decisions in this State interpreting the statute are to the effect that where the time to file pleadings has been extended on the application of the parties, or when such time is given at some particular term by order of court, and same is not objected to, such order is taken to have been acquiesced in by defendant, and the right of removal is thereby waived. *Patterson v. Fiber Co.*, at the present term; *Ford v. Pridgeon River Lumber Co.*, 155 N.C. 352; *Bryson v. R. R.* 141 N.C. 594; *Howard v. R. R.*, 122 N.C. 944; Moon on Removal of Causes, sec. 156.

In the case of *Hyde v. R. R.*, 167 N.C. 584, cited and chifly relied upon by appellant, the defendant objected to the order giving time to plead, duly excepted to same, filed his petition for removal as soon after complaint was filed as opportunity was offered.

Speaking to this distinction, *Associate Justice Walker*, delivering the opinion in the *Hyde* case, said: "At no stage of the case has the de-

fendant been in fault. It has done all that it could to save its rights. The law does not require the performance of the impossible. The extension of time was duly objected to and the defendant can lose nothing by the adverse ruling of the Court allowing it," etc.

On the present record the defendant, as stated, having acquiesced in the order extending the time to plead, has been properly held to have waived his right of removal and the judgment denying his application must be

Affirmed.

Cited: *Powell v. Assurance Society*, 187 N.C. 597; *Burton v. Smith*, 191 N.C. 607; *Butler v. Armour*, 192 N.C. 515.

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(52)

MECHANICS BANK AND TRUST COMPANY v. H. B. WHILDEN, E. S. JOHNSTON, TRUSTEE, ET AL.

(Filed 22 December, 1917.)

1. Evidence—Depositions—Relevancy—Former Trial.

While depositions properly and regularly taken and introduced on a former action between the same parties or those in privity therewith may properly be introduced on the later trial under certain circumstances, their rejection will not be held for error unless it is made to appear that the proposed evidence was relevant and reasonably calculated to have appreciable effect in the verdict.

2. Evidence—Declarations—Corroboration—Appeal and Error.

Declarations not admissible as substantive evidence under the rule are properly rejected as corroborative of evidence excluded on the trial when there is no substantive evidence of like effect.

3. Boundaries—Evidence—Declarations—Interest—Ante Litem Motam.

Parol evidence of declarations as to the placing of the corner of private lands of which the title is in dispute is allowed when made *ante litem motam* by a declarant who was disinterested at the time and dead at the time of trial; and in such case the lapse of time is not always controlling.

4. Same—Remote Period—Definite Corners.

Parol evidence of common reputation as to the placing of a corner, on the question of private boundary, is admissible when shown to have existed for a remote period and direct evidence of its origin is not likely to be procurable; such reputation must always be shown to have existed *ante litem motam*, and should attach itself to some muniment of title, or natural object, or be fortified by testimony of occupa-

tion and acquiescence tending to give the land some definite and fixed location.

5. Same—State Grants.

Where both parties to the action claim lands by mesne conveyances under separate grants from the State, and the controversy is made to depend upon the location of the lands under the defendant's grant, with description, "Beginning at a locus near the gap of the trail, between Johnson's and McManus', and runs," etc., and defendant insists the locus was at "J," while the plaintiff that it was at "O," *Held* general reputation as to the location of an indefinite tract of land, not shown to have been at a remote period or *ante litem motam*, etc., is properly excluded, and general reputation as to the location of the Johnston and McManus tracts and the trail between tending to show the corner locus at "O" is competent, it appearing that the declarant was dead, disinterested, and his declarations made *ante Litem motam*, the lapse of time not considered controlling.

CIVIL ACTION to recover land, tried before *Ferguson, J.*, and a jury at June Term, 1917, of GRAHAM.

Plaintiff claimed the land under and by virtue of Grant No. 7315, of date August 1885, covering the land, and introduced said grant in evidence. Defendant, admitting possession, claimed the land under Grant No. 3522, of date May 27, 1872, and introduced
(53) same evidence. It was admitted by defendant that plaintiff, by proper mesne conveyances, could connect itself with its grant introduced by it, and by plaintiff that defendants had a proper paper title connecting them with their Grant No. 3522.

The controversy, then, was strictly on the true location of defendant's grant and whether same covered the land in dispute. The calls of said grant are as follows: "Beginning at a locus near the gap of the trail, between Johnston's and McManus', and runs N. 45 E. 127 poles to a stake, then N. 80 E. 226 poles to a stake; thence S. 10 W. 223 poles to a stake; thence S. 80 W. 226 poles to a stake; thence N. 320 poles to the beginning."

Defendant insisted that the beginning corner of their grant, the locus, was at a point marked "J" on the map, and so placed, the course and calls of the grant covered the land.

Plaintiff contended that the locus, or beginning corner of defendant's grant, was not at "J," but at a point marked "O," a mile away or near that.

On issue submitted the jury rendered the following verdict:

"Have defendants located their grant (3522), and if so, at what point is the beginning corner?" Answer: "N."

Judgment for plaintiff and defendants excepted and appealed.

J. N. Moody for plaintiff.
Bryson & Black, A. W. Horn, and R. C. Phillips for defendant.

HOKE, J. We have carefully examined the record and find no reason for disturbing the results of the trial. It was chiefly urged for error that the court, on objection of plaintiff, excluded a disposition, offered by defendant, of William Williams taken in a former suit between these parties other than Fred S. Johnston, the record of such suit having been first introduced, showing that the cause involved practically the same issue as that now presented, and on proof *ultra* that the deponent was now 84 or 85 years of age, very feeble, and resident in the State of Tennessee.

So far as the subject-matter of the two actions are concerned and the identity of the issues involved, we incline to the opinion that the deposition could have very well been received in evidence, in accord with the principle expressed and approved in the recent and well-considered case of *Hartis v. Electric Ry.*, 162 N.C. 236, opinion by *Associate Justice Allen*, a position that should undoubtedly prevail in case the new party, Fred S. Johnston, has acquired and holds his interest in privity with the former action, a fact that is very probably true. *Settee v. Electric Railway*, 171 N.C. 440; *Cooper* (54) *v. R. R.*, 170 N.C. 490; *Bryan v. Malloy*, 90 N.C. 509.

The exception, however, is not available to defendant on the present record, for the reason that it nowhere appears either that the deposition was introduced on the former trial or that it was sufficiently regular in the way of notice or otherwise to justify its admission, and, further, it is nowhere shown by suggestion or otherwise that the contents of the deposition were material to the inquiry. Waiving the question of any irregularity of the deposition, as the objection was not made on that ground, it has been uniformly held with us that, in order for the rejection of evidence to constitute reversible error it must appear that the proposed evidence was relevant and was reasonably calculated to have appreciable effect on the decision of the issue. *Goins v. Training School*, 169 N.C. 736.

The objection to the declarations of this deponent and other persons as to the placing of a disputed corner fails with the exclusion of the deposition. It appearing that the declarant is now alive, his statements are not admissible as substantive evidence under the requirements for the reception of hearsay evidence of this character. They could only, therefore, be received in corroboration of his testimony, and this having been excluded, the exception is disallowed. We do not understand

that the learned and careful counsel insist on this objection if the deposition has been properly excluded.

Defendants, further, object to the exclusion of two questions on general reputation, as follows:

a. "Is there a general reputation in that country as to what tract of land covers the sawmill branch country?"

b. "Is there a general reputation in that country as to what tract of land the locus at J is the corner of?"

We have repeatedly held that declarations and common reputation, under some circumstances, are competent in this State on questions of private boundary. *Sullivan v. Blount*, 165 N.C. 7; *Lamb v. Copeland*, 158 N.C. 136; *Bland v. Beasley*, 140 N.C. 628; *Hemphill v. Hemphill*, 138 N.C. 504; *Yow v. Hamilton*, 136 N.C. 357.

The conditions for the reception of such evidence of either kind are given in *Lamb v. Copeland, supra*, as follows: "Parol evidence of declarations as to the placing of the corner of private lands of which the title is in dispute is allowed when made *ante litem motam* by a declarant who was disinterested at the time and dead at the time of the trial; and in such case the lapse of time is not always controlling.

"Parol evidence of common reputation as to the placing of a corner on the question of private boundary is also admissible in this State when the same is shown to have existed from a remote period and direct evidence of its origin is not likely to be procurable. (55) Such reputation must always be shown to have existed *ante litem motam*, and should attach itself to some monument of boundary, or natural object, or be fortified by testimony of occupation and acquiescence tending to give the land some definite and fixed location."

In further elucidation of the requirement that evidence of common reputation must give itself some fixed and definite placing, the Court, in *Bland v. Beasley, supra*, at p. 632, quotes from *Mendenhall v. Cassels*, 20 N.C. 43, as follows:

"In a country recently and of course thinly settled, and where the monuments of boundary are neither so extensively known nor so permanent in their nature as in the country of our ancestors, we have from necessity departed somewhat from the English rule as to traditionary evidence. We receive it in regard to private boundaries, but we require that it should either have something more definite to which it can adhere, or that it should be supported by proof of corresponding enjoyment and acquiescence. A tree, line, or water course may be shown to have been pointed out by persons of a bygone generation as the true line or water course called for in an old deed or grant. A field, house, meadow, or wood may be shown to have been reputed

the property of a particular man or family, and to have been claimed, enjoyed, and occupied as such. But a mere report, unfortified by evidence of enjoyment or acquiescence, that a man's paper-title covers certain territory is too slight and unsatisfactory to warrant a rational and conscientious person in making it the basis of a decision affecting important rights of his fellow men, and therefore, as far as we are advised, has never been received as competent testimony."

Applying these principles, if it be conceded that these questions sufficiently comply with the requirement that the common reputation sought for should fix itself on some definite placing, they altogether fail as to the additional requirement that such reputation, to be admissible, must be shown to have had its origin at a remote period or that it arose even *ante litem motam;* this last being always essential.

Again, it was objected that the witness Crisp, testifying for plaintiff, was allowed to give the declarations of Frank Cooper, deceased, as to the location of the McManus place and the Johnston place and as to the location of the trail between the Johnston and McManus places, his answer tending to support plaintiff's position that the beginning corner of defendant's grant was at "O," etc., and did not cover the land in dispute. All the conditions required by the authorities for the reception of such evidence were present here. This trail being a locative call in defendant's grant, it appeared that the declarant was dead, disinterested, and that his declarations were made *ante litem motam* and,
(56) as shown in *Lamb's* case, *supra,* this being the relevant declaration of a deceased witness as to the location of a specified call of the grant; the lapse of time is not, as in case of common reputation, always considered controlling.

So far as we can see, the remaining exceptions are without merit, and on the record, we are of opinion that the judgment below should be affirmed.

No error.

Cited: *Tripp v. Little,* 186 N.C. 218.

H. A. MILLARD v. J. L. SMATHERS.

(Filed 22 December, 1917.)

1. **Boundaries—Deeds and Conveyances—Intent—Interpretation—Ejectment.**

The intent of the parties in a deed to land as to its boundaries, as expressed in the entire instrument, should be given effect, and in ascertaining such intent, that which is definite and specific shall prevail over that which is uncertain, and in case of conflicting descriptions that cannot be reconciled, the courts will adopt that construction which best comports with the manifest intention of the parties and the surrounding circumstances of the case at the time the instrument was executed.

2. **Same—Calls—Straight Lines.**

None of the calls in a deed to lands shall be disregarded when they can be fulfilled by any reasonable way of running the lines, and this requirement will be defeated only when it is necessary to give effect to the intention of the parties as expressed in the instrument, justifying, in proper instances, a departure from a straight line called for between two established calls and requiring at times the running of two or more lines instead of one.

3. **Same—Fixed Corners—Line Deflected.**

When the call in a deed to lands is along a recognized line to a known or established corner, and the line does not go to such corner, the usual rule of location is to run the line of the description as far as it will go, or to the nearest point to the corner called for and thence a direct line to the corner.

4. **Deeds and Conveyances—Tenants in Common—Plats—Interpretation—Intent.**

Where lands are divided by tenants in common, according to a survey, by executing deeds for the separate parcels, referring to each other and also to a common plat, accordingly made, for a more particular description of the property, such deeds should be construed together and with the plat referred to, in ascertaining the intent and meaning of the parties.

5. **Same — Boundaries — Fixed Corners — Buildings — Deflected Lines — Ejectment.**

Where the location of the true divisional line between adjoining city lots is in dispute between parties who formerly held the lands in common and it appears that they have interchanged deeds to their respective lots, according to a plat made by a surveyor for this purpose, and have referred to this plat in the deeds, for boundaries, etc., and that on the plaintiff's lot was a brick building mentioned in his deed which ran back from the street 100 feet of the given distance of 110 feet, and admitted corner being the corner of this building on the street, and there is nothing on the face of the deeds which gives or purports to give the width of the plaintiff's lot in the rear, or definite direction of the line, but the plat referred to places the further point as 16 feet

from an alley which would cut off 3 feet from the corner of the building in the rear; *Held*, the building is considered as a part of the land conveyed, and the line in question should be run from the recognized corner at the street, taking the line of the building to the nearest point opposite the rear corner, according to the plat, 16 feet from the alley, and thence directly to the rear corner.

ACTION OF EJECTMENT, tried before *Shaw, J.*, and a jury at April-May Term, 1917, of BUNCOMBE.

(57) On the trial it appeared that the six children, devisees and heirs at law of James Thomas, deceased, owned a certain business block in the city of Asheville, bounded on the north by Walnut Street and on the east by North Main Street (now called Broadway), and desiring to make partition of same by deeds, *inter partes*, had the lot surveyed and platted by B. M. Lee, an official surveyor for the city, and interchanged deeds for the separate parcels of date 28 December, 1897, and thereafter said heirs entered into the enjoyment of their respective portions and they and their grantees have since so occupied and possessed the same. That the plat in question referred to in each and all of the deeds "for a more particular description of the property," is set forth in the record, as follows:

That the lot on said plat designated as Lot E was assigned and conveyed to Mrs. Carlisle, one of the tenants in common, and has since been acquired by plaintiff; that designated on the plat as Lot D was assigned and conveyed to Mrs. Currie, another of the heirs at law, and at the time of partition had there was a brick store on Lot D filling the frontage on Main Street and running back 100 feet of the 110 feet depth of the lot, and that this store has, since partition, been continuously occupied and owned by Mrs. Currie and those claiming under her; that the description of Lot E appearing in the partition deeds is as follows:

"That certain lot of land with a small frame store thereon situated on the western side of Main Street, south of Walnut Street, designated as Lot 'E' on B. M. Lee's plat of the Thomas property, dated 26 November 1897, attached to and recorded with a certain deed of even date herewith from said William D. Thomas and also to said Gabrielle T. Pearson; said lot commencing on the western line of Main Street eighty-one 5-10 feet (81.5) south of Walnut Street, running thence southwardly along the western line of Main Street and front-

(58) ing thereon seventeen 67-100 (17.67) feet and running back between lines almost parallel, slightly oblique to Main Street, and along the southern line of an alley between lots 'E' and 'F' one

hundred and ten feet (110) to an open court in the rear as shown by said plat, to which reference is hereby especially made for a more particular description of said lot."

That the description of Lot D as it appears in the partition deed is as follows: "A certain lot of land with a brick store thereon, now designated at No. 34, North Main Street, situated on the western side of Main Street, south of Walnut Street, said lot commencing at a point in the western line of Main Street 99.17 feet south of Walnut Street, running thence southwestwardly along the southern line of Main Street and fronting thereon twenty-five feet and running back between parallel lines slightly oblique to Main Street, one hundred and ten feet to an open court in the rear, being designated as Lot 'D' on the plat made by B. M. Lee, dated 26 November 1897, attached to and to be recorded with a certain deed of even date herewith from said W. D. Thomas, *et al.*, to said Gabrielle T. Pearson, to which plat reference is hereby specifically made for a more particular description of said lot."

The plat in question disclosed that Lot E was just south of an alley and purported to have a frontage on Main Street of 17.67 feet and on an open court in the rear of 16 feet, and there was no dispute between the parties as to the corners or frontage on Main Street, the dispute arising as to the correct location of the divisional line from the Main Street corner back to proper corner on the open court on the rear of the property.

Plaintiff having acquired the title to Lot E, ascertained that by running the divisional line straight from his corner on Main Street to a point 16 feet from the alley, the rear portion of defendant's store was 3 feet and 8 inches over such line, and for this he brings suit.

On denial of plaintiff's claim, the following verdict was rendered:

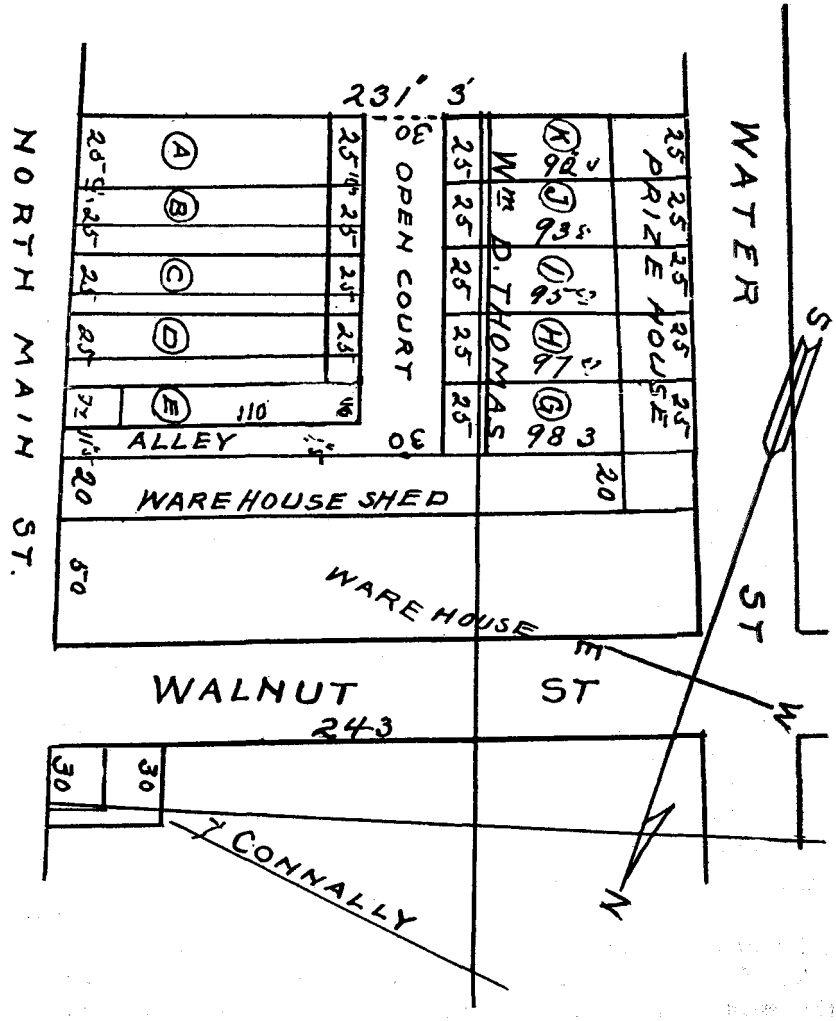
1. Is the plaintiff the owner of the land described in the complaint? Answer: "Yes, all of it excepting that part of it covered by the brick store claimed by the defendant and indicated on the plat attached marked 'Exhibit X-Y. The Court's Plat. Thos. J. Shaw, Judge,' by the small letters *a, b,* and *c.*"

2. Is the defendant in the wrongful possession of said lands or any portion thereof Answer: "No."

3. What damage, if any, is the plaintiff entitled to recover of the defendant, Answer: "Nothing."

The Court being of opinion that, if the jury believed the evidence, the issues should be so answered. There was judgment according to

the verdict, and plaintiff excepted and appealed, assigning for
(59) error that he should recover all of the lot to the line contended for by him, running straight to a point 16 feet south of the alley, and defendant appealed, assigning for error that he should be held to own all of the store and all of the open court back of the store and which would be covered by an extension of the store line to the rear of the lot.



Merrimon, Adams & Johnston for plaintiff.
George H. Smathers for defendant.

HOKE, J. These deeds, executed by the parties at the same time and for a common purpose, referring to each other and (60) also to a common plat for a more particular description of the property, should be construed together in ascertaining the intent and meaning of the parties as expressed in the instruments and the plat annexed thereto. *Gudger v. White*, 141 N.C. 507.

Considering the case in that aspect and recurring to certain recognized principles in our law of boundary, it has been held:

1. "That the intent of the parties as expressed in the entire instrument must be supported and, in ascertaining such intent, that which is definite and specific shall prevail over that which is uncertain, and, in case of conflicting descriptions that cannot be reconciled, the courts will adopt that construction which best comports with the manifest intention of the parties and the surrounding circumstances of the case at the time the instruments are executed." *Ferguson v. Twisdale*, 137 N.C. 414; *Shaffer v. Hahn*, 111 N.C. 1; *Campbell v. McArthur*, 9 N.C. 33.

2. That none of the calls of the deed shall be disregarded when they can be fulfilled by any reasonable way of running the lines, which will be defeated only when necessary to give effect to the intent of the parties as expressed in the instrument. *Power Co. v. Savage*, 170 N.C. 625-629; *Bowen v. Lumber Co.*, 153 N.C. 366; *Clark v. Wagner*, 76 N.C. 463; *Long v. Long*, 73 N.C. 370. A position that has been, not infrequently, extended to justify a departure from a straight line between two established points and, at times, requiring that two or more lines be run instead of one.

3. That when a call of the deed is along a recognized line to a known or established corner and the line does not go to such corner, the usual rule of location is to run the line of the description as far as it will go or to the nearest point to the corner called for, and thence a direct line to the corner. *Boyden v. Hagaman*, 169 N.C. 199; *Shultz v. Young*, 25 N.C. 385.

Considering the record in view of these principles, it will appear that there has been no reversible error committed in any way the present case has been determined and certainly none that gives the plaintiff any just ground of complaint. A devise or deed for a house or store has been held to pass the land on which the same is situate, and such a building is frequently regarded as a monument of boundary sufficient at times to control course and distance. *Wise v. Burton*, 73

Cal., 166-170; *Bacon v. Bowdoin,* 39 Mass., 401; *Common Council v. State,* 5 Ind., 334; *McMillan v. Solomon,* 42 Ala. 654; 2
(61) Dwelin on Deeds, sec. 863. And, from a perusal of the deeds and plat and facts in evidence, it is perfectly manifest that it was the intent and meaning of these parties, as expressed in the instruments, that the holder of Lot D should have the store that was situate thereon; a substantial brick building, then erected, occupied as a business site before and since without let or hinderance, it would require very specific and definite description *ultra* to justify an interpretation that would require the parties engaged in a division of this property for their mutual advantage to shave off three feet and eight inches from the rear of the store and give it to the holder of the adjoining lot, and so far from having any sufficient description for such purpose appearing in the deeds or plat, the language of the instrument directly appertaining to the divisional line between the lots is very indefinite. In that of plaintiff the call is from the recognized corner on Main Street "back between lines almost parallel, slightly oblique, to Main Street and along the southern side of an alley between Lots E and F, 110 feet to an open court in the rear, as shown by the plat." And that of defendant: "From the corners on Main Street back between parallel lines, slightly oblique, to Main Street, 110 feet to an open court in the rear, designated as Lot D on the plat."

It will be noted that the course of the divisional lines is not given, and there is nothing on the face of the deeds themselves which gives or purports to give the width of plaintiff's lot at the rear. The plat, however, "which, as shown in above copy, has become very much blurred and indistinct from time and use," gives this rear width as 16 feet. True, the surveyor testified that he did not measure this, and only put it down from an estimate by taking off other distances called for, but, taking the plat as affording data for the description, the certain definite calls of these deeds and plat by which this divisional line should be determined are the store, as far as it extends, and the next established point is the point in the rear 16 feet from the alley, lying north of the plaintiff's lot. Taking these two calls as the more definite data and applying the rules heretofore stated, the divisional line in question should properly run: Beginning at the recognized corner on Main Street, run the line of the Brick store building to the nearest point opposite the rear corner, 16 feet from the alley and thence directly to the rear corner.

This is in accordance with the ruling of his Honor below, and, in our opinion, his decision should be affirmed in both appeals.

There is nothing in either *Loan Association v. Bethel,* 120 N.C. 344, or in *Davidson v. Arledge,* 88 N.C. 326, that in any way conflicts with these positions. In both of these cases, there was a full, accurate description of the boundaries, by course and distance, in the one case, and by this record a reference to the lot as designated on the plat of the town in which a full description appeared, and it was held that these being the more definite descriptions, the same should (62) prevail. There is decided intimation in the *Arledge* case that but for the very definite and particular description referred to, the boundaries of the lot, as determined by actual use and occupation, should be adopted. As we have endeavored to show, in reference to the divisional line, the description is not specific and these other and more definite data have been followed.

There is no error in either appeal, and the judgment of the lower court is affirmed.

No error.

Cited: *Brown v. Smathers,* 188 N.C. 176; *Martin v. Bundy,* 212 N.C. 445.

CITIZENS BANK v. MURRAY ET AL.

(Filed 22 December, 1917.)

1. **Wills—Estates—Contingent Remainders—Intent.**

Where an estate by will is limited over on a contingency and no time is fixed for the contingency to occur, the time of the testator's death will be adopted unless a contrary intent appears from the terms of the will, etc.

2. **Same—Event—First Taker.**

Where an estate by will is limited over on the "death of the first taker without issue," these words, without more, will be given their primary and natural significance and effect the estate with a contingency during the entire life of the first taker, unless there be a contrary intent appearing from a proper interpretation of the instrument.

3. **Same—Interpretation.**

Both of the positions are subject to the controlling principle that the intent of the testator, as expressed by the terms of the will, must be given effect unless in violation of law; and when it appears from a perusal of the will and the circumstances relevant to its proper interpretation, that a different time was intended, such time must always prevail.

4. Wills — Ambiguity—Interpretation—Intent—Estates—Early Vesting—Object of Testator's Bounty.

Where ambiguity occurs in the terms of a will, permitting construction, the courts, in its interpretation, will favor that which makes for the early vesting of estates, and the first taker is ordinarily to be considered as the primary object of the testator's bounty.

5. Same—Contingent Remainders.

A testator leaving a will disposing of a large estate in real and personal property, chiefly the latter, and with large lumber interests, after bequeathing certain legacies to others, enjoined upon his son, his only child, to help his executor in the management of the property and stated that he, to whom the rest of the property was devised and bequeathed, would "naturally fall heir to everything outside of the annuities, and should he not marry or even marry and have no issue, then one-half of what he is worth goes to the three children of M. in fee"; *Held*, the son was the primary object of the testator's bounty, and, under the circumstances, the event to determine his absolute ownership of the property was that of his marriage and having living child or children thereof. *Buchanan v. Buchanan*, 99 N.C. 308, cited and distinguished.

CIVIL ACTION to obtain construction of a will, heard before *Lane, J.*, at April Term, 1917, of BUNCOMBE.

On the hearing it was made to appear that George A. Mur-
(63) ray had died resident in said county, leaving a last will and testament composed of an original and two codicils thereto, disposing of a large estate consisting of real and personal property, chiefly the latter, and appointing plaintiff bank executor. Certain controversies having arisen as to the meaning of said will and codicils, the present proceedings were instituted to obtain an authoritative construction of same, all of the parties in interest having been made defendants.

The said will made provision for the payment of various legacies and annuities, among others, one of $10,000 to W. H. Murray, his son and heir, and an annuity of $600 per annum for his life. Another legacy of $1,000 is given to his brother, J. B. Murrell, of Rogersville, Tenn., and others of $2,000 each to the three children of said brother, to be paid after the death of the testator's sister, and an annuity of $300 for life after the death of an aunt, Mrs. Hutchinson. Having made these preliminary bequests and others, as stated, on matters more directly relevant, the will and first codicil are as follows:

"It is my will and desire that upon the death of any of the annuitants hereinbefore mentioned that such annuities shall be paid to the surviving annuitants, except in those cases where it has otherwise been hereinbefore provided. And upon the death of all the annuitants

then it is my will and desire that all my property shall go to my son, W. H. Murray, his heirs, executors or administrators.

"It may be that after my estate is put in shape and after paying the above bequests that the annuities can be increased, in which case all annuities are to be increased *pro rata* accordingly.

"I prefer that my stock in the Citizens Bank and the Citizens Lumber Company be held intact by my executor, and that the dividends be collected and used in the payment of the above mentioned bequests and annuities as long as the same continue to pay good dividends.

"It is my will and desire that J. E. Fulgham be employed by my executor to cooperate with my son, W. H. Murray, in closing up my lumber business, and to aid my executor in the sale of my Wesser Creek lands in Swain County, N. C., and my timber lands at Lone Star, S. C., or any other timber or timber lands that I may own, and that my son, W. H. Murray, and Mr. Fulgham shall be paid a reasonable compensation for their services in doing said work, or at least that said Fulgham shall be employed to aid in closing out said lumber business and in the sale of said timber and (64) timber lands so long as he and my said executor and my son, W. H. Murray, can agree.

"As a part of my assets consist of notes secured by real estate, and as it will necessarily be many years, on account of the numerous annuitants, before my estate can be wound up, it is my will and desire that my executor shall collect so much money as will be necessary to meet the payments of the bequests and annuities herein provided for and shall sell and dispose of my real estate and personal property as it may deem advisable to do so, and after paying the bequests and annuities aforesaid then reinvest the funds by taking notes secured by real estate or discount good notes secured by real estate worth double the amount of the loan, or invest the same in unquestionably good interest-paying bonds or other good securities, but the loans or paper secured by deed in trust on good real estate as above are preferred. I request my son, W. H. Murray, and enjoin upon him the duty of cooperating with my executor in looking after and preserving my estate, which ultimately goes to him and his heirs after the falling in of the annuities, and to see that the provisions of my will are fully carried out.

"I hereby nominate, constitute, and appoint the Citizen's Bank of Asheville, N. C., as executor of this my last will and testament, hereby revoking all former wills and testaments.

"Codicil to my last will now in my private box at Citizen's Bank—copy in right-hand drawer of my desk in envelope marked Mrs. A. M.

Ross. In the above mentioned will Veda Merrimon McFatridge, 122 W. 30th St., Indianapolis, was made an heir to the extent of $240 per year—$20 per month—I wish to increase that to $30 or $360 per year, to be paid to her her natural life.

"My son Will naturally falls heir to everything outside of the annuities—should he not marry—or even marry and have no issue, then one-half of what he is worth goes to the three children of J. B. Murrell in fee.

"The household furniture is to be divided between my sister, Mrs. Ross, and Will Murray, my son, and especially is the matter of leaving to and for my sister's use any and sufficient funds to keep her in comfort and plenty the rest of her life, the estate which is worth near one hundred thousand dollars, should be ample for all these.

"The one thousand paid-up insurance policy in New York Life shall go to my brother, J. B. Murrell, in addition to the other thousand left him, and my old Aunt Nattie N. must never want for anything.

"I want the people mentioned to get the benefit of the money, and I ask and request Will Murray to carry out and see carried out to the best of his ability my wishes.

(65) "Get J. E. Fulgham to help close out lumber and timber business; he should be paid well for this."

The second codicil is in no way material to the enquiry.

It was further made to appear that, since the death of G. A. Murray, his son and heir has married and had issue born alive of said marriage, which issue is still living.

Upon this statement, one and chief of the questions presented is whether, under the second clause of the codicil, the interest bequeathed and devised to W. H. Murray became absolute on his marriage and the birth of issue, or is same affected with a contingency in favor of the children of J. B. Murrell as to one-half of the estate until the decease of W. H. Murray, the first taker, without issue surviving. The court being of the opinion that the estate of W. H. Murray, on his marriage and birth of issue, became absolute, entered judgment so construing the will, and the children of J. B. Murrell, nephews and nieces of the testator, excepted and appealed.

J. D. Murphey and Garland A. Thomasson for appellants.
R. M. Wells and J. E. Swain for W. H. Murray, appellee.

HOKE, J., after stating the case: From the facts stated in the record and on the argument, it appears that all matters of controversy growing out of the will of the testator have been satisfactorily adjusted

except the one question whether, under the codicil and the facts and circumstances properly relevant to its construction, the estate of W. H. Murray became absolute on his marriage and the birth of issue of the marriage, which issue is still living.

Subject to the position that the intent and purpose of the testator, as expression in his will, shall always prevail except when the same is in violation of law, it is a recognized rule of interpretation with us that when an estate by will is limited over on a contingency and no time is fixed for the contingency to occur, the time of the testator's death will be adopted, unless it appears from the terms of the will that some intervening time is indicated between such death and that of the first taker. *Bank v. Johnson*, 168 N.C. 304; *Dunn v. Hines*, 164 N.C. 113; *Galloway v. Carter*, 100 N.C. 111; *Price v. Johnston*, 90 N.C. 593; *Vass v. Freeman*, 56 N.C. 221; *Cox v. Hall*, 17 N.C. 121.

Our decisions further hold that in case of ambiguity in the terms of the will, permitting construction, the courts will favor the interpretation which makes for the early vesting of estates and that the first taker is ordinarily to be considered as the primary object of the testator's bounty, a position more insistent when such first taker is his child and heir at law. These rules are very convincingly stated by *Associate Justice Walker* in the recent case of *Dunn v. Hines, supra,* a case very similar to the one before us, and this and (66) others of like import are in support of his Honor's ruling that, under the terms of the codicil, the estate of W. H. Murray, the only child and heir at law of the testator and the chief beneficiary of his will, became absolute on his marriage and the birth of living issue.

True, as defendant contends, it has been held that the courts may supply words in a will when its terms are ambiguous and the context and the facts and circumstances relevant to its interpretation show that this was the testator's meaning and purpose, the case cited by appellant, *Blum v. Gillett*, 208 Ill., 473, being in illustration of the principle.

It is true also that it is now held with us that where by will an estate is limited over on the contingency of a dying without issue, the contingency will usually be given its natural meaning and affect the estate till the time of the death of the first taker. See *Buchanan v. Buchanan*, 99 N.C. 308, and many other cases. But neither position can be allowed to prevail in the present case, where the testator has in express terms willed that the half of the estate shall go over in case his son fails to marry and have issue, thus fixing the marriage and birth of issue as the time when the son's estate shall become absolute. To uphold the contruction insisted on by appellants, it would

be necessary to add the words "which issue shall survive him." Not only do these words not appear in the will, but there is nothing anywhere in it to indicate that the testator had any such desire or purpose. On the contrary, the will throughout shows an effectionate confidence in his son and his desire and intent that he should be the chief beneficiary of his bounty. The very clause in question begins with the statement: "That my son will naturally fall heir to everything outside of the annuities." And while he might naturally be willing to affect the half of the estate with a contingency in favor of his brother's children while his son was single, it is entirely unreasonable to suppose, in the face of this will, that when his son married and had the responsibility of a wife and children, that it was the testator's intent to hamper half of his estate with a condition of this character till his death. It is not so expressed in the will, and there is nothing in the record to justify the Court in adding to the codicil the words required to effect such a purpose.

We regard the case of *Dunn v. Hines* as decisive of the present appeal, and the judgment of him Honor below must be affirmed.

Affirmed.

Cited: S.c. 528; *Sharpe v. Brown,* 177 N.C. 297; *Goode v. Hearne,* 180 N.C. 477; *Williams v. Hicks,* 182 N.C. 113; *Dupree v. Daughtridge,* 188 N.C. 196; *Westfeldt v. Reynolds,* 191 N.C. 806; *Yarn Co. v. Dewstoe,* 192 N.C. 124; *Walker v. Trollinger,* 192 N.C. 748; *Paul v. Paul,* 199 N.C. 524; *Weill v. Weill,* 212 N.C. 766; *Rigsbee v. Rigsbee,* 215 N.C. 759; *Trust Company v. Miller,* 223 N.C. 4; *House v. House,* 231 N.C. 220.

P. A. WIGGINS v. R. ROGERS.

(Filed 22 November, 1917.)

1. Boundaries—Surveys—Evidence.

Evidence that the parties had for many years before the action recognized a line between their adjoining lands, made by a surveyor, as the true line thereof, is competent as to the location of the true line in dispute, and its exclusion is reversible error.

2. Evidence — Boundaries — Public Records — Copies — Notations—State Lands—Official Surveys.

A duly certified copy made by the Secretary of State of records and maps of an official survey of lands formerly owned by the State, is competent evidence in an action involving the dividing line of adjoin-

ing lands, when relevant, but it must be confined to the contents of the records and maps themselves, as they therein appear; and notations thereon based on the returns of the surveyor, as to the date of survey, does fall within the meaning of the law, and should be excluded.

CIVIL ACTION, tried at September Term, 1917, of GRAHAM.

The action was brought to recover a parcel of land the ownership of which depended on the true location of the dividing (67) line between the parties who were adjoining proprietors. The jury returned a verdict for the defendant, and plaintiff appealed from the judgment entered thereon.

Bryson & Black and R. L. Phillips for plaintiff.
J. N. Moody and T. M. Jenkins for defendant.

WALKER, J. The exceptions were all taken to the admission or exclusion of evidence. It will be necessary to consider only two or three of them.

1. Plaintiff proposed to show that the line had been run some years before the time of the trial by Posey Hyde, and that the respective owners had recognized it as the line of division between them for many years. This evidence was excluded by the Court, but we think it was competent, not to change the boundaries of the land (*Davidson v. Arledge*, 97 N.C. 172), or, in other words, to show that the parties had orally agreed upon a line different from the true line, but as some evidence to prove where was the true line. *Haddock v. Leary*, 148 N.C. 378; *Barfield v. Hill*, 163 N.C. 262, 267. It was also relevant to show the character and extent of the possession of the parties. Following this rule, as stated in these cases, we must hold that there was error in excluding the evidence. We do not think the evidence was irrelevant, as claimed by the defendant. It may not prove very much, but it proves something which the jury should consider in this very close question as to boundary. The conduct of the parties with respect to a certain line, as being the dividing line between their (68) lands, is surely some proof of their true location.

2. The defendant offered in evidence a map of "the Cherokee County, North Carolina, survey." It was admitted that this map was properly certified from the office of the Secretary of State, and no objection was taken to the map itself, as being a correct copy. But defendant proposed to prove the date of the actual surveys of tracts numbered 33 and 36, upon which the record of the surveys was based, by a

certificate of the date made by the Secretary of State to the effect that the surveys were made in the year 1837, as "drawn from the returns of deputy surveyors by R. Deever, P. R. S., S. R." The map was competent evidence, but a certificate as to the date of a survey, which appears upon the returns of the surveyor or deputy surveyor, is not competent to prove what was the date. The returns, if in his office, must themselves disclose their contents, and while the Secretary may certify to copies of documents filed in his office, under the law he cannot certify, independently and apart from the writing, to matter appearing on those papers.

The objections to this kind of evidence was well stated by *Justice Montgomery* in *S. v. Champion,* 116 N.C. 987, as follows: "This certificate was offered as some evidence to show that the defendant was not worth as much as he justified for on 19 October, 1891. The defendant objected to its introduction because it did not purport to be a copy of the tax record certified as required by law to be received in evidence. We think the objection was well taken and that his Honor ought not to have overruled it. Section 1342 of The Code provides that 'Copies of all official bonds, writing, papers, or documents recorded or filed as records in any court or public office shall be as competent evidence as the original when certified by the keeper of such records or writings under the seal of his office, when there is such seal, or under his hand when there is no such seal, unless the Court shall order the production of the original.' A copy is a transcript of the original—a writing exactly like another writing. The certificates used in evidence did not purport to be a copy in this sense. If such statements, as this certificate, were allowed to be used as evidence in courts of law, as copies, there would be danger that the interpretations and conclusions of the officers in charge of records would often be used in evidence instead of the exact words and figures of the original entries. The record is the evidence and must speak for itself, and the certificate of the register's office is only evidence of the correctness of the record."

This power of an officer who is the keeper of certain public records to certify copies is confined to a certification of their contents as they appear by the records themselves, and the records must, there-
(69) fore, be so certified, for he has no authority, under the law, to certify to the substance of them, nor that any particular fact, as a date, appears on them. The exercise of such an authority, which is not conferred by the law, would be fraught with great danger.

There are other questions raised by the appeal which are worthy of

serious consideration, but as those we have considered must result in a new trial, we need proceed no further with the discussion.

New trial.

Cited: *Woodard v. Harrell,* 191 N.C. 198; *Daniel v. Power Co.,* 204 N.C. 277; *Midgett v. Nelson,* 212 N.C. 43.

NAPOLEON B. BELK, BY HIS TESTAMENTARY GUARDIAN AND NEXT FRIEND, R. R. BELK, v. A. H. A. BELK.

(Filed 22 December, 1917.)

1. **Deeds and Conveyances—Registration—Evidence—Presumptions—Burden of Proof—Statutes.**

The registration of a deed to lands, regular as to probate, is only presumptive evidence of its due execution; and where its validity as to execution is contested with supporting evidence, and the *locus in quo* claimed under a subsequently registered deed from the same grantor, the registration of the prior deed is only such evidence of its due execution as will take the case to the jury, with the burden of proof on the plaintiff alleging its invalidity and the presumption of its due execution in his favor.

2. **Evidence—Impeachment.**

Questions asked for the purpose of impeaching a witness or showing his bias are more broadly admitted than substantive evidence, but when irrelevant and harmful they should be excluded.

3. **Appeal and Error—Favorable Error.**

Appellant cannot complain of errors, if any, made by the trial judge in his favor in the charge to the jury.

4. **Deeds and Conveyances — Fraud—Execution—Evidence—Tax Lists—Impecunious Grantee.**

Evidence of the impecunious condition of the grantee in a deed to lands, and that, therefore, he had no money to pay the recited consideration, is properly admitted with other evidence as competent to show fraud in its execution, as also the tax lists tending to show that the grantee did not own the lands.

5. **Evidence—Consistent Statements—Corroboration.**

Consistent previous statements of a witness are competent in corroboration of his testimony on the stand.

6. **Appeal and Error—Issues—Answers—Harmless Error.**

Where the answers by the jury to other issues renders immaterial the

submission of one of them, its submission will be considered on appeal as harmless, if erroneous.

BROWN, J., concurs in result.

CIVIL ACTION, tried before *Long, J.*, and a jury, at August Term, 1917, of UNION.

Plaintiff sued for the recovery of his interest in a tract of
(70) land containing 484 acres, alleged to have been conveyed by deed dated 4 January 1857, of Calvin Laney to plaintiff's mother, Parmelia J. Belk, and her children, namely, Napoleon B. Belk, Altha H. Belk, and Phredo R. Belk, as tenant's in common. This deed was probated and registered on 25 September 1880. On 15 December 1865, Calvin Laney conveyed by deed to the defendant A. H. A. Belk 207 acres of land, which included within its boundaries 97 acres of the land before conveyed by him to Parmelia J. Belk and her children. This deed was registered in 1875.

The defendant denied, in his answer, that Calvin Laney had ever executed a deed for the 484 acres to Parmelia J. Belk and her children, and averred that the alleged deed under which plaintiff claimed an interest in the land was a forgery, or at least was never executed by Calvin Laney, and upon this allegation and denial the first issue was based.

One of the principle questions relates to the burden of proof. The plaintiff contended that the probate and registration of the deed of 1857 raised a presumption of its due execution, which cast the burden on the defendant to show that it was not so executed, or that Calvin Laney's signature to it is a forgery. The defendant contends that the burden of proof throughout the trial was upon the plaintiff as the registration of the deed only made out a *prima facie* case for the plaintiff as to its execution and genuineness, but did not shift the burden to the defendant.

The Court charged the jury at the outset that the burden of proof was upon the plaintiff, and he must satisfy them by the greater weight of the evidence that the deed was executed as alleged, but that when he introduced the deed of 1857 in evidence and showed by the record that it was duly probated and registered, the law raised a presumption of its due execution on the day of its date and of the intention of the grantor to transfer the title to the grantees, "And you are instructed that the burden of proof rests upon the defendant in that state of the case to satisfy you by the greater weight of the evidence that the said deed was not executed and delivered by Calvin Laney, and unless the defendant

has so satisfied you by the greater weight of the evidence, you should answer the first issue 'Yes.' "

The judge then recited the evidence bearing upon the question as to the execution of the deed, and then proceeded as follows: "When the defendant alleges that the paper-writing is a forged instrument, the burden is upon him to show it by the greater weight of the evidence. I have already told you that the burden is upon the (71) plaintiff to make out his contention as to the paper and that this paper-writing was executed and delivered by Calvin Laney as and for his deed." The plaintiff excepted as to so much of the charge as placed the burden upon him, insisting that when it was shown that the deed had been duly probated and registered the burden then fell upon the defendant to prove to the satisfaction of the jury by the greater weight of the evidence that it was not the deed of Calvin Laney, either because it was never executed by him or because it was a forgery. The following verdict was returned by the jury:

1. Did Calvin Laney execute and deliver the deed bearing date of 4 January 1857, to Parmelia J. Belk and others, as alleged in the complaint? Answer: "No."

2. Did the defendant A. H. A. Belk become a purchaser of the 207-acre tract for value and without notice of the deed dated 4 January 1857, as alleged in the answer? Answer: "Yes."

3. Is any part of the land claimed by the defendants A. H. A. Belk and wife embraced in said deed, and if so, what part of said land? Answer: "97 acres, as per plat."

4. Is the action of the plaintiff Napoleon B. Belk barred by the statute of limitations? Answer: "No."

Judgment for defendant, and plaintiff appealed.

Stack & Parker for plaintiff.

W. B. Love, Frank Armfield and Redwine & Sikes for defendant.

WALKER, J., after stating the case: We are of opinion that the burden of proof, throughout the trial, was upon the plaintiff, and that the judge not only committed no error as against the plaintiff, but placed too great a burden upon the defendant in regard to the execution of the deed, and of this the plaintiff cannot complain, as it was an error committed in his favor. It is true, as contended by the plaintiff's counsel in their able and forceful argument, that the introduction of a deed which has been duly probated and registered is sufficient proof of its execution and genuineness, at least *prima facie*, but we do not agree

that it raises such a presumption of law or of fact as to require the defendant to rebut it by a preponderance of the evidence.

The registration of a deed is founded upon and authorized only by a probate of the same taken according to the statute, and *ex parte* proceeding, in which the execution of the particular deed in question is adjudged upon the acknowledgment of the grantor or the simple examination of a witness, without the presence of interested parties. As it is not an adversary proceeding, the law does not attach to it the force and effect of a judgment rendered after all parties con-
(72) cerned have been heard, or could have been heard if they desired to be, but only allows it to have the force of presumptive evidence as to the fact of the due execution in any contest as to the latter.

The force and effect of the registration of a deed has been said by this Court, in some cases, to be *prima facie* evidence of its due execution, and, in others, to be presumptive evidence of the fact. We are of the opinion that, owing to the nature of a probate and registration, and having regard to the language of the statute with respect thereto, when a registered deed is introduced it raises such a presumption of its due execution, including in this term both signing and delivery, that, in the absence of any contest as to the execution of the deed, and where no evidence is introduced to assail it, the presumption thus raised as to its due execution will warrant the court in directing the jury to find in favor of the validity of the deed; but when its execution is denied and evidence is introduced which tends to show that it was not executed, the burden of proof is on the party claiming under the deed, but he is entitled to the full benefit of the presumption, as evidence in his favor, and whether the opposing evidence is sufficient to overcome this presumption and to call for more evidence from the plaintiff, is a question for the jury, because they must pass upon the credibility of the evidence and its weight. The burden of proof, sometimes called the burden of the issue, is upon the plaintiff, who alleges the existence of the fact, but who, however, in such a case, has the advantage of a presumption in his favor. *Justice Ruffin*, in *Love v. Harbin*, 87 N.C. 249, 255 citing *Carrier v. Hampton*, 33 N.C. 307, said: "It is not intended to say that the fact of registration is conclusive as to either the execution or probate of the deed, but only *prima facie* evidence, and as the factum of the instrument may be disputed after its registration, so may the fact that it was ever admitted to probate, or that it was proved by a competent witness, as was done in *Carrier v. Hampton, supra.*" It is held in *Kelly v. Jackson*, 6 Peters (U.S.) 622 (8 L. Ed., 523), that *prima facie* evidence of a fact is such as, in judgment of

law, is sufficient to establish the fact and, if not rebutted, remains sufficient for the purpose.

The presumption as to the due execution of a deed which arises from its registration, founded upon a probate, is itself but evidence which must be left to the jury with proper instructions as to its effect in law as proof; but, after all, it is for the jury to say what weight it will attach to it when there is other evidence tending to contradict it and to show that the deed was not executed, and upon all of the evidence it is for them to say, with the burden resting upon the plaintiff and the benefit of the presumption allowed to him, whether the deed was executed. (73)

Our statute concerning the registration of deed reads as follows: "All deeds, contracts, or leases, before registration, except those executed prior to 1 January 1870, shall be acknowledged by the grantor, lessor, or the person executing the same, or their signatures proven by oath by one or more witnesses in the manner prescribed by law, and all deeds executed and registered according to law shall be valid and pass title and estate without livery of seizin, attornment, or other ceremony whatever." It will be seen, therefore, that by the statute all deeds *executed* and registered according to law shall be valid, etc. This can mean nothing more or less than that the fact of execution is not concluded by the registration, but is left open to be found by the jury upon proof, and so we have determined in several cases. If, though, there is no proof except the registration, the court may instruct that the deed is valid and passes the title, and that the jury should find accordingly. This was the evident purpose and intent of the statute, and, in this respect, the ordinary rule as to the burden of proof when there is a *prima facie* or presumptive case would not apply. But if there is a denial of execution and evidence tending to show that the deed was not executed, the burden continues with the plaintiff throughout the case to prove the fact of execution, but he has the benefit and strength of the presumption raised by the statute in his favor. That the burden is upon him results from the fact that if he offeres no proof, being the actor in the case, he cannot recover; but when he introduces his registered deed as evidence of his title, he still has the burden, but with the added advantage of the presumption that the deed was duly executed, which arises from the registration. If there is no more evidence than the registered deed itself, it will entitle him to the recovery, if that depends solely upon the deed, because of the words of the statute; but if there is a denial of the execution of the deed, and evidence to support it, the question as to the

execution of the deed becomes an open one with the burden on the plaintiff but with the presumption of its due execution in his favor.

We need not attempt to reconcile the expressions we find in the books in regard to this matter, if there is any conflict between them, as we believe that the rule stated by us is the safest one, and the one to be fairly deduced from the words of the statute and the nature of the proof, for there is no good reason why, when the deed is probated and registered and is not assailed, it should not be considered as valid, nor why the burden should not rest upon the party claiming under the deed when the execution of it is denied and there is conflict in the evidence. The formal proof of the execution is taken before a judicial officer, and even though it be an *ex parte* proceeding, it must be that some more weight should be allowed it than a mere *prima facie* case arising from oral evidence of facts, and that it should stand for satis-
(74) factory and sufficient proof of execution if there be no contradicting evidence. The use of the word "executed" in the statute shows that it was not intended to close the mouth of any one claiming against the deed, but that when there is an issue as to the due execution of the deed it should be incumbent on the party claiming under it to take the laboring oar and satisfy the jury of its execution, but all through the issue he must have the benefit of the presumption growing out of the fact that it has been formally probated and registered. There is no independent defense set up in the answer, such as fraud in the treaty, insanity, illegality of consideration, or other like matter, which would, of course, admit the formal execution of the deed, but, instead, a general denial that it was the deed of the alleged maker of it, or, in other words, a denial that it was either signed or delivered by him.

The learned judge who presided at the trial presented these views to the jury, and there was no real conflict in the charge as contended by the plaintiff. If there was any error, it was favorable to the appellants, as the defendant was required to show by the preponderance of the evidence that the deed was not executed.

There was some questions of evidence, but it will not be necessary to consider them in detail. All of them, presented by many exceptions, can be reduced to a very few in number if we disregard repetition.

The objections to questions asked P. R. Belk were properly overruled, as it will be found upon an examination of the questions that they tended to impeach him or to show that he dealt with the property in question in a manner inconsistent with his present attitude toward this suit. We do not think that the evidence was irrelevant, but if so, as to that which was not clearly competent it was harmless. There is

some latitude allowed on cross-examination, especially when a witness is being attacked or impeached to show his bias or his interest in the event of the action, or his lack of credibility, and we do not always scan it too closely when it is not substantive evidence. If we could see that it is irrelevent and harmful, we would, of course, exclude it, but that is not the case here, as this evidence is both relevant and competent.

The same may be substantially said as to the examination of A. H. A. Belk. The testimony of this witness and that of W. A. Eubanks concerning the charge of A. H. A. Belk against his brother P. R. Belk that he had forged the deed was also relevant to the controversy. It was defendant's contention that the deed was not executed by Calvin Laney, but that his name subscribed to the deed was forged by P. R. Belk. That was the dispute between them. When P. R. Belk called his brother, A. H. A. Belk, a liar, and the latter sharply retorted "I never forged a deed!" it was the same as a direct charge that P. R. Belk had forged the deed, though made by implication. P. R. Belk could not well have misunderstood it as an accusation of the (75) forgery, and he was silent. When A. H. A. Belk said, "I never forged a deed," he meant that P. R. Belk had done so, and could have meant nothing else by his insinuation or intimation, but if the language was equivocal, it was for the jury to decide what was intended.

The fact that Parmelia Belk was impecunious and had no money to pay for a deed reciting a consideration paid by her, was circumstance proper for the consideration of the jury upon the question of its execution—not of great weight, it may be, but of some.

The tax lists also were some evidence that the parties did not own the land. It may be slight, but still not to such an extent as to be none at all. *Austin v. King*, 97 N.C. 342; *Ruffin v. Overby*, 105 N.C. 78; *Bernhardt v. Brown*, 122 N.C. 590. It was competent to be weighed with other evidence.

It is competent to show previous consistent statements of a witness to strengthen his credibility. *Johnson v. Patterson*, 9 N.C. 183; *Jones v. Jones*, 80 N.C. 246; *Cuthbertson v. Austin*, 152 N.C. 338; *March v. Harrell*, 46 N.C. 329; *Bennett v. R. R.*, 120 N.C. 517. The court gave those of the requested instructions to which the defendant was entitled and the charge fully covered the case.

Whether the second issue should have been submitted makes no difference now, as the jury have found for the plaintiff upon the first issue. If there was no deed, it is immaterial whether the defendant purchased the land for value and without notice. If the plaintiff ac-

quired no title, it follows that the defendant did, as he had a deed for the land which has not been assailed.

In discussing the burden of proof we may not have sufficiently directed attention to the form of the issue, which is, Whether Calvin Laney had executed and delivered the deed, as alleged in the complaint. The burden of such issue is clearly upon the plaintiff.

The cases of *Benedict v. Jones,* 129 N.C. 470; *Smithwick v. Moore,* 145 N.C. 110, are cited as deciding that the burden of proof as to the nonexecution of the deed rests upon the defendant. The last case cited, *Smithwick v. Moore,* is a direct authority in support of what we have said in this opinion. It was there held that the registration of the deed raised a presumption of its execution, and that there was no evidence in the case that rebutted or impaired it. The question there was whether the plaintiff, who attacked the deed, had offered any evidence that it was not executed. There is nothing in that case which conflicts with our decision. The other case, *Benedict v. Jones, supra,* related to the privy examination of the wife, as from the following language of the Court will appear: "In order to rebut that presumption she
(76) must show to the jury by clear, strong, and convincing proof that she was not privately examined separate and apart from her husband touching her execution of the deed of trust according to law." The decision was based upon Laws of 1889, ch. 389 (Revisal, sec. 956). The deed of trust considered in that case purported to have been duly executed by the wife with her privy examination and was dated 4 August 1891. The court simply held that if the probate of the deed, including the privy examination, was validly taken, it could not be invalidated for fraud, etc., unless the grantor or person to whom the deed was made participated in or had notice of this defect. But it is said that *Lyerly v. Wheeler,* 34 N.C. 290; *Meadows v. Cozart,* 76 N.C. 450; *Kendrick v. Dellinger,* 117 N.C. 492, cited and approved in *Fortune v. Hunt,* 149 N.C. 358, 362, support plaintiff's contention. It will be found that in those cases the only question related to the date of a deed. This appears from the following language used by *Judge Peason* in *Lyerly v. Wheeler, supra* at p. 291: "The defendant contended that the date of the deed was no evidence that it was executed on that day; and the plaintiff could not recover without proving that it was executed on the day it bore date. The court charged that the date of the deed was *prima facie* evidence of the time of its execution. To this the defendant excepts, which is the only point made in the case. There is no error. The date of the deed, or other writing, is *prima facie* evidence of the time of its execution, upon the general principle that the acts of every person in transact-

ing business are presumed to be consistent with truth, in the absence of any motive for falsehood." Similar language is used by *Justice Bynum* in *Meadows v. Cozart, supra,* with reference to the date of a deed, and *Lyerly v. Wheeler, supra,* is cited in approval of the principle. The same is substantially said by *Justice Ruffin* in *Love v. Harbin, supra,* both as to the execution of a deed and as to its probate and registration.

It is said in *Kendrick v. Dellinger, supra,* in the first sentence of the opinion, that "A deed is presumed to have been delivered at the time it bears date, unless the contrary is satisfactorily shown," and for this statement *Lyerly v. Wheeler, supra,* and *Meadows v. Cozart, supra,* are cited. As we have shown, they are not authorities for the statement, as they only decide that "the date of a deed or other writing is *prima facie* evidence of the time of its execution," per *Bynum, J.,* in *Meadows v. Cozart, supra.*

In recent years this Court has not given to a *prima facie* or presumptive case the force and effect it formerly had, and has more properly and correctly treated it as furnishing evidence of the fact to be proved. Where there is really no controversy as to the execution of the deed in question, or no evidence to support a denial of it, we go quite far enough when we allow the probate and registration of it to be sufficient proof, under the statute, of its validity; (77) and when there is controversy and evidence to sustain a denial of its execution, we place the burden upon the party claiming under it of proving its due execution, but give him the benefit of the presumption arising from its registration. The other rule which is contended for would reverse our decisions as to the burden of proof when there is a *prima facie* case, and, besides, would make it easy for fraud to be committed by registration and very difficult and perhaps impossible to overcome the presumption raised by the registration of a deed, the result being that titles to land in the State would be seriously threatened if not destroyed. We do not deny that a presumption of regularity attaches to the proceedings of courts of record acting within their jurisdiction, but the presumption that public officers have done their duty does not always supply proof of a substantive fact. *U. S. v. Ross,* 92 U.S. 281, citing Best on Evidence, sec. 300.

The Legislature, by using the words "all deeds *executed* and registered according to law shall be valid and pass title and estates," etc., Revisal, sec. 979, evidently intended that the burden as to due execution should be imposed upon the party claiming under the deed, when there is an issue joined in regard to it calling for proof. The case of

Lumber Co. v. Leonard, 145 N.C. 341, is like *Benedict v. Jones, supra,* and in it the privy examination of the wife was assailed, under the statute, for fraud. Besides, the wife alleged that she thought the instrument was a contract to convey timber and not land, which would call for a reformation of it. *Odom v. Clark,* 146 N.C. 550, did not involve the same question as the *Leonard* case, but was cited collaterally and incidentally. The Court expressly says in the *Odom* case that it is not like *Lumber Co. v. Leonard, supra,* and *Harding v. Long,* 103 N.C. 1, and only a preponderance of the evidence was required. There is no attack on the probate of the deed in this case. It involves merely the construction of the statute, which clearly leaves the execution of the deed open to proof, nor is there any attempt to reform an instrument as in *Harding v. Long, supra.* If clear, strong, and convincing proof is required, then the case of *Love v. Harbin, supra,* which has been approved in many cases, was not correctly decided, as there it was held that probate and registration are only *prima facie* evidence of the execution of a deed. *Glenn v. Glenn,* 169 N.C. 729, was a suit for the reformation of a deed, the execution of which was admitted, and has no application whatever in this case, as this is not an action to reform or to set aside a deed, or a probate or registration, but the question is what is the legal effect, as proof, of the probate and registration upon an issue as to the execution of the deed—and that is all. The authorities cited and just reviewed are not relevant.

We have carefully examined the record, and no error has been
(78) found.

No error.

BROWN, J., concuring in result: I think that the charge of the judge upon the burden of proof is strictly correct and in accord with the decisions of this Court. The probate of a deed with registration raises a presumption of execution and delivery which entitles plaintiff to a verdict unless defendant rebuts such presumption by evidence satisfactory to the jury. The burden of proof shifts when the probated and registered deed is introduced in evidence by the plaintiff, and then it rest on defendant to satisfy the jury that the deed in fact was never executed and delivered. The law gives to the probate and registration of a deed the "artificial weight" of a presumption, and whoever attacks such deed must assume the burden of overthrowing or rebutting such presumption.

The probating of a deed is the solemn act of the law and imports

absolute verity. It is a judicial act by the officers duly appointed by law.

This rule is laid down by *Clark, C. J.*, with much clearness in *Smithwick v. Moore,* 145 N.C. 110, and up to now has been regarded and acted upon as the settled law of this State.

In *Fortune v. Hunt,* 149 N.C. 358, this Court said: "His Honor should have told the jury that the law *presumes* that this deed, proved, registered, and offered in evidence by defendants claiming under it, was executed and delivered at the time it bears date unless the contrary be shown and the burden to show it rests on plaintiff."

In *Benedict v. Jones,* 129 N.C. 470, the Court went so far as to hold that the presumption of the correctness of the certificate of probate must be overcome by "clear, strong, and convincing evidence." The same rule was laid down in *Lumber Co. v. Leonard,* 145 N.C. 341, cited and approved in *Odom v. Clark,* 146 N.C. 550, by *Mr. Justice Hoke.*

In *Glenn v. Glenn* the same learned judge again cites and approves *Leonard v. Lumber Co.* and holds that this rule of evidence applies to "written certificates of officers given and made in the course of duty." This rule is founded upon the protection which the law gives to land titles and the weightiest considerations of public policy require that it should not be weakened.

(79)

The *Chief Justice* concurs in this opinion.

Cited: *S. v. Bethea,* 186 N.C. 24; *Dellinger v. Building Company,* 187 N.C. 850; *Jones v. Coleman,* 188 N.C. 632; *Best v. Utley,* 189 N.C. 364; *S. v. Love,* 189 N.C. 771; *S. v. Buck,* 191 N.C. 529; *McKay v. Bullard,* 219 N.C. 595; *Johnson v. Johnson,* 229 N.C. 546; *Bank v. Sherrill,* 231 N.C. 732; *Hall v. Fayetteville,* 248 N.C. 483.

AMERICAN NATIONAL BANK v. H. P. DEW ET AL.

(Filed 23 December, 1917.)

1. **Judgments—Pleadings—Demurrer—Estoppel.**

A judgment sustaining a demurrer to the pleadings upon the merits, while it stands unreversed, is conclusive as an estoppel in another action between the same parties upon the same subject-matter.

2. **Corporations—Certificates of Stock—Pledgee—Defects—Good Faith—Notice.**

Where a corporation has made out its certificate of stock, in proper form and property signed, to a certain named person, and permits him to use it in the open market as collateral security for a loan, the corporation is bound by the acts of such person as its agent, and the holder who has taken the stock in good faith from him, without notice of any defect in the title of the pledgor, and for value, acquires a good title as against the corporation.

3. **Same—Trials—Questions for Jury.**

Where a certificate of stock of a corporation appears upon its face to have been regularly issued to a certain named person, and is pledged by him to a bank as collateral security for a loan, the question of whether the pledgee received the shares with actual notice of any equity claimed by the corporation is one for the jury under the evidence and not one of law for the court.

4. **Estoppel — Corporations — Shares of Stock — Pledgee—Irregularity of Issue—Notice.**

Where certificates of stock of a corporation appear to be regularly issued to a certain person, and they are by him pledged to another as collateral security for a loan, for value without notice of any irregularity in their issuance, the corporation is estopped, *in pais*, as against the innocent pledgee, from setting up that such shares had not been transferred on the books of the corporation.

5. **Corporations—Shares of Stock—Pledgee—Bills and Notes—Extension of Payment—Consideration.**

Where a bank renews a note of its customer upon consideration of the additional pledge of certificates of stock of a corporation, the extension of time accordingly granted is a sufficient consideration to make the bank a purchaser for value and protect it, as against the corporation, as an innocent holder of the certificate in due course, if it had no notice of any infirmity in the title of its pledgor.

6. **Same—Antecedent Debt.**

Promised forbearance to enforce an antecedent debt and extend the time of payment in consideration of the debtor's pledging additional collateral security, which was given, is sufficient to constitute the pledgee a holder for value. As to whether the pledgee's actual promise of forbearance is necessary or whether his implied promise is sufficient, *quaere*.

7. Corporations—Liquidation—Actions—Parties.

A national bank in the course of liquidation may maintain an action to collect debts due it in order to wind up its affairs.

CIVIL ACTION, tried at May Term, 1917, of NEW HANOVER, before *Bond, J.* (80)

Plaintiff brought this action to compel a transfer on its books by the defendant United Development Company of 25 shares of its stock purporting to have been issued by it to the defendant. H. P. Dew and which the plaintiff received from him, as a purchaser for value and without notice of any defect in his title to the same, as collateral security to a note given by Dew for money borrowed from it. Other relief was prayed against H. P. Dew's codefendants. The following issues were submitted to the jury:

1. Is the defendant H. P. Dew indebted to the American National Bank in the sum of $1,750, with interest from 11 October 1912, upon the note sued on this case?

2. Was the stock referred to of the United Development Company ever issued and delivered to H. P. Dew or to any one for him?

3. Was the plaintiff the owner as pledgee of Certificate No. 8, for 25 shares of stock in the United Development Company?

4. Did the plaintiff bank, in due course of business and without notice of any fraud, if any existed, receive said certificate of stock as collateral security to note given in renewal of unpaid balance on prior note, which prior note was originally given to said bank for money borrowed and in consideration of extension of time for payment of said balance?

5. Did the United Development Company wrongfully refuse to transfer said stock on the books of said corporation?

6. Was the real estate set forth in the complaint conveyed by the United Development Company to the Chatham Estates, Incorporated, without valuable consideration? No answer.

7. Was the real estate set out and described in the complaint fraudulently and wrongfully conveyed to the Chatham Estates, Incorporated? No answer.

8. At the time that Chatham Estates, Incorporated, took the conveyance of the property from the United Development Company, did it have notice of the rights of H. P. Dew or of this plaintiff? No answer.

9. Did defendants, or any of them, acting in concert with each other, wrongfully convey the land of the United Development Company to Chatham Estates, Incorporated, and thereby cause injury to plaintiff? No answer.

10. What was the value of the 25 shares of stock sued on at time property of said corporation was conveyed away? No answer.

11. Is the plaintiff estopped by the judgment which is pleaded in the further defense set up by defendants in their answer to this
(81) suit?

12. What damages, if any, is plaintiff entitled to recover of the defendants United Development Company, Chatham Estates, Incorporated, Chatham Park Land Company, Paul Chatham, and W. A. Ebert?

The jury answered the first issue "Yes," second issue "No," third issue "No," fourth issue "Yes," fifth issue "No," eleventh issue "Yes," except as to the United Development Company, as to whom nonsuit was taken, and the twelfth issue "Nothing"; and under the direction of the court did not answer the sixth, seventh, eighth, ninth, and tenth issues.

The court instructed the jury as to the first, fourth, and eleventh issues, that if they believed the evidence those issues should be answered "Yes," otherwise "No"; and as to the second, third, and fifth issues, that if they believed the evidence they should be answered "No," otherwise "Yes"; and as to the twelfth issue, that if they believed the evidence they should answer it "Nothing," otherwise such an amount as they should find to be due.

The court was of opinion, upon the verdict, that the plaintiff was not entitled to recover at all, and judgment was entered accordingly, and for costs against the plaintiff, whereupon it appealed to this Court.

Rountree & Davis and McClammy & Burgwyn for plaintiff.

H. L. Taylor and Kenan & Wright for defendants other than H. P. Dew.

WALKER, J., after stating the case: First. As to the estoppel and the eleventh issue. We are of the opinion that the presiding judge ruled correctly when he held that upon the result of the prior suit in the Superior Court of Mecklenburg County the plaintiff was estopped by the judgment therein as to all the defendants in this case who were parties to that action, except the United Development Company. It appears from a perusal of the record in that case that the complaints in the two cases are at least substantially alike, and that the same questions were determined in the former case as are now raised in this case, and the judgment of the Superior Court of Mecklenburg County is a complete and final adjudication of all matters embraced within its scope and settled conclusively against the plaintiff and in

favor of the defendants who had not been nonsuited and who were parties defendant every question covered by the complaint and involved in the cause of action.

This does not apply to the United Development Company, for as to it the demurrer was overruled. The legal effect of sustaining a demurrer to a complaint, as an estoppel or *res judicata,* in any (82) subsequent action brought for the same cause, if the former judgment is properly pleaded, has been considered by this Court several times. A recent case is *Marsh v. R. R.,* 151 N.C. 160, where it is said: "As applied to domestice judgments, it is a principle universally recognized that when a court has jurisdiction of a cause and the parties, and on complaint filed a judgment has been entered sustaining a general demurrer to the merits, such judgment while it stands unreversed and unassailed is conclusive upon the parties and will bar any other or further action for the same cause," citing *Johnston v. Pate,* 90 N.C. 335; *Willoughby v. Stevens,* 132 N.C. 254; *Alley v. Nott,* 111 U.S. 472; *Gould v. R. R.,* 91 U.S. 526; and *Miller v. Leach,* 95 N.C. 229, the last case holding that the doctrine applies to a judgment recovered in the court of another State having jurisdiction of the subject-matter and the parties and where, of course, there is no fraud in its procurement. The charge of the court upon the eleventh issue, in respect to the Mecklenburg judgment, was, therefore, correct.

Second. But we think that the court erred in its charge to the jury upon other issues, as there were phases of the case which, if the evidence was believed by the jury, entitled the plaintiff to their verdict. We presume the presiding judge was of the opinion that the plaintiff, though a pledgee of the certificate of the stock, was not a *bona fide* holder of it for value and without notice. Whether the plaintiff, when it received the stock as collateral for the debt owing by H. P. Dew to it, had actual notice of the equity claimed by the United Development Company was a question for the jury to determine upon the facts and circumstances, as there was nothing which, in law, would constitute notice. If the Development Company, by its own negligence or the negligence of its officers, to whom the possession of the stock made out to H. P. Dew in proper form and signed by the proper person was entrusted, allowed it to fall into the hands of H. P. Dew with such evidence appearing on its face of his lawful or rightful ownership, and thereby permitted him to use it in open market as collateral security for a loan which the plaintiff made to him, it is bound by the act of its agents, and the holder who has taken the stock in good faith without notice of any defect in the title of

the pledgor and for value will be entitled to hold it as against the company by which it purported to have been issued. We so held in *Havens v. Bank,* 132 N.C. 214, where the subject was fully considered and many authorities cited in support of the principle. *Titus v. R. R.,* 61 N.Y. 237; *R. R. v. Bank,* 60 Md. 36; *McNeill v. Bank,* 46 N.Y. 325; *Allen v. R. R.,* 5 L.R.A. (Mass.), 716; *Bank v. Lanier,* 11 Wall. 369. A strongly reasoned case is *N. Y. & N. H. R. Co. v. Schuyler,* 34 N.Y. 30.

(83) In *McNeill v. Bank, supra,* the Court stated the rule with great force, as follows: "The holder of such a certificate and power possesses all the external *indicia* of title to stock and an apparently unlimited power of disposition over it. He does not appear to have, as is said in some of the authorities cited, concerning the assignee of a chose in action, a mere equitable interest which is said to be notice to all persons dealing with him that they take subject to all equities, latent or otherwise, of third parties; but apparently the legal title and the means of transferring such title in the most effectual manner. Such, then, being the nature and effect of the documents with which the plaintiff entrusted his brokers, what position does he occupy towards persons who in reliance upon those documents have in good faith advanced money to the brokers or their assigns on a pledge of the shares? When he asserts his title and claims as against them, that he could not be deprived of his property without his consent, cannot he be truly answered that by leaving the certificate in the hands of his brokers, accompanied by an instrument bearing his own signature, which purported to be executed for a consideration, and to convey the title away from him and to empower the bearer of it irrevocably to dispose of the stock, he in fact 'substituted his trust in the honesty of his brokers for the control which the law gave him over his property,' and that the consequence of a betrayal of that trust should fall upon him who reposed it, rather than upon innocent strangers from whom the brokers were thereby enabled to obtain their money." And the language of the Court in *R. R. v. Bank, supra,* is equally as strong and convincing: "It may be conceded, and was doubtless the case, that the agent had no authority as between himself and his principal or other parties cognizant of the facts for doing the particular acts complained of; but the company, by its own act and, as it turned out, misplaced confidence, placed the agent in the position to do and procure to be done that class of acts to which the particular act in question belongs; and in such case, where the particular act in question is done in the name of and apparently in behalf of the principal, the latter must

be answerable to innocent parties for the manner in which the agent has conducted himself in doing the business confided to him. Upon no other principle could the public venture to deal with an agent. In such case the apparent authority must stand as and for real authority." And again: "Where he issued such a certificate and delivered it to a third party, who acted without knowledge and in good faith, paying value for it, such party had the right to act upon the presumption that the representations of such certificates were truthful, and not false and fraudulent. Having confided to him the said trust of executing the business, the agent was held out to the public as competent, faithful, and worthy of confidence; and though he deceived both his principal and the public, by forging and (84) issuing false certificates, it is but reasonable that the principal, who placed him in the position to perpetrate the wrong, should bear the loss."

This principle was applied in *Cox v. Dowd,* 133 N.C. 537, where the *Chief Justice,* in delivering the opinion of this Court, said: "The recent opinion in *Havens v. Bank,* 132 N.C. 214, especially what is said at pages 222-225, renders it unnecessary to discuss the effect of a transfer in blank of a certificate of stock, which it is there held 'passes the entire title, legal and equitable, in the shares,' notwithstanding any requirements in the charter or by-laws that the stock shall be transferrable only on the books of the corporation. Besides cases there cited, we may add *Hirsch v. Norton,* 115 Ind. 341; 2 Thompson Corp., sec. 2368." In the Indiana case it is said that the property transfered, certificate of stock, is of a peculiar nature and is assignable in a peculiar method, so that the cases which govern the transfer of tangible personal property cannot control when the subject of the transfer is the capital stock of a corporation. The Court then says: "Where a party, by clothing another with all the legal *indicia* of ownership, enables him to mislead others, he, and not those who are misled by his acts, must be the sufferer. If loss comes, the man who invested the debtor with the evidence of absolute title, and thus misled creditors, must bear it, and not the creditors. The conclusion we assert involves little more than an application of the familiar general principle that where one of two innocent persons must suffer by the act of a third, he must suffer who put it in the power of the third to do the act."

The rule need not be based upon any principle in the law of negotiable instruments, but may rest upon the doctrine of equitable estoppel. It is true that the purchasers of non-negotiable demands from others than the original owner of them can take only such rights as

he has parted with, except when by his acts he is estopped from asserting his original claim, and it is established by all the authorities. He must, in such case, as *Lord Thurlow* said, abide by the case of the person from whom he buys. *Cowdrey v. Vandenburgh,* 101 U.S. 572. In that case it is said by *Justice Field*: "The principle is well settled that when the owner of property in any form clothes another with the apparent title or power of disposition, and third parties are thereby induced to deal with him, they shall be protected. The case of *McNeill v. Bank,* in the Court of Appeals of New York, contains a clear statement of the law on this head. There, it is true, a certificate of stock was pledged with a blank assignment and power of attorney indorsed, which the pledgee afterwards filled up and then disposed of the stock. It was evident that the owner contemplated that the blanks in the assignment and power should be filled up, if it should ever become necessary. 46 N.Y. 325. But the prin-
(85) ciple stated by the Court is as applicable where no such intention is manifested. The rights of innocent third parties, as the Court there observes, 'do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyances.' Here the complainants could have expressed in their indorsement the purpose of the deposit of the certificate with Blumenburgh, that it was as security for a specified sum of money, and thus imparted notice to all subsequent purchasers or assignees that the pledgee held only a qualified interest in the claim. But having endorsed their name in blank, they virtually authorized the holder to transfer or dispose of the certificate by writing an absolute assignment over their signatures."

If, therefore, the plaintiff in this case received the stock in pledge as security for its debt and did so in good faith for value, and without notice of the company's rights or equities, it acquired a good title thereto as against the latter, notwithstanding that the stock had not been transfered to him on the books of the company. *Havens v. Bank, supra,* and cases cited, to which we add 1 Cook on Stocks and Stockholders, 3 Ed., sec. 487.

The next question is whether the plaintiff is a *bona fide* holder, or pledgee, of the certificate of stock, as purchaser for value and without notice of any right of the United Development Company therein. It appears that the plaintiff was not satisfied with the security it had for the note of H. P. Dew, namely, 160 shares of the Peoples Bank of

Blacksburg, and refused to extend the time of payment unless it was strengthened by the deposit with it of additional collateral, and on 15 April, 1912, the note, being then for the amount of $1,900, was renewed, the time of payment being extended for four months, or until 13 August, 1912, and this was done in consideration of the deposit of the certificate for 25 shares of stock in the United Development Company. The stock was transferred to the plaintiff and a renewal note given for the balance owed by H. P. Dew. There was evidence tending to show that the plaintiff would not have granted the forbearance unless the certificate for the 25 shares of stock had been deposited as additional collateral security, for the Peoples Bank of Blacksburg, S. C., was not in good financial condition, and the 160 shares of its stock, which the plaintiff already held as security for the payment of the note, was not considered adequate under the circumstances. Plaintiff had actually called for more collateral. This, we think, constituted value sufficient to protect the plaintiff as an innocent holder of the stock certificate, provided it had no notice of any infirmity in Dew's title, and whether it had or (86) not was a question for the jury, there being evidence from which the jury might infer that it had no such notice.

Colebrook, in his work on Collateral Securities, sec. 269, says: "The pledgee of certificates of stock receiving the same indorsed, with an irrevocable power of attorney to transfer, in good faith, without notice, and for value advanced thereon, is entitled to the privilege of a *bona fide* purchaser for value, in the usual course of business. Such indorsement and delivery of certificates of stock as collateral security vests the legal and equitable title in the pledgee and he holds the absolute ownership of the shares of stock represented thereby. His title, when he has advanced value in good faith, without notice, cannot be impeached, although the act of pledge be a fraud and misappropriation of such certificates of stock by persons intrusted therewith so as to have the apparent ownership. The title thus acquired by an innocent pledgee for value of stock collaterals is sustained as between the parties, and (in the absence of restrictive statutory or charter provisions) as against the company and third parties seeking by legal process to subject such shares of stock to the payment of debts or other liabilities of the pledgor, although no transfer thereof has been made on the books of the company issuing the same, or notice given."

And again at section 270: "It is established by commercial usage that a certificate of stock endorsed with an irrevocable power of attorney in blank or filled up is, in the hands of a third person, presumptive evidence of ownership of the holder. The title of an innocent

holder for value, and in the usual course of business having possession of the certificate, endorsed to himself or in blank, is good against the world. Subsequent purchasers of such certificates, although paying value but not receiving the certificates, the company issuing the stock when a transfer is demanded by such holder for value without notice, the creditors of the pledgor and transferrer are not allowed to impeach the title of such innocent holder for value. The transfer of certificates of stock, endorsed, under the general usage of dealers in securities and on exchanges, vests in the holder for value, without notice, more than the mere equitable title obtained upon the assignment and delivery and of a non-negotiable chose in action. The legal ownership vests in the endorsee of a stock certificate, endorsed in blank, as in the case of the favored instruments of commerce."

Cyc., vol. 10, p. 636 (b), says: "Where a certificate of shares is regular on its face, imports ownership in its holder, and contains no intimation of any equities impairing such ownership or full title, whether in the corporation or in third persons, an intending purchaser is not bound to suspect fraud or infirmity of title, or to go back and search the register, but may rely upon the disclosures
(87) of the certificate." And again, at pages 624 (e) and 635: "Where the shares of a corporation are offered for sale by the person named in the certificate, an intending purchaser is not required to look beyond the recitals of the certificate in regard to his title or the equities of the corporation, or to suspect fraud in the issuing of the shares, where all seems fair and honest. He is not bound to examine the books of the corporation to ascertain the validity of a transfer. The reason arises from the nature of a share certificate, which as already stated is a continuing affirmation of the ownership of the specified amount of stock by the person designated therein or his assignee, until it is withdrawn in some manner recognized by law; and a purchaser in good faith has a right to rely thereon and to claim the benefit of an estoppel in his favor as against the corporation. . . . By parallel reasoning the corporation should be held liable where through its negligence it suffers its share certificates, formally filled out, signed and sealed, to get out upon the market, where they may operate to deceive innocent purchasers."

With more particular reference to the vital question in this case, Colebrook says, at section 279: "Upon a pledge of certificates of stock for an antecedent debt, new notes being given as evidence thereof, the pledgee is regarded as a holder for value within the rule, as the transaction amounts to a valid extension of the time for payment."

And to the same effect is Norton on Bills and Notes, p. 315, where he says: "Where the preexisting debt has fallen due, and there is a transfer of a bill or note as collateral security with an express agreement for delay, the forbearance is a sufficient consideration. This is because such forbearance is a surrender by the holder of his valuable right of immediate prosecution. But the rule only applies for the reason that the holder, by valid agreement, has estopped himself from prosecuting."

And this accords with what was held in *Black v. Tarbell,* 89 Wis., 390, 393: "If the plaintiff had received the collateral note in suit after his endorsement was made and his liability fixed, no other fact appearing, he would not be a *bona fide* holder for value. But it affirmatively appears that, in consideration of the receipt of this collateral, he definitely extended the duration of his liability, and so the case comes within the first rule laid down in *Bowman v. Van Kuren,* 29 Wis., 219. The note was transferred not only as collateral to a preexisting obligation, but in consideration of a definite extension of the duration of such obligation. This makes the plaintiff clearly a *bona fide* holder for value before due, and precludes the defense which the defendant attempts to make here," citing *Body v. Jewson,* 33 Wis., 402-409. We have not lost sight of the rule, which formerly prevailed in this State, that a precedent debt did not constitute value in the transfer even of negotiable instruments as against a (88) prior equity. *Harris v. Horner,* 21 N.C. 455; *Holderby v. Blum,* 22 N.C. 51; *Potts v. Blackwell,* 56 N.C. 449. But this has been changed by the Negotiable Instruments Law, Revisal, sec. 2173. *Brooks v. Sullivan,* 129 N.C. 190. This old rule was known as that of the New York Court, based upon the opinion of *Chancellor Kent* in *Bay v. Coddington,* 5 Johns., ch. 54 (9 Am. Dec., 268), and the opposite one, holding a preexisting debt to be sufficient value to protect the holder of the paper, was called the Federal Rule, based upon *Swift v. Tyson,* 16 Peters, 1 (10 L. Ed., 865). The subject is carefully reviewed and the authorities collected and explained in *Exch. Nat. Bank v. Coe,* 31 L.R.A. (N.S.), 287 and note.

But this is not our question, as here there was evidence that plaintiff extended the time of payment when the certificate of stock was taken and the forbearance was the consideration for adding to the other security which had become descredited. The annotator of *Exch. Nat. Bank v. Coe, supra,* at p. 298 of L.R.A., N.S., under the title of "Extension of Time," says: "Authorities which disagree on the subject of the rights of one who takes a bill or note as collateral security for a preexisting debt are in accord in holding that if the

transferee grants an extension of time or surrenders other rights, he is considered as having parted with value, and may enforce payment as a *bona fide* holder. Thus, a note transferred to secure a preexisting obligation in consideration of an extension of time for the payment of the debt makes the transferee a *bona fide* holder for value, and the note is not subject to the defense of payment by the maker to the bank to which it had originally been given," citing *L. Banking Co. v. Howard,* 123 Ala. 380, and many other cases for his statement of the law, and among them *Fretwell v. Carter,* 78 S.C. 531, which is more like our case in its facts than perhaps any of the others. He says of that case: "The Court held that a note in which the name of the payee had been left blank but which had been signed and endorsed by others, and which another, to whom it had been delivered, negotiated to an innocent holder as collateral for a past indebtedness, thereby obtaining an extension of time, is a valid contract which the holder may enforce free of any equities existing between the original parties."

It is decided by some courts that a valid promise to forbear must be shown, and not the mere fact of a voluntary forbearance, though other courts hold that a promise to forbear which may be implied from the nature of the transaction and its circumstances is sufficient value. We need not settle this difference, as there is evidence of an actual promise to extend the time of payment, and that the deposit of the collateral was the consideration of the promise. See, also, 3 R. C. L., secs. 263 and 264; 1 Daniel Neg. Instr. (Calvert Ed.), (89) sec. 829A, and *Harvester Co. v. McLean,* 57 Wis. 258, where it is said: "If there was an express or implied agreement on the part of a creditor to extend the day of payment on the delivery to him of a note as surety for his debt, then the creditor receiving such note was an innocent holder thereof for value."

Certificates of stock are largely used now in commercial transactions as collateral, and there is a growing disposition of the courts to allow them the advantages of commercial paper, though they are not such in form; but we need not put our decision on any such ground, as it can well rest on the other principle which we have stated, that when one of two innocent parties must suffer by the wrong of another, he who made it possible for him to commit the wrong should bear the loss resulting therefrom. The doctrine of implied agency arising out of negligence has its true basis in the principle of *estoppel in pais;* and is founded upon the injustice of allowing a party to be the author of his own misfortune, and then to charge the consquence upon others; and it implies an act in itself invalid, and a person forbidden, for

equitable reasons, to set up its invalidity. *R. R. v. Schuyler,* 34 N.Y. 30. It results that the charge of the court was erroneous, as the jury could have believed the evidence and yet have decided in favor of the plaintiff. The case must, therefore, be submitted to another jury with instruction from the court, so that they may find the facts and apply the law thereto.

Third. Plaintiff had the right to bring this action, notwithstanding it had gone into liquidation. The corporation was not dissolved or extinct, and it is necessary to collect its assets in order to wind up its affairs. *Cent. Nat. Bank of Baltimore v. Conn. M. L. Ins. Co.,* 104 U.S. 54, 72; *Pritchard v. Barnes,* 101 Wis. 89; *Hutchinson v. Crutcher,* 98 Tenn. 427; *Chemical Bank v. Hartford Dep. Co.,* 161 U.S. 8.

The learned presiding judge doubtless was of the opinion that in order to constitute the plaintiff a *bona fide* holder for value, it must have parted with something, as money or at least money's worth; but we think that by extending the time of payment, if the note was an old one, plaintiff gave up valuable rights, which is sufficient to defeat the equity of defendant, if other elements, such as want of notice and good faith, are present. The taking of the new note for $1,900 was a definite extension of the time of payment. 8 Corpus Juris., 425.

Our conclusion is that there should be a new trial for an error in the charge.

New trial.

Cited: *Hayden v. Hayden,* 178 N.C. 263; *Bank v. Bank,* 183 N.C. 472; *Swain v. Goodman,* 183 N.C. 533; *Castelloe v. Jenkins,* 186 N.C. 172; *Blue v. Wilmington,* 186 N.C. 324; *Bank v. Schlichter,* 191 N.C. 355; *Bank v. Liles,* 197 N.C. 418; *Bowie v. Tucker,* 197 N.C. 673.

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(90)

L. P. PATTERSON v. CHAMPION LUMBER COMPANY.

(Filed 22 December, 1917.)

1. Removal of Causes—Extension of Time to Plead—Exceptions—Motions—Waiver.

Where a nonresident defendant does not move to remove the cause to the Federal Court for diversity of citizenship within the statutory time to plead, and the court allows each party time therefor, to which neither has excepted or moved to dismiss for failure to file the com-

plaint, his not having done so will be taken as his consent to the extension of the time allowed, and a waiver of his right to remove the cause.

2. Removal of Causes—Pleadings—Allegation—Tort.

An allegation of the complaint that plaintiff was injured in the course of his employment while obeying a negligent order of a vice-principal of his employer, which with other of their negligent acts caused the injury, the allegation is a joint tort and the plaintiff had the right to regard the wrong either as joint or several.

3. Removal of Causes—Fraudulent Joinder—Allegations.

Where a nonresident is sued jointly with a resident defendant for a joint tort, a petition to remove the cause to the Federal Court for a fraudulent joinder must do more than allege the fraud by general averment by setting out the essential facts so that the court can see there has been such joinder.

4. Removal of Causes — Petition — Bond — Sufficiency — Jurisdiction — Courts.

Sufficiency of the petition and bond of a nonresident to remove the cause to the Federal Court is decided as a matter of law by the State courts, and if there are questions of fact arising on the motion, they are for decision in the Federal Court.

5. Pleadings—Evidence—Variance—Statutes.

An objection to a variance between the allegations of the pleadings and the proof, when prejudicial and misleading, etc., should be taken in apt time, under the provisions of Revisal, secs. 515, 516.

6. Pleadings — Verdict — Amendments — Court's Discretion—Appeal and Error.

It is within the discretion of the trial judge to allow, after verdict, amendments, to the complaint in accordance with the evidence, when no change in the cause of action has been made, and, in the absence of abuse of this discretion, no appeal therefrom will lie. Revisal, secs. 505, 507.

7. Pleadings—Amendments—Presumptions—Appeal and Error.

The trial judge will be presumed to have found the facts necessary to support his order allowing an amendment to pleading, when no facts are stated in the record.

8. Appeal and Error—Issues—Instructions—Assumptions of Risks.

In an action to recover damages for a personal injury, where the judge has correctly charged the jury on the evidence as to negligence and contributory negligence, including that as to the plaintiff's assumption of risks, the failure to submit an issue or give a request for instruction as to assumption of risks, is not reversible error.

CIVIL ACTION, tried before *Adams, J.*, and a jury at May
(91) Term, 1917, of HAYWOOD.

Plaintiff alleged that he was employed by defendant as lum-

ber inspector and was required, among other duties, to measure and grade lumber as the same was put upon cars for shipment, he being under the superior authority of Charley Buck and J. C. Orndorff, and subject to their orders, which he was bound to obey. He further alleges that while engaged in the performance of his regular duties he was ordered by Charley Buck to leave the place where he was then at work and to transfer some loaded cars from the planing mill over certain tracks and switches to the bill-dock, where they were to be unloaded. That in order to do this work, it was necessary to move a handcar which was heavily loaded with green lumber and then standing on Track No. 2, back to a place beyond a switch, so that the other cars could pass over the tracks to the place of their destination without any obstruction. While engaged in this business, and without any fault on his part, the loaded car was moved and overturned and the heavy and green lumber fell from the car and upon the plaintiff, whereby he was severely injured. He alleges that the overturning of the car, which caused his injury, was due to its having been improperly and negligently loaded.

The defendant filed a petition for the removal of the case to the United States Court, but the judge refused the motion to remove, and defendant excepted.

At the trial, and after the verdict, the plaintiff moved to amend his complaint by alleging that the overloading of the car with lumber, which upset and caused his injuries, was due to the fact that defendant had negligently failed to provide for itself a sufficient number of cars and trucks with which to handle its output of lumber, and resorted to overloading of the cars it had for the purpose of supplying the deficiency. The motion was granted, and defendant excepted. Evidence had been admitted, over defendant's objection, that the car was overloaded, and that there was not a sufficient number of cars for hauling the lumber, and for that reason the car in question was overloaded. The defendant requested the court to submit an issue as to assumption of risk which it tendered, but this request was refused.

The three issues, as to negligence, contributory negligence, and damages, were submitted, and the jury answered them in favor of the plaintiff, assessing his damages at $6,000. Exceptions were taken to the charge of the court and to the refusal of the court to give special instructions. Judgment for plaintiff was entered upon the verdict, and defendant appealed.

Alley & Leatherwood for plaintiff.
Merriman, Adams & Johnston for defendant.

WALKER. J., after stating the case: First. The court properly refused to remove the case to the United States Court. In the first place, the petition was not filed within the time allowed by law. The
(92) summons was returnable to September Term, 1916, and at that time an order was made enlarging the time for filing pleadings, the plaintiff being given 60 days for filing his complaint, and the defendant 60 days thereafter to file answers. The plaintiff filed his complaint within the 60 days allowed to him, but the defendant's answer was not filed until 3 February 1917, after the time given by the order for filing it had expired. If there had been no order extending the time, the answer was due before adjournment of the September term of the court, under the statute. The defendant did not except to the order extending the time for filing the pleadings, nor did it move to dismiss the action for failure to file the complaint, and from the record it would appear that it was made with the consent of both parties, if not at their request. Anyhow, the law so construes it.

A like order was made in *Ford v. Lumber Co.*, 155 N.C. 352, and the Court said, in commenting on a motion to remove the cause to the Federal Court: "The summons was returnable to September Term, 1910, at which term an order was made in this cause as follows: 'Plaintiff allowed 40 days to file complaint; defendant has 40 days to file answer.' The defendant did not except to this order and did not move to dismiss the action for failure to file complaint, as it had a right to do. It may be, as contended by defendant, that a petition for removal need not be presented until the complaint is filed, and the record then discloses a removable controversy as to the sum demanded, but under our decisions the defendant has waived his right to remove and submitted himself to the jurisdiction of the court by not excepting to the order we have quoted. By failing to except to it, the defendant is taken to have consented to it. *Lewis v. Steamboat Co.*, 131 N.C. 653; *Bryson v. R. R.*, 141 N.C. 594; *Garrett v. Bear*, 144 N.C. 23. . . . When the defendant takes no exception to the order extending the time within which to file complaint and answer, the order is a consent order and voluntary submission by defendant to the jurisdiction of the court and waiver of a right to remove."

To the same effect is *Howard v. R. R.*, 122 N.C. 944; *Duffy v. R. R.*, 144 N.C. 26; *Pruitt v. Power Co.*, 165 N.C. 416; *Spangler v. R. R.*, 42 Fed. 305; *Fox v. R. R.*, 80 Fed. 945; *Williams v. Telephone Co.*, 116 N.C. 558; *R. R. v. Daughtry*, 138 U.S. 298.

We also are of opinion that the plaintiff has stated a joint tort as having been committed by the defendant, and he had the right thus

to regard the wrong either as joint or as several. *Gurley v. Power Co.*, 173 N.C. 447; *Haugh v. R. R.*, 144 N.C. 704; *Rea* (93) *v. Mirror Co.*, 158 N.C. 24, 27; *R. R. v. Miller*, 217 U.S. 209.

The petition for removal does not sufficiently allege a fraudulent joinder, and the State court was not required to give up its jurisdiction. General averments will not do, but the essential facts must be stated so that we can see that there has been such a joinder. *Hough v. R. R., supra*, 144 N.C. 700; *Tobacco Co. v. Tobacco Co., ibid.*, 367; *Smith v. Quarries Co.*, 164 N.C. 351; *Pruitt v. Power Co.*, 165 N.C. 418; *R. R. v. Thompson*, 200 U.S. 215. It can easily be seen from these authorities that defendant has not complied with the statute, and the judge was right in refusing to remove the case. Questions of law in removal cases are decided by the State court, that is, as to the sufficiency of the papers, and questions of fact by the Federal court. *Kansas City R. Co. v. Daughtry, supra*, and 5 Rose's Notes to that case (Sup.), p. 233.

When the evidence was offered as to the shortage in cars, the defendant should have proceeded under Revisal, secs. 515 and 516, as for a variance, if there was thought to be one. We do not think that there was any change in the cause of action by reason of the amendment, and we doubt if the amendment was necessary. *Simpson v. Lumber Co.*, 133 N.C. 95; *Williams v. May*, 173 N.C. 78. The amendment merely added an additional ground of negligence, and did not alter the original nature of the action. The court has ample power to amend, in furtherance of justice, either before or after verdict, Revisal, secs. 505, 507, and we do not review the exercise of its discretion in the absence of a clear abuse of the power. The judge must be presumed to have found the facts necessary to support his order when no facts are stated in the record. *McLeod v. Gooch*, 162 N.C. 122; *Gardiner v. May*, 172 N.C. 192; *Alston v. Holt, ibid.*, 417. We also are of the opinion that the allegations of the complaint, though somewhat general, were reasonably sufficient to include the matter covered by the amendment. Our ruling upon these questions disposes of the first six assignments of error, as to the removal of the cause and the matters of evidence, and, as to the latter, we think it was otherwise competent.

The exceptions to the charge of the Court and to the refusal of prayers for instructions to the jury are without merit. There was evidence of negligence sufficient to support the verdict. The real and proximate cause of the injuries to the plaintiff was the careless overloading of the car, which became topheavy and when it was put in motion the lumber lost its balance and toppled over and upon him. As his injury was due to the defendant's negligence, we do not see

that there was any assumption of risk. *Hux v. Refining Co.*, 173 N.C. 97. Plaintiff was ordered to do the work by a person in authority over him whose orders he was bound to obey, and the jury have virtually found that the risk and danger were not so obvious (94) that a man of ordinary prudence would not have gone on with the work, under the circumstances, and in the presence of the danger, for the court charged fully as to these matters, and we must presume that the jury observed the instructions. The charge as to contributory negligence fully covered the question as to assumption of risks, and when this is the case, we have held that a specific instruction as to assumption of risks or an issue as to it is not necessary. *Hux v. Refining Co., supra.* This case is very much like the one just cited in all its essential features. The charge was clear and accurate in its recital of the evidence, and in the explanation of the law applicable to it, and requests for instructions were substantially given in the charge. Upon the question of negligence, contributory negligence, including assumption of risks, and also upon concurring negligence, and the negligence of a fellow servant, the law could not well have been more correctly stated.

We affirm the judgment because we can find no error in the record. No error.

Cited: *Motors Co. v. Motor Co.*, 180 N.C. 620; *Powell v. Assurance Society*, 187 N.C. 597; *Morganton v. Hutton*, 187 N.C. 739, 740; *Bank v. Hester*, 188 N.C. 71; *Timber v. Insurance Co.*, 190 N.C. 804; *Burton v. Smith*, 191 N.C. 603; *Patton v. Fibre Co.*, 192 N.C. 50; *Butler v. Armour*, 192 N.C. 515; *Trust Co. v. R. R.*, 209 N.C. 310; *Whichard v. Lipe*, 221 N.C. 57; *Bank v. Sturgill*, 223 N.C. 827.

WAYNESVILLE HOSPITAL COMPANY v. C. D. SUTPHEN AND ALDEN HOWELL, JR.

(Filed 22 December, 1917.)

Fraud—False Pretense—Corporations—Principal and Agent—Vendor and Purchaser—Secret Agreement.

Where one actively secures subscribers to shares of stock in a corporation to conduct its business on a certain lot of land, representing that the lowest price for the property was a certain sum, and he has a secret agreement with the owner that he was to receive certain compensation for the sale, and upon the formation of the corporation by acceptance of the charter he has obtained, induces it to purchase the

land at the price stated, it was his duty to have disclosed his secret agreement with the owner, and his misrepresentation of the lowest price obtainable was fraudulent and obtaining money by deceit and false pretense.

APPEAL by plaintiff from *Shaw, J.*, at September Term, 1917, of HAYWOOD.

W. J. Hannah and Margan & Ward for plaintiff.
M. Silver and R. W. Winston for defendant.

CLARK, C. J. The complaint alleges, and there was evidence to support it, that the defendant Sutphen, who participated in organizing the plaintiff company, undertook to purchase for the company at the best and lowest bid a house and lot known as "Bonnie Castle" from his co-defendant, Alden Howell, Jr., for use as a hospital, (95) and that he reported to the company that such lowest bid was $9,300, and urged and procured its purchase at that price, whereas in truth and in fact he had an agreement "on the side" with his codefendant, the owner of the said property, by which Sutphen was to receive $400 for procuring the sale of the property to the company. There was also evidence that the company would not have accepted the bid had they known of this secret agreement.

The defendant admitted that he was the originator of the plan to organize the hospital company and procured most, if not all, of the members who joined the same and that on 27 November, 1916, he forwarded to the Secretary of State at Raleigh the charter which he had caused to be prepared but which was returned as imperfect, and he sent on a second copy, upon which the charter was issued 2 December. It was admitted that the company was organized on 8 December, 1916, by the stockholders accepting the charter at a called meeting and electing officers and directors and adopting by-laws. At that meeting the defendant Sutphen submitted the $9,300 offer from Alden Howell, Jr., who was also a member of the plaintiff company as well as Sutphen himself, and there is evidence that he represented this to be the best and lowest price at which the property could be bought and urged the stockholders to purchase it at that price, but he did not make known his secret agreement with the seller by which Sutphen was to receive $400 to induce the plaintiff to purchase at that price. The stockholders, at that meeting, agreed to purchase, and on 13 December took title at the price of $9,300, in ignorance of the secret agreement by which Sutphen was to receive $400 from said seller.

Sutphen admitted that on 29 November, while engaged in getting up the organization and two days after he had sent on an application for the charter to the Secretary of State, he had the secret agreement with Howell to get $400 "on the side" to secure the adoption of the purchase. But he asserts that he was not a "promoter," and therefore had a right to make this private agreement unknown to the associates whom he had induced to enter the company and who had entrusted him with securing the Bonnie Castle house and lot for the hospital. There was evidence for plaintiff by several witnesses in support of the allegation that Sutphen was the trusted agent of the corporators to secure such lowest offer for the company that was to be organized, though at that time it had not yet been legally "organized," and that if the stockholders had known at the time he reported and urged the bid of $9,300 that he was to make $400 for himself out of the sale, the company would not have accepted the offer.

(96) The defendant Howell files an answer in which he admits that there was an agreement "on the side" between him and Sutphen whereby he was to give Sutphen $400 out of the purchase price of $9,300, provided that said Sutphen should induce the company to take the Bonnie Castle property at that price, which agreement was not known to the plaintiff till after it had purchased the property at that price and taken the deed, and that he would have sold the property to the company at 8,900 but for such agreement to pay Sutphen for making the trade; that he had paid Sutphen $300 of this bonus, and he offered to pay the remaining $100 into court, whereupon a nonsuit was ordered as to Howell.

The agreement between Sutphen and Howell is in evidence and is as follows:

WAYNESVILLE, N. C., 29 November, 1916.

In the event of the sale of my property known as "Bonnie Castle" for hospital purposes and in view of the fact that Mr. Sutphen is the promoter of this movement for the establishment of a hospital for Waynesville, I hereby agree to pay him a commission of four hundred ($400) as a consideration for his efforts towards the selection and sale of the above property. ANDREW HOWELL, JR.

Among the resolutions adopted after the company was organized, and at the time of the purchase, on his recommendation, of the property at $9,300, the following resolution was adopted, Sutphen being present: "Mr. Swift moved that in view of the valuable services rendered by Mr. C. D. Sutphen in the promotion of this corporation

and his untiring efforts in its behalf, that he be recommended to the board of directors for the position of business agent, it being the sense of this meeting that his services in further promoting the interests of the hospital and keeping it in the eyes of the public would be of great value. Carried unanimously."

Notwithstanding the recital in the contract between Sutphen and Howell, and in the above resolution, that Sutphen was the "promoter" of the enterprise, his defense seems to be that he was not such and that when he made the contract on 29 November there had been only the preliminary meeting on 27 November, and that the real organization did not take place till afterwards, and therefore that he had a right to make this secret agreement and withhold knowledge thereof from the company when he urged and procured their acceptance and purchase of the property at $9,300 on the false representation that it was the best and lowest bid.

It is not material whether Sutphen was an agent or a promoter, nor that when he was entrusted by the meeting on 27 November with the duty of getting the best and lowest offer the company (97) was not then fully organized. He was acting as agent or promoter, if the evidence for the plaintiff is to be believed, and if he reported and urged the company after its organization to accept the offer of $9,300 as the best and lowest obtainable price, he was guilty of procuring $400 of the company's money by deceit and false pretense. There was clear allegation in the complaint to this effect and ample evidence to sustain it. Whatever evidence he could offer in rebuttal was matter for the jury, but he did not put on any evidence.

In the first ten verses of Chapter V of the Acts of the Apostles there was a transaction which bears a remarkable family resemblance to this case. The early disciples, in their effort to establish a system of owning property in common, agreed to sell all that they had and put the price into a common fund. One of them sold a possession, but, keeping back a certain part of the price, laid the rest at the Apostles' feet and represented it to be the full sum received by him. His fraud was detected. And his wife, ignorant of the punishment that had befallen him, assenting to the same statement, suffered the same punishment. Peter, the chief of the Apostles, said to the offender that it was not necessary for him to bring the price of the possession into the common fund, but having done so, it was a fraud to represent the part which he brought in as the whole amount received.

The case is stronger against Sutphen, if the evidence for the plaintiff is to be believed, and it had a right to have that evidence submitted to the jury. By his own admission, he got up the company and pro-

cured the charter. There is evidence that he was entrusted with the duty of getting the lowest and best bid, and that later he represented to the company falsely, in violation of the trust and confidence reposed in him, that $9,300 was the best and lowest price at which "Bonnie Castle" could be bought for the proposed hospital, and procured the acceptance by the company of the property at that price by his recommendation. Whereas, in fact, $8,900 was the price the owner was willing to take, and Sutphen admits that he reserved for himself out of the purchase money $400, which was to go, not to the seller, but into his own pocket. That such transaction, if found to be true by the jury, is in breach of good faith and good morals and was in fact and in law obtaining money by deceit and false pretenses, can require no citation of authority.

It was the duty of Sutphen to make to his fellow stockholders at the time he recommended the purchase of the property a full and fair disclosure of his interest and of all the facts which the corporation ought to know before entering into the intended contract. 10 Cyc., 275, 276.

The evidence of the plaintiff shows that Sutphen was the "promoter" of the enterprise, which also appears by his written agreement with Howell and the resolution passed by the meeting at the time
(98) the property was purchased on his recommendation. He admits that he took it upon himself to organize the plaintiffs into a corporation; to procure the necessary subscribers to the articles of incorporation; to see that the necessary documents were presented to the proper officers of the State to be recorded and to procure the necessary certificate of incorporation, and that he did generally what was necessary to "float the company." The same relation existed between the association and Sutphen when it was informally organized on 27 November as after it was legally organized, and the same good faith was required on his part toward his associates. The law requires of promoters of corporations that they make a full and fair disclosure to the corporation, when formed, of their interests, and it is a breach of trust for such promoter, who induces others to join in the enterprise, to purchase property at one valuation and then without making a full and fair disclosure to those whom he has induced to join the enterprise to sell such property to the company at a higher price, thereby taking to themselves a secret profit. 10 Cyc., 275 and notes; *Goodman v. White,* at this term.

The judgment of nonsuit and dissolving the order in arrest and bail is

Reversed.

W. H. HOOD ET AL v. F. L. SUTTON, MAYOR, ET AL.

(Filed 22 December, 1917.)

1. School Districts—Bonds—Municipal Limits—Election—Calls—Statutes.

Where a graded school district is established under chapter 96, Public Laws of 1899, with territory coterminous with the corporate limits of the town, and thereafter the territory is extended beyond such limits under a private law containing no authority to issue bonds, and there being no such authority conferred under the Laws of 1899, to issue them for the enlarged district, the board of aldermen of the town are without authority to call an election for the issuance of bonds by the enlarged district, by virtue of chapter 81, Public Laws of 1915, amended by chapter 130, Laws of 1917, this act being confined to the municipal limits and taxes levied on property therein; and such would destroy the uniformity of taxation with regard to the outlying territory but within the school district.

2. Same—Ambiguity.

Ambiguity, if any, in chapter 81, Public Laws of 1915, as to the calling of an election by the municipal authorities for a school district extending beyond the incorporate limits of the town, is resolved against the validity of such call by reference to other provisions therefor required by chapter 55 of the Public Laws, passed at the same session of the Legislature.

3. Elections—Injunctions.

While the courts are slow to restrain the holding of an election, it will nevertheless do so if the election contemplated would be held contrary to law, and therefore be ineffective and void.

APPEAL by defendants from order of *Stacy, J.*, at chambers, 21 November 1917, from LENOIR.

This is an action brought by the plaintiff in his own behalf (99) and in behalf of other taxpayers and residents of the city of Kinston to restrain the holding of an election and the issuing of bonds in the sum of $150,000 for school purposes in the Kinston Graded School District, plaintiffs contending that there is no authority for holding the election or issuing the bonds:

(1) For that the election has been ordered by the aldermen of Kinston instead of by the board of commissioners of the county on petition of the board of education.

(2) For that there is no legislative authority to issue bonds in excess of $25,000.

The defendants claim the right to hold the election and to issue the bonds under chapter 81, Public Laws of 1915.

A temporary restraining order issued, and upon the hearing it was

continued until the final determination of the action, and defendants appealed.

R. A. Whitaker for plaintiff.
Loftin, Dawson & Manning for defendants.

ALLEN, J. The Kinston Graded School District was established under authority of chapter 96, Public Laws of 1899, the territory included in the district being then coterminous with the corporate limits of the city of Kinston. This act was ratified by a vote of the people of Kinston under a provision in the act requiring the election to be held under the same rules and regulations as for the election of a mayor.

Under chapter 225, Private Laws of 1915, the district was enlarged to include much territory outside of the corporate limits of Kinston. This last act was also ratified by a vote of the people at an election held at the time of electing municipal officers and by the same judges and registrars, as required by the act.

There is no provision in either act for issuing bonds or for holding any election except one for the ratification of the acts, and the defendants must show legislative authority elsewhere for their action in ordering an election and for issuing the bonds.

They rely on chapter 81, Public Laws of 1915, as amended by chapter 130, Laws of 1917, which are recited in the resolution, adopted by the aldermen when the election was called, as their authority.

The act of 1917 is not material to the present inquiry as it does not deal with elections or issuing bonds, and an examination
(100) of the act of 1915 shows clearly that it refers only to incorporated towns and cities, and does not support to deal with districts, such as the Kinston Graded School District, which include municipal corporations and territory outside of the corporate limits.

The act of 1915 is entitled "An Act to authorize the *board of aldermen or other governing body of towns and cities* to issue, upon approval by vote of the people, bonds for purchasing sites, erecting buildings, etc., for school purposes." The act provides, in section 1, "That whenever it shall be necessary, *in the judgment of the board of aldermen or other duly constituted authority of any incorporated town or city* in the State, which is in charge of its finances, to purchase lands or buildings or to erect additional buildings for school purposes, *said board of aldermen or other authority* is authorized and empowered to issue for said purposes *in the name of said town or city,* bonds, etc."; in section 3, "Said bonds shall be signed by the

mayor, attested by the town or city clerk or treasurer, and *sealed* with the *corporate seal of said town or city,* and shall bear the signature of the *town or city clerk and treasurer* written, engraved, or lithographed"; in section 4, "That the *board of aldermen or other proper authority of said towns and cities* is hereby authorized to levy and collect each year, in addition to all other taxes in said city, *an ad valorem tax upon all the taxable property in said city,* sufficient to pay the interest on said school bonds as the same become due, and also at or before the time when the principal of said bonds become due, a further uniform *ad valorem tax upon all the taxable property in said city* sufficient to pay the same or provide for the payment thereof."

It therefore appears that under the provisions of the act under which the defendants are proceeding the governing body of the city or town is given authority to determine whether the bonds shall be issued or not; that the bonds are to be executed in the name of the city or town and by its officers; that there is no authority to levy any taxes for the payment of principal or interest, except upon taxable property within the corporate limits, and this excludes the idea that the act has any reference to a district which includes territory outside of the municipal corporation, as otherwise the city or town would be required to issue its bond, imposing upon it an obligation to pay, and to collect taxes for the payment of the principal and interest from its citizens for the benefit of territory outside of the corporate limits, when those in this territory would not be bound and would not be required to pay principal or interest, or be subject to any tax levy, which would destroy the principle of uniformity in taxation. *Faison v. Comrs.*, 171 N.C. 415.

There is no ambiguity in the statute and no room for construction, but if its meaning were doubtful, the doubt would be resolved against the defendants because at the same session of the General Assembly provision is made by chapter 55, Laws of 1915, for (101) school districts, like the Kinston Graded School District, which include incorporated towns and cities and territory outside, to issue bonds for school purposes.

The first section of this last act provides that "the board of county commissioners of any county in the State shall, upon the petition of the couty board of education, order an election . . . to be held in any county, township, or school district which embraces an incorporated town or city," to ascertain the will of the voters on the question of issuing bonds for school purposes. The act further regulates the holding of the election for bonds and the use of the proceeds, and

has express provision that in no case shall bonds issued by any school district exceed the sum of $25,000.

We therefore conclude that there is no authority in the governing body of Kinston to call the election or to issue the bonds, and that if an election is held, it must be under chapter 55, Public Laws of 1915, or under the act a copy of which is attached to the complaint.

We are not inadvertent to the fact that the plaintiffs are asking a court of equity to restrain the holding of an election, a jurisdiction which the courts are slow to exercise, and they will not do so except where it is clear that the election would be held contrary to law, and would be ineffective and void, as appears from this record. 9 R. C. L., 1001; 14 R. C. L., 375; *Conner v. Gray,* 9 Anno. Cases, 121 and note; *R. R. v. Comrs.,* 109 N.C. 159.

We therefore conclude that there was no error in continuing the restraining order.

Affirmed.

Cited: *Hill v. Lenoir County,* 176 N.C. 587; *Griffith v. Board of Education,* 183 N.C. 409; *Coble v. Commissioners,* 184 N.C. 355; *Hailey v. Winston-Salem,* 196 N.C. 23.

MARY M. MAKELY v. WASHINGTON-BEAUFORT LAND COMPANY.

(Filed 22 February, 1918.)

Wills — Devise — Powers of Sale — Purchaser — Application of Funds — Trusts and Trustees.

A devise of land to the wife, to have "complete control" for her life, to sell to pay debts of testator, who was her husband, and for division among their children, with power to give any share to testator's grandchildren, subject to the support of their parents for life, "and to sell and make deed for said property as if it were her own, and without being required to give bond," and expressing anxiety as to two of the testator's children, with "hope that they will come around all right": *Held,* the will conferred the power upon the wife to sell the land in her discretion and make a valid deed, not requiring the purchaser to see to the application of the purchase money.

CIVIL ACTION, tried before *Bond, J.,* at January Term, 1918, of CHOWAN, upon case agreed.

Plaintiff Mary M. Makely, on 9 January 1918, sold to the defendant above named a tract of land, known as the "Donnell (102) Farm," with certain exceptions, for a valuable consideration, which defendant agreed to pay, and a deed sufficient in form to pass the title, and duly executed, was tendered by her to the defendant, which the latter refused to accept upon the ground that the title is defective, as under the will of her husband, Metrah Makely, the source of her title, she has no power to sell the land, and the controversy between the parties calls for a construction of the will, the relevant parts of which are as follows:

"I give, bequeath, and devise all my property of every kind to my beloved wife, Mary, to have complete control of during her life, to sell to pay any just debts of mine, or to sell to divide among her children, George, Metrah, Luella, Alice, and Agnes, to be divided equally between them. In the event my wife should be of the opinion that it would be to the interest of the grandchildren to give any share to the said grandchild and not to the said heirs or child, said heir or child is to have his or her support from said property as long as he or she lives, but no right to sell or in any way to dispose of the said property and leave their child destitute. I am afraid of our two sons, George and Metrah, but hope that they will come around all right. My wife is to take said property, what she needs for her support, and to sell and make a deed for the said property as if it were her own, and without being required to give a bond. I prefer that the most of the land be sold, where it can be sold at a fair price, the piece of the Donald farm, the Blount tract, if it can be retained for George or his children without injuring the sale of the balance, I prefer it to be retained and charge what it is worth to that share."

No part of the Blount tract mentioned in the will is involved.

Judge Bond held that plaintiff has the power, under the terms of the will, to sell the land, and that her deed would therefore convey a good title. Judgment was rendered accordingly, and defendant appealed.

S. Brown Shepherd and Pruden & Pruden for plaintiff.
No counsel for defendant.

WALKER, J., after stating the case: There is no question raised as to the proper distribution of the fund derived from a sale of the land, the only question being whether plaintiff has the power under the will to sell. The power is given twice; in the first part of the will, it is directed that she may sell for the purpose of paying debts or for a division among the children, and in a later clause a less restricted

power is bestowed, namely, "she is to take said property, what she needs for her support, and to sell and make a deed for the same
(103) as if it were her own, and without being required to give a bond," and then a preference is expressed, "that the most of the land be sold, where it can be sold at a fair price, the Blount tract to be retained for George or his children, if this can be done without impairing the sale of the other tract, the value of the Blount tract to be charged to that share."

As we have stated, the Blount tract is not embraced by the description in the deed tendered by the plaintiff, and has not been sold, so far as appears. It would seem that the language of the will is quite broad and comprehensive and confers a power very extensive in its scope. The testator evidently was very solicitous about the interests and welfare of his children, and was somewhat doubtful, as well as anxious, about the career of at least two of them. In his lifetime he could watch over them and act for the promotion of their best interest, but he wished to devolve this duty in respect to them upon his wife, in whom he had great confidence, after his death, so that she might take his place and exercise her judgment and supervising care in their behalf, having the same interest as he in their welfare. He therefore gave her large discretion, so that she could exercise a proper and adequate restraining influence and do what was best for them according to the existing circumstances, a not infrequent provision to be found in wills. She had the power in the distribution of his estate to prefer a grandchild to a child, in order to disinherit any one who might prove to be unworthy of his bounty or to do what seemed best to her as between the children and grandchildren. She was specially authorized to sell that she might pay his debts or divide the estate among the children. This provision would confer the power to sell without reference to the other parts of the will where a power is also conferred. The purpose in making the sale is not stated, nor was it material that it should be, as we are not concerned with that matter in the present phase of the case, as we do not understand it to be required that the purchaser should look to the application of the proceeds of the sale.

Cases bearing more or less upon the question in this case have been decided by this Court. The language of *Judge Manly* in *Stroud v. Morrow*, 52 N.C. 463, lends support to our construction of Mr. Metrah Makely's will. The learned judge there said: "The question presented for decision upon the case agreed is, as we think, free from difficulty. The wife's estate for widowhood is coupled with a power of disposition by sale, will, or otherwise, absolute and unconditional.

There seems to be no restriction upon it except that discretion in which her deceased husband so entirely confided, and we are accordingly of opinion that her covenant of a right to convey as set forth in the case is true, and consequently the action cannot be maintained. Our opinion is based upon the strong and explicit language employed by the testator in his will. All property is given therein to the wife during life or widowhood, *with full power to dispose of the same by sale, will, or otherwise, at her discretion,* for her (104) and their common children's use and benefit, etc. The power to convey by will is clear to the point that the estate to the wife was not simply during widowhood, with power to apply the *income,* but intended to leave it to her discretion, if circumstances required it, to sell in her lifetime or to dispose of it by will at her death. The power of sale is scarcely less significant. It would be an extraordinarily use of that term to mean by it a power to mortgage or pledge for a limited time only to raise moneys or pay debts. The power to sell, absolutely, is clear; which disposes of the case before us, and we forbear to discuss the rights of persons under the will which may arise upon other possible contingencies." He also alludes to the fact that in *Little v. Bennett,* 58 N.C. 157, an estate devised for purposes similar to those declared in the *Stroud* case, and with a power of sale for the more complete fulfillment of the testator's intent, was held to create a trust with respect to it, with an absolute power of disposition, and that the estate in reversion was subject to be divested by and to the extent that the power was exercised.

The case of *Troy v. Troy,* 60 N.C. 624, is like our case in one or two respects. Mr. Robert E. Troy devised all of his property to his wife during her life, with remainder to his son, Alexander Troy, but provided that his wife should have the power to sell any part or all of it as she might deem proper in the exercise of her judgment. It was held that this was a power appurtenant, and the estate created by the exercise of it took effect out of her life estate as well as out of the remainder, and that the exercise of this right vested in the purchaser an estate in fee simple, and he was not bound to see to the application of the purchase money. See, also, to the same effect, *Parks v. Robinson,* 138 N.C. 269; *Wright v. Westbrook,* 121 N.C. 156; *White v. White,* 21 Vt. 250; *Underwood v. Cave,* 176 Mo. 1. We are of the opinion that the terms of this will more clearly express the intention to confer a power of sale upon the wife at her discretion than those contained in the wills construed in the cases we have cited.

We have given the same construction as herein indicated to this will, at this term, in *Makely v. Shore,* where the *Chief Justice* says: "The

will not only gives the property to the wife for her life with 'complete control' to sell and divide the same, but gives her the right to appoint the property to the grandchildren instead of to the children, subject only to giving the children a 'support' from the property."

The learned judge decided correctly upon the facts stated in the case, and this affirms the judgment.

Affirmed.

Cited: *Wells v. Williams,* 187 N.C. 139.

(105)

COMMISSIONERS OF BLADEN COUNTY v. S. W. BORING.

(Filed 21 February, 1918.)

1. **Constitutional Law — Counties — Townships — Bond Issues—Endorsement—"Faith and Credit."**

Where townships upon petition to the county commissioners are permitted by statute to call an election for the purpose of voting upon the question of the issuance of township bonds for the roads of the township, the proceeds to be turned over to the sole management and control of the township commissioners, with further provision that the county endorse the bonds upon being satisfied of the validity of the issuance under the statutory authority conferred, the endorsement by the county of the township bonds is a loan of the credit of the county, without benefit to the other townships, however remote the liability and contrary to the Constitution, Art. I, sec. 17; Art. VII, sec. 7. *Commissioners v. State Treasurer,* 174 N.C. 141,, cited and applied.

2. **Same—Statute—Intent—Part Constitutional.**

Where a provision of a statute authorizing the issuance of bonds is valid and complete in itself and evidences the intent of the Legislature that township bonds for road purposes may be voted upon and issued as bonds of the township, and there is an unconstitutional provision of the same act authorizing the endorsement of the bonds by the county tending to increase the market value of the bonds: *Held,* the unconstitutional feature of the statute does not affect the validity of the constitutional part, and the bonds may be sold without the endorsement of the county.

3. **Counties—Townships—Principal and Agent—Constitutional Law.**

Held, under the facts of this case, that a county may act as the agent of a township in the issuance of the bonds of the township for road purposes.

4. **Constitutional Law—"Faith and Credit"—Statutes—Counties—Townships—Bond Issues—Principal and Agent.**

Where the townships of a county are authorized by statute to sepa-

rately act upon and issue township bonds for road purposes, with an unconstitutional provision that the county endorse the bonds of such townships as should issue them, the fact that several or all of the townships should issue them, the fact that several or all of the townships have voted for the issuance of the bonds under the valid provisions of the act does not affect the unconstitutional provision thereof as to the endorsement of the bonds by the county.

CLARK, C. J., concurring in part and dissenting in part.

CIVIL ACTION, tried before *Bond, J.*, at December Term, 1917, of Bladen.

Under the provisions of chapter 336, Public-Local Laws of 1915, three townships in Bladen County have voted for the issue of bonds for the improvement of the roads in the township, to the amount of $27,500, and the county commissioners sold the bonds to defendant and offered to execute the same on behalf of the townships and to endorse them on behalf of the county as provided in the act. The defendant refuses to comply with his contract of purchase, alleging that the commissioners have no right to endorse the bonds on (106) behalf of the county, and that the bonds are not valid as township bonds without such endorsement, and the court below so held.

The facts agreed exclude any question as to the passage of the bill, the regularity of the elections authorizing the bonds, or the sale of the bonds, and the controversy narrows itself down to a construction of said act upon two points:

1. Have the commissioners of Bladen County the right, on behalf of the county, under section 5, chapter 336, Public-Local Laws of 1915, to endorse and guarantee payment of the bonds?

2. If the commissioners have no such right, are not the bonds valid as township bonds?

The act (in section 1) provides that when 25 per cent of the voters in any township in the county shall file with the commissioners a petition asking for an election in such township upon the question of issuing road bonds, the commissioners must order the same. The petition, as well as the notices of election following it, must state the amount of bonds to be voted on, the term of years for which they are to run, the rate of interest that they shall bear, not to exceed the legal rate. All these questions are left to the people of the township.

Section 2 of the act provides that if a majority shall be cast in favor of the bond issue, the county commissioners shall advertise for sale, sell, and issue the bonds for the township, and that the bonds so issued shall be township bonds and not county bonds.

Section 3 of the act is as follows: "The Board of Commissioners of

Bladen County, in order to provide for the payment of the interest on such bonds as may be issued by any township and to create a sinking fund which shall be sufficient to redeem such bonds at maturity, shall compute and levy each year, at the regular time for levying other taxes, a sufficient tax on all taxable property and polls within such township; and in so doing shall observe the constitutional equation between property and polls."

Section 11 of the act provides that these taxes shall be collected as other State and county taxes are and shall be kept separate and distinct from all other taxes, and used only for the purpose of paying the interest and creating a sinking fund. The act then provides for the election of township highway commissioners, throws certain definite restrictions around the expenditure of the money and the manner of building the roads, and the latter part of section 29 provides that when the bonds have been sold, the county commissioners shall turn over to the highway commissioners the proceeds therefrom, less any amounts

which may be necessary to keep in hand in order to meet any
(107) interest accruing before the next tax levy can be collected.

Section 5 is as follows: "That when any such bonds shall have been issued, and it appears that the sale of the same can be effected, the Board of Commissioners of Bladen County shall cause an investigation to be made for the purpose of ascertaining whether or not the said bonds have been issued in accordance with law and are a binding obligation upon the township issuing the same; and if it shall appear that the election herein provided for has been properly held, that the bonds have been properly and legally issued, and that the same constitute a binding obligation against the taxable assests of such township, then the Board of Commissioners of Bladen County shall, on behalf of the county, endorse and guarantee the payment of such bonds and the interest thereon: *Provided,* that in the event default should be made by the said township or the officials thereof in the payment of either the interest or the principal of said bonds, the county of Bladen shall not be in any way liable for the payment of any amount whatsoever on account thereof until all the taxable assets of the township issuing such bonds shall have been fully exhausted."

The court held, and so adjudged, that the commissioners had no legal authority to guarantee the bonds, and that without such guaranty they are not valid obligations of the county or of the township. Plaintiffs appealed.

E. F. McCulloch, Jr. and Bayard Clark for plaintiff.
Sinclair, Dye & Ray for defendant.

WALKER, J., after stating the case: One question in this case is whether it is governed by the principal stated and applied in *Commissioners v. States Treasurer*, 174 N. C., 141. We are unable to distinguish the two cases. The following we consider to be a fair statement of the substance of that decision:

First. Under Laws of 1917, ch. 6, sec. 20, providing that townships and road districts created by special act of the General Assembly may avail themselves of the benefits of the chapter, a statute designed to enable the State to lend its aid to road building and maintenance in counties, townships, and road districts upon compliance with the requirements 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, and under other provisions of the chapter and its general meaning and purpose, whether a loan from the State for the purpose of road building and maintenance be applied for by a county, township, or road district, the bond tendered the State must be that of the county.

Second. The Legislature of North Carolina is without power to require a county to give its binding obligation to pay the in- (108) terest on a loan at 5 per cent for 41 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, since it is not within the legislative power to tax one community or local-taxing district for the exclusive benefit of another; hence Laws 1917, ch. 6, sec. 20, so requiring a county is violative of Constitution, Art. I, sec. 17, providing that no person shall be in any manner deprived of his property but by the law of the land.

Third. A State or county, as a rule, may lend its aid or expend its money in the building or maintenance of a public road anywhere within its borders when it is being done for the public benefit or as a part of a State or county system, but no taxing district can be taxed for the exclusive benefit of another district.

Fourth. Laws 1917, ch. 6, is designed to enable the State to lend its aid to road building and maintenance in counties, townships, and road districts, and section 20, requiring the county to give its binding obligation to pay the interest on a loan at 5 per cent for 41 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, is violative of Constitution, Art. VII, sec. 7, providing 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, unless by a vote of the majority of the qualified voters therein.

Fifth. When two constructions of a statute are permissible, the courts, in favor of upholding legislation, should adopt the construction which is in accord with the organic law; but the principal does not justify a departure from the plain and natural significance of the words employed which the meaning and purpose of the law clearly tend to confirm and support.

Sixth. When the constitutionality of a statute is the question what the statute authorizes, and not what is being presently done under it, furnishes the proper test of validity.

The only difference between that case and this one is merely formal, for there the county was required to issue the bond as its own independent obligation for the township, the county being the principal, while here the county is required to endorse or guarantee the township bond. In the one case the obligation of the county is primary, in the other it is secondary. Nevertheless, the county would incur an obligation for the township, contrary to the principle of the *Lacy* case, that a State or county, as a rule, may lend its aid or expend its money in the building or maintenance of a public road anywhere within its borders when it is being done for the public benefit or as a part of a State or county system; but no taxing district can be taxed for the exclusive benefit of another district. Under such a provision as
(109) that contained in the statute, one township would get the benefit of road improvement and maintenance within its borders at the expense of all the other townships and without their consent expressed at an election. We have frequently held, at least in principle, that where the roads of the different townships or districts are set apart and a scheme is devised whereby they can be planned, laid out, constructed or improved entirely under the township's control and management, and without reference either to State or county benefit, it is not within the legislative power to tax one community or local district for the exclusive benefit of another. *Harper v. Comrs.*, 133 N.C. 106; *Faison v. Comrs.*, 171 N.C. 411; *Keith v. Lockhart*, 171 N.C. 451, and numerous cases in other jurisdictions collected in *Commissioners v. State Treasurer, supra,* are to the same effect.

"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." Cooley on Taxation (3 ed.), 430.

"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." 37 Cyc., 749.

Taxes should be laid upon those only for whose benefit they are imposed, and when the burden is laid upon one locality for benefits accruing solely to another it is violative of constitutional guarantees as contained in the Constitution, Art. I, sec. 17, providing that no person shall be deprived of his life, liberty or property but by the law of the land. The clear injustice of any other rule of action is apparent. It is provided in Constitution, Art. VII, sec. 7, that no county, city or 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 a majority of the qualified voters therein. While the construction of public roads is a necessary expense, as has been so often decided, we held in the *Lacy* case that the establishment of a road system confined to a township or road district, and under its control and for its special benefit, is not a necessary county expense; and even if sanctioned by a majority of the voters of the township or district at an election, the Legislature cannot create any obligation of the county which must be paid by taxation of the entire county when the voters in the latter have not consented thereto, and there is not even a method provided for their doing so.

The Court said in *Commissioners v. State Treasurer, supra:*

"A localized road system can in no sense be considered a neces- (110)
sary 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."

This review of the *Lacy* case, we think, shows unmistakably that this case falls directly within its governing principle. It can make no difference that in the *Lacy* case the county was a principal, and not a surety or guarantor for the township. In either case the county is made to assume a liability or obligation for the township. And it must be observed that Constitution, Art. VII, sec. 7, refers not only to a debt, but to a pledge of its faith or loan of its credit, and a guaranty is of the latter class. The prohibition of that section was on ground upon which the decision in the *Lacy* case was based. The language of section 7 of Article VII was purposely given a broad scope so as to include any and every form of indebtedness, legal obligation or liability, for it was seen that the same rule should be provided for all in order to protect the people against discriminating and unjust taxation.

But it is argued that the county may never have to pay, as the "tax-

able assets" of the township must be fully exhausted before it can be called upon to make good any deficiency. This does not destroy the debt, pledge of its faith, or loan of its credit, or alter in the least the legal character of its undertaking, and it may also be said that the suggestion, if carried out, would lead to the conclusion that if the county will never have to pay, there was no use in requiring its guaranty of the debt, as it would add nothing to the credit of the township or to the salable value of the bonds on the market. The question, therefore, is not whether the county *will* have to pay, but whether it *may* have to pay on default of the township. An ordinary guarantor may never be called upon to pay for his principal, because the latter is able himself to pay, but this does not alter the character of his liability in law. It is only something incident to the relation he has assumed.

In the *Lacy* case this contention also was met as follows: "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 payment of 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 accrue, or that the power is being exercised in a benevolent manner, for when a statute is being squared to the
(111) 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.'" But the probability of the county never having to pay anything not only does not change the nature of its obligation, but the suggestion is further answered by the fact that it is not the eventual amount of the liability that determines the question of its original validity, but solely the character of the obligation assumed, whether the money risk is small or great. We must hold, therefore, that the *Lacy* case applies, and that the county has no power to guarantee the payment of the bonds.

But we are of the opinion that this conclusion does not affect the validity of the township bonds. The guaranty of the county was intended to add its credit to that of the township and increase thereby the market value of the bonds. It surely was not intended to go beyond this and make the guaranty a condition precedent to the validity of the bonds, or, in other words, that the power of the township to issue the bonds and that of the county to guarantee them were inseparably joined together, so that the one could not exist without the other. The guaranty was intended for the benefit of the township and the pur-

chasers of its bonds. If they choose to take the bonds without the guaranty, we do not see why they cannot legally do so. We think the principle of the following cases applies: *Berry v. Haines,* 4 N.C. 311; *Darby v. Wilmington,* 76 N.C. 133; *Cotton Mills v. Waxhaw,* 130 N.C. 293; *Lowery v. School Trustees,* 140 N.C. 42-43.

Where a part of a statute is invalid, the remainder, if valid, will be enforced, provided it is complete in itself and capable of being executed in accordance with the apparent legislative intent; but if the void clause cannot be rejected without causing the statute to enact what the Legislature did not intend, the whole of it must fall. 26 A. & E. Enc. of Law (2 ed.), 570; Black on Const. Law, p. 64; *Lowery v. School Trustees, supra; Keith v. Lockhart, supra.*

"Even in a case where legal provisions may be severed in order to save, the rule applies only when it is plain that the Legislature would have enacted the legislation with the unconstitutional provisions eliminated." *Employers' Liability Cases,* 207 U.S. 463, 501; *R. R. v. McKenonill,* 203 U.S. 514; *Riggsbee v. Durham,* 94 N.C. 800; *Greene v. Owen,* 125 N.C. 212.

The leading or dominant intent in passing this statute was to authorize the issuing of township bonds, which can be done without any endorsement of the county, and the object, if not the sole object, to be attained by the guaranty was, as we have said, to increase the market value of the bonds so that they may be sold for an adequate price, or to the best advantage. But if this can be done without the endorsement, and it appears in this case that it can be done, we (112) should not declare the entire statute to be void. It is stated in the brief of the defendant's counsel that he will take the township bonds without the county's endorsement if the county has no power to endorse them.

There can be no doubt upon the question incidentally presented in the case that the county may act as agent for the township in the manner described in the statute. *Jones v. Comrs.,* 107 N.C. 248, 265; *McRackan v. R. R.,* 168 N.C. 62; *Edwards v. Comrs.,* 170 N.C. 448.

The fact that more than one of the townships has voted for the issue of bonds, each for itself, can make no difference in the result. They do not even collectively constitute the county in its corporate capacity, but each is acting for itself, and the law is the same as if only one township had issued bonds, for several of the townships is no more the same entity as the county than one township would be, not even if they acted in concert, which they cannot do, as it is required by the statute that each township should act for itself by a separate vote, the county being its agent in certain respects.

Our conclusion is that the township bonds are valid, but that the

county cannot endorse them or add its guaranty to them. This modifies the judgment.

The costs of this Court will be taxed against the plaintiff Board of Commissioners of Bladen County.

Modified.

CLARK, C.J., concurring in part and dissenting in part: The bonds being issued by the township for necessary purposes, under a vote of the people, and under the authority of an act of the Legislature, there can be no doubt as to their validity.

The act, however, is also equally explicit (section 5) in authorizing the board of commissioners on "behalf of the county to endorse and guarantee the payment of such bonds and the interest thereon," after investigation by the commissioners and a finding by them that the bonds have been legally issued and are a binding obligation against the taxable assets of such township, with a *proviso* that "the county of Bladen shall not be in any way liable for the payment of any amount whatsoever on account thereof until all the taxable assets of the township issuing such bonds shall have been fully exhausted." With this *proviso*, the county could not incur any liability, as a matter of fact, and the endorsement is merely to give the bonds a higher market value, thus benefiting the township without risk to the county.

A perusal of the State Constitution with a microscope of the highest possible power will fail to discover a single line or word or intimation that prohibits the Legislature from authorizing a county to en-
(113) dorse the bonds of one of its townships issued for necessary purposes. If there is, the language should be pointed out. It would be passing strange if there could be such prohibition upon the Legislature since the Legislature has repeatedly bound not only the county in which the local improvement has been made, but all the counties of the State therefor. The Quaker Bridge Road in Jones and Onslow and the public road in Jones County from Core Creek to Trenton were built at State expense, Jones County bearing its part, though the road is no part of a State system. The same is true as to a public road built at State expense in Pender County and the Hickory Nut Gap Road and many similar enterprises. All the numerous State appropriations for railroads have been made by the sale of bonds issued by the whole State for the benefit, in each instance, of a few counties through which these roads run.

Even now the State is giving aid for the construction of a short railroad from Elkin to Sparta and to the reconstruction of the Hickory Nut Gap Public Road. The Dismal Swamp Canal and Harlowe's Creek Canal were built largely at State expense, though of local value

mostly and of no benefit to the State at large. If Cherokee and other western counties can be taxed to pay bonds issued for public roads and canals in the East and if California and Oregon can be taxed for building waterways or highways in North Carolina, the Legislature can certainly, as in this case, authorize a county to give the aid of its credit to one of its townships by endorsing bonds issued for necessary expenses, this being done without any risk to the county and when there is nothing in the Constitution restricting the Legislature in such exercise of its power to direct the public policy of the State.

Our State has also pursued the policy of exchanging bonds with a railroad corporation, giving its own bonds for the railroad bonds, as among other instances, to aid in building the short line of railroad from Taylorsville to Statesville, better known as the "Junebug Railroad," and in the construction of the Chatham Railroad, with which it not only exchanged State bonds for railroad bonds, but it also exchanged State bonds with the city of Raleigh, which had subscribed for the construction of that railroad, and in other cases. The instances have been numerous.

In passing upon the constitutionality of the statute, the question is not whether this Court or a previous Court has held such act invalid or valid, but whether the Constitution itself shows any prohibition on the Legislature to pass the act. Such prohibition must be clear and explicit, "beyond a reasonable doubt." It was so held by *Chief Justice Marshall,* who invented, or first asserted, the claim of the supremacy of the courts over the Executive and Legislative Departments, in *Marbury v. Madison,* 1 Cranch, 137, and this restriction on what would otherwise be an unlimited and arbitrary power in the courts—the autocracy of an irreviewable veto—has been affirmed several hundred times (114) since by State and Federal Courts. *Ogden v. Sanders,* 12 Wheat., 213; 6 R.C.L., p. 82, and cases cited in notes, secs. 81-86, and 98-116.

Unless the Legislature is expressly prohibited by the Constitution from passing an act, then the matter rests in the discretion of the law-making power, and the Court has no power to interfere with the legislative exercise of its right to direct the public policy of the State, without itself violating the Constitution, which provides that the three departments of the government—Legislative, Executive, and Supreme Judicial—shall be "forever separate and distinct from each other." Constitution, Art. I, sec. 8. Neither of the three departments is given control over the other two beyond the power given the legislative, which is nearest to the people and with shorter terms of office, to impeach and remove any official. In other respects, all three are left subject to control by the people only, who will pass upon their conduct in the election of their successors as public agents. So jealous has North

Carolina always been of the free and untrammeled expression of its will by its Legislature, subject only to review by the people themselves, that this State has never given the Governor the veto power to this day. It certainly did not intend to give an irreviewable veto to the courts, especially in cases where the Constitution does not expressly forbid the General Assembly to act.

Cited: Martin County v. Trust Company, 178 N.C. 32; *Comrs. v. Trust Co.,* 178 N.C. 173; *Brunswick-Balke Co. v. Mecklenburg,* 181 N.C. 388; *Jones v. Board of Education,* 185 N.C. 309, 310; *Bank v. Lacy,* 188 N.C. 29; *Ellis v. Greene,* 191 N.C. 765; *Greene Co. v. R. R.,* 197 N. C. 423; *Banks v. Raleigh,* 220 N.C. 37; *Strickland v. Franklin Co.,* 248 N.C. 674.

R. C. BARCLIFT AND WIFE v. NORFOLK SOUTHERN RAILROAD CO.

(Filed 20 February, 1918.)

1. Railroads—Construction—Waters—Damages—Limitation of Actions.

Under the provisions of Revisal, sec. 394 (2), that actions to recover damages caused by the construction of a railroad, or repairs thereto shall be commenced within five years, etc., after the cause of action accrues, the statute does not necessarily begin to run from the time the road or structures were originally erected if thereafter changes have been made therein which caused appreciable and substantial damages to adjoining lands.

2. Same—Ditches—Increase of Flow.

A railroad company in 1881, by lateral ditches, diverted quantities of water from their natural flow, conveying a part of the same by a drain ditch towards plaintiff's land, passing through a culvert under a county road, which method was sufficient at that time not to appreciably injure the plaintiff's land or crops growing thereon. In 1911 the company enlarged the ditch so as to increase the flow of the diverted water, to the substantial damages to the plaintiff's land and crops he endeavored to grow thereon, for which compensation is sought in the action: *Held,* the statute began to run from the later date, 1911. Revisal, sec. 394 (2).

3. Railroads—Waters—Measure of Damages—Entire Damages—Crops.

The damages to land caused by the building of a railroad and structures within contemplation of Revisal, sec. 394 (2), are the entire damages, past, present, and prospective, including not only the depreciation of the land incident to the trespass, but also the injury to growth of crops during the period covered by the enquiry to the time of trial, which may be assessed by the jury on separate issues as to each.

BARCLIFT *v.* R. R.

CIVIL ACTION, tried before *Kerr, J.*, and a jury, at November (115) Term, 1917, of PASQUOTANK.

The action, instituted 30 October 1915, is to recover for the alleged wrongful diversion of water by defendant company on the lands of plaintiffs R. C. Barclift and his wife, Lavina, causing substantial damages to the same. On denial of liability, the jury rendered the following verdict:

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

2. Has the defendant wrongfully diverted and discharged the water on the lands of the plaintiff, as alleged? Answer: "Yes."

3. What damage, if any, was done to the crops of Luna Barclift during the years 1913, 1914, 1915, 1916, and 1917? Answer: "1913, $75; 1914, $75; 1915, $87.50; 1916, $50; 1917, $100. Total, $387.50."

4. What permanent damage, if any, has the plaintiff, Lune Barclift, sustained to her lands described in the complaint by the wrongful acts of the defendant? Answer: "$50."

5. Is the right of action of the plaintiffs barred by the statute of limitations? Answer: "No."

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

Aydlett & Simpson and Thomas J. Markham for plaintiff.
Ward & Thompson for defendant.

HOKE, J. There were facts in evidence tending to show that defendant company, constructing its road in 1881, by lateral ditches diverted quantities of water from its natural flow and drainage and by a drain ditch conveyed a part of this diverted water towards the lands of plaintiffs, passing through a culvert under a county road, etc.; that this drain ditch, as originally made by the company, was about six feet wide and two to three feet deep and held the water in such fashion that the culvert under the county road and lower drain ditches were sufficient to carry same to a natural watercourse and without appreciable injury to plaintiff's lands or the production of crops growing thereon; that in 1911 the company enlarged this drain ditch to 9 feet in width and made it much deeper, and in this way increased the flow of this diverted water to such an extent that the culvert under (116) the road and the lower ditches were insufficient to carry it off, and the plaintiff's lands and the crops he endeavored to grow thereon were thereby greatly injured and damaged.

These facts, which have been accepted by the jury and established

by their verdict, give plaintiffs a clear right to recover, and there is no error, to defendant's prejudice, in the proceedings below.

Our statute, Revisal, sec. 394, subsec. 2, provides that actions to recover damages caused by the construction of railroads or repairs thereto shall be commenced within five years after the cause of action accrues and requires that, in any such action, the jury shall assess the entire amount of damage which the party aggrieved is entitled to recover by reason of the trespass upon his property. In construing this statute, it has been repeatedly held that the limitation begins to run, not from the time the road or structures are built or repaired, but from the time that said structures cause appreciable and substantial damages to the property. It is further held that the entire damages shall be awarded, "past, present and prosepctive," and that said damages may properly include, not only the depreciation in the value of the land incident to the trespass, but also the injury to growth of crops during the period covered by the inquiry and to the time of trial, and that these different sources of damages may be assessed on separate issues if such a course is found desirable. These positions were all recognized and applied in *Barclift v. R. R.*, 168 N.C. 268, a suit between these same parties concerning another piece of land in the same locality and involving the same diversion of water and the trespass incident to this alleged wrong. That well-considered case is in full accord with our decisions on this subject, and we regard it as decisive of all questions presented on the present appeal. *Perry v. R. R.*, 171 N.C. 38; *Duvall v. R. R.*, 161 N.C. 448; *Porter v. R. R.*, 148 N.C. 563; *Beasley v. R. R.*, 147 N.C. 362; *Stack v. R. R.*, 139 N.C. 366; *Ridley v. R. R.*, 118 N.C. 996.

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

No error.

Cited: Barcliff v. R. R., 176 N.C. 41; *Jackson v. Kearns*, 185 N.C. 420; *Phillips v. Chesson*, 231 N.C. 570.

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WHITMORE-LIGON COMPANY, INC., v. R. B. HYATT, SHERIFF OF EDGECOMBE COUNTY, S. A. GARDNER AND R. E. FULFORD.

(Filed 20 February, 1918.)

1. **Statutes—Vendor and Purchaser—Merchandise in Bulk—Police Powers—Constitutional Law.**

   Statutes regulating the "sales of merchandise in bulk" are a valid exercise of the police power of the State. Pell's Revisal, 964a, as amended.

2. **Statutes—Vendor and Purchaser—Merchandise in Bulk—Void Sales.**

   A "sale in bulk of a large part or the whole of merchandise" under the conditions set forth in our statute, without an inventory and proper notice to creditors, or without an adequate or proper bond to account for the proceeds, is absolutely void as to creditors and may be made available for their debts and claims.

3. **Same—Exemptions and Executions.**

   A vendor of merchandise in bulk which is void under our statute is not deprived of his right to his personal property exemption under execution of his judgment creditor.

4. **Sheriffs—Exemptions—Fees Demanded.**

   Where the judgment debtor claims his personal property from execution, the sheriff is justified in refusing to proceed further till such exemptions are properly set apart, and the payment of his fees for the purpose by the plaintiff in the action, except when the suit is brought *in forma pauperis*. Revisal, sec. 1275.

CIVIL ACTION, heard on demurrer to complaint by *Daniels, J.*, at November Term, 1917, of EDGECOMBE.

The action was in part against the defendant sheriff, to compel the sale of certain goods levied on under an execution in plaintiff's favor against defendant S. A. Gardner, judgment debtor, and without setting apart the personal property exemptions of said Gardner, as requested by him, and also to recover certain penalties against said sheriff by reason of other defaults in the enforcement of said process. The claim for specific penalties having been withdrawn, the demurrer of the sheriff to plaintiff's first cause of action was sustained, and plaintiff, having duly excepted, appealed.

There were other facts stated in the complaint looking to further recovery by plaintiff against S. A. Gardner, vendor, and his codefendant, R. E. Fulford, vendee, arising by reason of a sale of goods from the former to the latter without any compliance with the requirements of the statute regulating taxes of merchandise in bulk, as set forth in Pell's Revisal, 964a, amended by Laws 1913, Extra Session, ch. 66; Gregory's Supp., p. 108; but, as judgment on that feature of

the case was rendered against said defendants and they do not appeal, the questions relevant to the claim against these parties is not presented.

James M. Norfleet for plaintiff.
A. W. MacNair for defendant Gardner.
W. O. Howard for defendant Hyatt.

(118) HOKE, J. It appears from the complaint that S. A. Gardner, a retail merchant, in October, 1916, sold his stock of goods in bulk to his codefendant R. E. Fulford without in any way complying with the requirements of the statute regulating such sales, Pell's Revisal, sec. 964a, and Gregory's Supp., same section, p. 108; that plaintiff, a creditor of the vendor, by reason of goods sold, delivered and unpaid for, instituted his action before a justice of the peace and recovered judgment for the then debt, $78.76 and costs, and that execution thereon having been placed in the hands of the defendant sheriff, he levied on the stock of goods remaining unsold and thereupon the fraudulent vendor, having requested that his personal property exemption be set apart to him, the sheriff, demanding that his fees for the purpose be paid by plaintiff, a position allowed by the law (*Lute v. Reiley,* 65 N.C. 20), except when the suit is *in forma pauperis,* Revisal, sec. 1275, declined to proceed further without the setting apart of the exemption as claimed.

It appeared, further, from the complaint that Gardner was insolvent and had no property other than the interest that might arise to him on their goods or the balance due on the purchase price, and further, that Fulford is also insolvent, the amount of goods remaining on hand and in his possession at the time of levy being about $125.

Upon these facts, admitted by the demurrer to be true, we concur in the view of the court below and are of opinion that the vendor is entitled to his exemption and the sheriff was justified in refusing to proceed further till such exemptions were properly set apart.

Prior to the enactment of the "sales in bulk" statute, it has been repeatedly held with us that when an insolvent debtor has made disposition of his property, real or personal, with the fraudulent intent to avoid the payment of his debts and the conveyance has been successfully assailed by the creditors and the property, by judicial proceedings, made available on the vendor's debts, the latter is entitled to his homestead or personal property exemption, or both, according to the nature of the property. *Cowan v. Phillips,* 122 N.C. 70; *Gaster v. Hardie,* 75 N.C. 460; *Board v. Reiley,* 75 N.C. 144; *Duvall v. Rollins,* 71 N.C. 218; *Crummen v. Bennet,* 68 N.C. 494.

Speaking to the position and the basic reason for it, *Chief Justice Pearson,* in the *Crummen* case, *supra,* said: "A makes a conveyance of his land to B, which conveyance is fraudulent and void as against the creditors of A. A creditor takes judgment and issues execution, treating the conveyance to B as void; can the homestead of A be sold? The creditor treats the conveyance to B as void and of no effect; take that to be so, how can the creditor have any more right against A than he would have had if the conveyance had not been made? (119) We can see no ground to support the position that an attempt to commit a fraud is a forfeiture of the debtor's homestead; there is no provisions of the kind, either in the Constitution or the statutes."

It has been also held in several well-considered opinions that the legislation regulating the "sales of merchandise in bulk" should be upheld as a valid exercise of the police power, and that a "sale in bulk of a large part or the whole of a stock of merchandise" under the conditions set forth in the statute, without an inventory and proper notice to creditors or without an adequate and proper bond to account for the proceeds, is absolutely void as to creditors and may be made available for their debts and claims. *Gallup v. Rozier,* 172 N.C. 283; *Pennel v. Robinson,* 164 N.C. 257.

Applying the principle of these various decisions, we see no reason why the position upheld in the first class of cases should not be controlling in the second. In the one, the conveyance is avoided because made with a fradulent intent. In the other, because of noncompliance with the statutory requirements, but both proceed on the theory that, as to creditors and their claims, the property did not pass, and, if this position is established and the property is held to be still in the debtor, then the incidents of ownership must attach and such debtor becomes entitled to the homestead and personal property exemptions allowed him by the constitution and laws of the State.

In the cases cited and chiefly relied upon by the appellant, *Daly v. Drug Co.,* 127 Tenn. 412, and *Marlow v. Ringer,* 91 S.E. 386 (W. Va.), the question of the debtor's right to his exemptions was not presented or considered and the decisions do not seem to be apposite to the facts of this record. In those cases, it was held, among other things, that legislation of this character is valid; that the transactions in those particular cases were within the provisions of the statute and that the vendee, in such sale, could be held liable to creditors for the value of the goods sold by him.

This last position seems to have been recognized in the present instance, for we find that judgment has been entered for plaintiff against both the vendor and vendee for the amount of plaintiff's claim, this on

allegation that a large amount of the goods has been sold by the vendee.

As heretofore stated, however, this question is not involved in the present appeal, which was taken from a judgment upholding the vendor's right to his personal property exemptions on final process against the goods and which, as we understand the record, had been levied on as the property of the vendor.

There is no error in this judgment appealed from and the same is Affirmed.

Cited: Armfield Co. v. Saleeby, 178 N.C. 303; *Rubber Co. v. Morris,* 181 N.C. 186; *Casualty Co. v. Dunn,* 209 N.C. 737; *Kramer Bros. Inc. v. McPherson,* 245 N.C. 359.

(120)

E. A. DANIEL, JR. v. MARTHA A. HARRISON.

(Filed 20 February, 1918.)

Wills—Estates—Bodily Heirs—Rule In Shelley's Case.

The donor in a conveyance of land reserved a life estate in himself, then to D. "during his natural life and then to the lawfully begotten heirs of said D.'s body, and to F. (wife of D.) during her widowhood"; *Held,* the use of the words heirs of D.'s body were not *descriptio personarium* so as to indicate his children, and D. takes the fee simple, under the Rule in *Shelley's* case, after the falling in of the preceding particular estates.

CONTROVERSY without action submitted to *Bond, J.,* at December Term, 1917, of BEAUFORT.

From the judgment rendered defendant appealed.

E. A. Daniel, Jr., for plaintiff.
Small, MacLean, Bragaw & Rodman for defendant.

BROWN, J. The purpose of this proceeding is to determine the title to a tract of land which the plaintiff contracted to sell to defendant. The defendant declined to accept the deed and to pay the purchase money, alleging that the plaintiff could not convey an estate in fee.

The defendant's contention is based upon the language in a deed from Elizabeth Robbins to C. M. Daw, constituting a link in plaintiff's chain of title. The case agreed is as follows:

"The land was conveyed by the said Elizabeth Robbins, by deed

dated 3 March, 1909, unto the said C. M. Daw, 'during his natural life, and then to the lawfully begotten heirs of the said C. M. Daw's body, and also to Fannie A. Daw (wife of C. M. Daw) during her widowhood,' reserving to Elizabeth Robbins a life estate, and the words quoted occur in the premises of the deed, and in the habendum, the words used are 'to C. M. Daw during his natural life, then to the lawful begotten heirs of the said C. M. Daw's body and also to Fannie A. Daw during her widowhood.' Elizabeth Robbins is now dead and C. M. Daw and wife, Fannie A. Daw, are both living and have children."

It is scarcely necessary to discuss the merits of this controversy, as this Court has so often and so recently held that the words of the deed to Daw convey a fee simple estate.

We content ourselves with citing a few of the adjudications bearing on the subject. "To my grandson during the term of his natural life, then to the lawful heirs of his body, in fee; on failing of said lawful heirs of his body, then to his right heirs in fee," was held to pass a fee simple to the grandson, *Tyson v. Sinclair,* 138 N.C. 23; "To A the use and benefit and profit during his natural life and to the lawful heirs of his body after his death," held to pass a fee simple, *Perry v. Hackney,* 142 N.C. 368; "To P during her natural life, and after her death to the begotten heirs of her body," (121) held to pass fee, *Leathers v. Grey,* 101 N.C. 162; "To A for life and at his death his surviving heirs," held to pass fee simple, *Price v. Griffin,* 150 N.C. 523; "To S. and the lawful heirs of his body forever," held to pass fee, *Sessoms v. Sessoms,* 144 N.C. 121; "To one during his natural life and at his death to his bodily heirs," conveys a fee, *Chamberlee v. Broughton,* 120 N.C. 171; "To A, and if he marries and has a lawful heir, they have this land," held to pass fee, *Ex Parte Cooper,* 136 N.C. 130; "To husband and wife during their natural lives, afterwards to wife's heirs forever," conveys fee to wife subject to life estate of husband, *Cotton v. Mosely,* 159 N.C. 1. *Harrington v. Grimes,* 163 N.C. 76.

The latest decision is *Smith v. Smith,* 173 N.C. 124, construing the will of Joshua Smith containing this clause: "I loan to my son D. L. Smith two tracts of land to have during his life, at his death to his bodily heirs and to his wife her lifetime or widowhood," etc. The language of the will was held to pass a fee. This case appears to be on "all fours" with the case at bar.

There are cases where the words "bodily heirs" or "heirs of the body" have been held to mean children. It will be found in those cases that the context of the instrument construed plainly indicated that the

words were used as *descripto personarium* merely indicated a purpose to limit the estate to the children rather than to the heirs generally. In such case the Rule in *Shelley's* case does not apply.

Affirmed.

CLARK, C.J., did not sit on the hearing of this case.

Cited: Radford v. Rose, 178 N.C. 290; *Hartman v. Flynn,* 189 N.C. 454; *Ratley v. Oliver,* 229 N.C. 121.

GEORGE MAKELY ET AL. V. LUELLA MAKELY SHORE, ET AL.

(Filed 20 February, 1918.)

1. Wills—Lands—Power of Disposition—Vested Interests—Division.

A devise of lands to testator's wife, with complete control during her life, with power to sell for division among their named children, with discretionary power in the wife to give child's share to the children of such child, reserving a support for such child for life, expressing a doubt as to the future of two of them; that she may sell and convey such lands as she needs for her own support; and with the testator's preference that most of the land be sold for a fair price with certain reservation of a small tract under certain conditions; *Held,* in an action for partition by two of the children against the others and their mother, the plaintiffs have no vested interest in the land.

2. Same—Contingent Interest—Statutes.

Where lands are devised to the wife for life, giving her control thereof with the power to sell, pay testator's debts, use such as she may require, divide the proceeds among the children, with further power of appointment, Revisal, sec. 2508, allowing an interest in reversion to be sold during the life of the first taker, has no application, for such would defeat the intention of the testator as to the powers expressly conferred upon the wife by his will.

(122) APPEAL by plaintiff from *Bond, J.,* at chambers in Edenton, 17 November, 1917; from HYDE.

This is a petition for partition heard before the Clerk of the Superior Court of Hyde, who dismissed the petition. Upon appeal, this judgment was affirmed by *Bond, J.,* at chambers in Edenton, 17 November 1917, and the petitioners appealed.

Small, MacLean, Bragaw & Rodman, Harry McMullan, Ehringhaus & Small, Spencer & Spencer, and S. S. Mann for petitioners.

Pruden & Pruden and Ward & Thompson for defendants.

MAKELY *v.* SHORE.

CLARK, C.J. Metrah Makely died leaving an estate, estimated at $300,000, which he disposed of by the following will, which was duly admitted to probate, and which is not contested:

"I, Metrah Makely, Senior, do make this my last Will and Testament; I give, bequeath, and devise all my property of every kind to my beloved wife, Mary, to have complete control of during her life, to sell to pay any just debts of mine, or to sell to divide among her children, George, Metrah, Luella, Alice, and Agnes, to be divided equally between them. In the event my wife should be of opinion that it would be to the interest of the grandchildren to give any share to the said grandchild and not to the said heirs, or child, said heir or child is to have his or her support from said property as long as he or she lives, but no right to sell or in any way to dispose of the said property and leave their child destitute.

"I am afraid of our two sons, George and Metrah, but hope that they will come around all right.

"My wife is to take said property, what she needs for her support and to sell and make a deed for the said property, as if it were her own and without being required to give a bond. I prefer that the most of the land be sold, where it can be sold at a fair price. The piece of the Donnell Farm, the Blount tract; if it can be retained for George or his children without injuring the sale of the balance, I prefer it to be retained and charge what is worth to that share.

"In witness whereof, I have hereunto signed and sealed this instrument and declared the same as and for my last will at Edenton, North Carolina, on this first day of March, 1911.

METRAH MAKELY, SR. (Seal)"

This action is brought by the two sons, George and Metrah, (123) against their three sisters and mother for partition.

The clerk properly dismissed the action for under the will the plaintiffs have no vested right to any share in the property. The will not only gives the property to the wife for her life with "complete control" to sell and divide the same, but gives her the right to appoint the property to the grandchildren instead of to the children, subject only to giving the children a "support" from the property.

The language is: "In the event my wife should be of the opinion that it would be to the interests of the grandchildren to give any share to said grandchild and not to the said heirs or child, said heir or child is to have his or her support from said property as long as he or she lives, but no right to sell or in any way dispose of said property and leave their child destitute." This immediately follows and qualifies the preceding sentence, which authorizes her "to have complete control

during her life" to sell to pay debts or to sell and divide the property among the five children equally. There is a further provision in the will that the wife can take what property she needs for her support and "to sell and make a deed for the property as if it were her own."

It is clear from the face of the will that the plaintiffs Metrah and George do not (and, in fact, none of the children) have any interest in the property entitling them to a partition. But the power of appointment is placed in the decedent's widow, who can give what would be the share of any child to the grandchildren if in her judgment this should be done. The doubt expressed by the testator as to the two sons (the plaintiffs) indicates why this discretion and power of appointment were vested by the will in the testator's widow.

It is true that by section 2, ch. 214, Laws 1887, now Revisal 2508, an interest in reversion may be partitioned or sold for partition, subject to the possession of the life tenant, *Baggett v. Jackson*, 160 N.C. 26; but it is apparent from this will that the devise to Mary M. Makely is not merely the devise of a life estate, but with it there is the power of appointment as to the estate itself. It is true, the estate must be divided equally, but it is left to her discretion whether any of the shares at all shall go to the children or whether any share shall go, instead, to the grandchildren. The testator very justly provides, however, that in case the widow shall allot any share to the grandchildren, the child shall have a "support" from said property as long as she or he lives. How much such support should be is not stated, but should be reasonable. The question whether the plaintiffs are receiving this is not raised and cannot be raised in this proceeding. This devise is not merely for a life estate, but a life estate with the power of appointment. *Chewing v. Mason*, 158 N.C. 578; *Herring v. Williams*, 153 N.C. 231; *Parks v. Robinson*, 138 N.C. 269; *Troy v. Troy*,
(124) 60 N.C. 624; *Stroud v. Morrow*, 52 N.C. 463. Revisal, sec. 2508, does not give the right of partition in an estate of this kind where the plaintiffs are not given any right in the realty or other property beyond the right to a support therefrom, *Gillespie v. Allison*, 117 N.C. 512.

Proceedings for partition of lands cannot be maintained where the plaintiff has no vested interest but only a contingent interest determinable on the death of the life tenant who is still living. *Vinson v. Wise*, 159 N.C. 655; *Aydlett v. Pendleton*, 111 N.C. 28. Still less is there such right when, as here, the life tenant is given complete control with power to take such property as she needs for her own support, with power to sell to pay his debts or to make an equal division among the children and with power to give any child's interest to the grandchildren, charged only with the support of the child. A partition of the

realty by order of the court would take from her all these powers which she is given by the will. She is still living and vested by the will with these powers.

The petition was properly denied and the proceeding dismissed. Affirmed.

R. W. LUCAS AND H. R. BUTT v. TOWN OF BELHAVEN.

(Filed 20 February, 1918.)

1. **Municipal Corporations — Cities and Towns — Bond Issues — Electric Lights—Water Works—Sewerage—Discretionary Powers—Repeal.**

Where the rights of third parties have not supervened, a present board of aldermen of an incorporated town, within their discretion, may revoke the action of a preceeding board thereof, differently constituted calling for a valid issuance of bonds for an electric light, water works, and sewerage system, which discretion the courts may not supervise.

2. **Municipal Corporations — Cities and Towns — Public Improvements — Bonds Contracts—Condition Precedent—Injunction.**

Where a former board of aldermen of an incorporated town have passed resolutions for a bond issue for electric light, water works, etc., systems, and have entered into a contract for their erection upon conditions that the bonds bring par, and pending an injunction against the action of the board, its attorney delivers the bonds to purchasers thereof and allows, under his instructions, damages to the purchasers of $2,775, and expenses, etc.: *Held*, the contract for the erection of the various systems is unenforcible for failure of the condition under which it was entered into, and the pendency of the restraining order.

APPEAL by Lucas and town of Belhaven from Kerr, J., at December Term, 1917, of BEAUFORT.

Prior to May, 1917, W. B. Tooly was mayor and C. T. Wind- (125) ley, W. D. Morrison, A. Miller, F. M. Bishop, and J. W. Smith were aldermen of the town of Belhaven. On 20 September 1916, these aldermen duly passed certain ordinances declaring that systems of electric lights, waterworks, and sewerage were necessary to the town and provided for an issue of $60,000 in bonds to install these utilities. At the same time a proposition was made by J. B. McCrary Company, contractors, to do the work, which proposition was made and accepted to become effective "when funds *are provided*"; that is, contingent upon receiving funds from a sale of the bonds.

On 22 February, 1917, the aldermen passed a resolution that the bonds be readvertised for sale on 28 March 1917, in accordance with

the resolution of 20 September 1916, which resolution provided that the bonds should "be sold when issued for not less than par at public sale, after advertisement and competitive bids." On 28 March 1917, W. L. Slayton & Co., of Toledo, Ohio, having bid par and more, and being the highest bidder, a resolution was adopted reciting said facts and directing the acceptance of their bid and execution and delivery of the bonds. During April, 1917, and before final acceptance of the bonds by Slayton & Co., the regular municipal election for mayor and alderman was held in the town of Belhaven and the question of issuing these $60,000 of bonds and installing these public improvements was an issue. The two members of the old board and mayor, who were candidates for reëlection, were defeated and a new board and mayor elected.

On 20 April 1917, after the defeat of the old board in the election, and before the final acceptance of the bonds by Slayton & Co., the old board made award on certain bids for materials, on condition, however, in the language of the resolution adopted at that time, that "all bids accepted for light, water, and sewerage material shall be accepted conditionally upon the sale of lights, water, and sewerage bonds."

On 25 April 1917, R. W. Lucas, a citizen and taxpayer, instituted an action against the old board, the members of which had not been reelected in the recent election, and whose terms of office would expire Monday, 7 May 1917, and filed his complaint on 27 April, asking an order to restrain the old board from proceeding further in making and completing contracts for these public improvements, alleging bad faith and that they were seeking on the eve of their retirement from office to fasten obligations on the town to carry out their personal will and to deprive their successors in office of any discretion in the premises. Upon this complaint, used as an affidavit, a restraining order was issued by Daniels, J., which on 27 April was served upon said mayor and aldermen, prohibiting their proceeding further in making or completing contracts with respect to electric lights, waterworks, and sewerage for the town of Belhaven. They were ordered to show cause on

(126) Monday, 7 May 1917, why the order should not be continued to the hearing, but did not do so. Immediately on the service of said restraining order, an attorney for said board, by its authority, had a conference with the McCrary Company in Atlanta, Ga., in consequence of which the aldermen, on 30 April 1917, sent an attorney to make a delivery of said $60,000 to Slayton & Co., who had not till then accepted the said bonds. Said attorney proceeded to Toledo, Ohio, and on 3 or 4 May 1917, pending said injunction, delivered said bonds to Slayton & Co., accepting in payment therefor $3,000 less than par and interest, and on 5 May said board made contracts with McCrary

& Co. for sundry materials. The expenses of counsel to Atlanta and to Toledo, Ohio, were ordered paid by the old board before going out of office.

On Saturday, 5 May 1917, just before retiring from office, the old board adopted certain resolutions in which is the following language: "The said W. L. Slayton & Co. declined compliance with its offer of purchase of said bonds, unless allowed by the board the sum of $2,775 for damages, attorney's fees for approval of the bonds, expense of printing bonds and other expenses, and the said bonds were sold to W. L. Slayton & Co. for par and interest from date thereof, allowing deduction aforesaid. The town treasurer is hereby authorized to allow the said W. L. Slayton & Co., in settlement for said bonds, the sum of $2,775, for the reason and for the purpose aforesaid." It was in evidence that the bonds could have been printed for $25 or lithographed for $100.

Upon retirement from office of the old board and mayor (who are the defendants in suit by R. W. Lucas), the new board of aldermen, composed of George L. Swindell, J. W. Bell, W. S. Riddick, J. B. Cuthrell, and W. E. Stubbs (who are the defendants in the suit by H. R. Butt), duly qualified on 7 May, and on 22 May they unanimously adopted a resolution rescinding the resolution of the former board to install said plants and in regard to any contract with J. B. McCrary Company, and due notice to said company was promptly given. On 30 May 1917, H. R. Butt brought suit against the new board of aldermen asking a mandamus to compel them "to proceed with the fulfillment of the contracts for the installation of the said system of electric lights, waterworks, and sewerage," and for the appointment of a receiver for the town of Belhaven to take over the corporate property, and to require the town "in all manner to carry on and complete the contracts for the installation of the said system." By consent, the two actions were consolidated and tried together.

The court submitted no issues to the jury in the *Lucas* case, but dismissed the action, from which order Lucas appealed. The defendants in that case did not show cause on 7 May as ordered, and since the action of the new board the injunction should have been granted.

The only issues submitted to the jury in the *Butt* case were (127) in substance: 1. Did the former board in good faith and in the exercise of its discretion, pass resolutions calling for the installation of a system of water, sewerage, and lights of said town, and authorize the issuance of $60,000 of bonds and to sell the bonds pursuant to said resolutions? 2. Has the new board of Aldermen failed and refused to provide these systems authorized by the former board?

The court charged the jury peremptorily to answer both issues in

the affirmative, and the jury having obeyed, the court gave judgment in the nature of a peremptory mandamus commanding the new board forthwith to install all three systems of public utilities in the town of Belhaven. From this judgment the town of Belhaven appealed.

Announcement was made in open court, both by attorneys for Butt and for the old board in the *Lucas* case, that the court was not asked to compel the present board of aldermen to perform any contracts made for the installation of water, lights, and sewerage prior to the induction of the present board into office. Though the J. B. McCrary Company was made a party to the suit by order of the court, that company did not allege or ask the court to enforce any contract between it and the town of Belhaven. No material men were parties to the action or have sued on any contracts.

Tooly & McMullan for plaintiffs.
Small, MacLean, Bragaw & Rodman for defendants.

CLARK, C.J. The validity of the $60,000 of bonds in question was upheld in the appeal of *Swindell v. Belhaven,* 173 N.C. 1. So there is no controversy on that point. Neither is there any exception by J. B. McCrary Company, who are parties to this action. It appeared in an answer filed by Slayton & Co., and was not denied here, that Slayton & Co. had offered to return the $60,000 bonds upon the surrender to them of the $57,225 in cash which they had deposited to the cerdit of the town in a bank in Washington, N. C.

The only question presented, therefore, is whether the court could by mandamus direct the present board of aldermen of Belhaven to proceed with the installation of lights, water, and sewerage in the town of Belhaven.

There being no question of the enforcement of any contracts with outside parties, it would seem very clear that the right of the present board to rescind a resolution passed by the former board for the installation of these public improvements cannot be gainsaid. It was a matter which rested in the discretion of the former board to pass such resolution, *Broadnax v. Groom,* 64 N.C. 244, which the courts
(128) cannot supervise, and the same power resided in the present board to rescind such order, *Ward v. Comrs.,* 146 N.C. 534; *Glenn v. Comrs.,* 139 N.C. 412.

It would seem, however, that as the contract with the J. B. McCrary Company was conditioned upon funds being provided by the sale of the bonds, that that condition had not been met, and that such contract can have no validity, for the attempted sale to Slayton & Co. was invalid because the bonds were not sold at par and interest, which was

in violation of the resolution of the aldermen of 20 September, 1916 (under which the bonds were directed to be issued), which required a sale at par and interest. Also, for the further reason that the bonds were delivered to Slayton & Co. in violation of the injunction then in force which directed that no further steps should be taken to effectuate any contract for the execution of the work.

It was also stated in the argument here by counsel for the new board that there would be no opposition to the installation of a plant to furnish electric lights, but that the people of the town had elected them to stay the installation of water and sewerage at this time owing to the increased expense attending it at the present juncture, and that the board proposed to submit the issuance of bonds for such purpose to a vote of the people.

The action of the court in both appeals is

Reversed.

Cited: Board of Education v. Commissioners, 189 N.C. 652.

MURRAY P. WHICHARD v. B. T. CRAFT.

(Filed 27 February, 1918.)

Wills—Devise—Estates—Contingent Limitations.

A devise of lands to testator's wife for life, and upon her death to H., his nephew, and W., her nephew, equally, and should W. "die without a lawful heir of his body," then to H. Upon the falling in of the life estate to the wife and after the death of H., W. purchased from the sole heirs at law of H., and contracted to convey the entire estate; *Held,* the purchaser would acquire good title under the decision of *Hobgood v. Hobgood,* 169 N.C., 485. *Burden v. Lipsitz,* 168 N.C., 523, cited and distinguished.

APPEAL by defendant from *Daniels, J.,* at December Term, 1917 of MARTIN.

This is a controversy without action to recover the purchase price of a tract of land, the defendant refusing to accept a deed and pay the purchase price according to the terms of a contract entered into between him and the plaintiff on the ground that the plaintiff has not an indefeasible title in fee.

Eli Hopkins was formerly the owner of said land, and he died leaving a will in which he devised the same in the fifth item as follows: (129)

"All the rest of my real estate wheresoever situated, I devise

and bequeath to my beloved wife, Mary Elizabeth, during her natural life or widowhood, and upon her death or marriage I give and bequeath the same to my nephew, Thomas Harrell, and her nephew, Murray Whichard, to be equally divided between them; and if the said Murray Whichard should die without a lawful heir of his body, I will that the land here allotted to him remain in the same tract and go to my nephew, Thomas Harrell."

It is admitted that Mary Elizabeth Hopkins, the life tenant, is dead; that Thomas Harrell, the ultimate taker under said item of said will, is dead; that Eli Hopkins, the maker of the will, died before Thomas Harrell; that Thomas Harrell died intestate, and that W. C. Harrell and wife, Talitha Harrell, were the sole heirs at law of Thomas Harrell, and that W. C. Harrell and wife, Talitha Harrell, have conveyed to Murray Whichard whatever interest they may have taken under item 5 of said will, present and contingent; that Murray Whichard is a married man and has children living.

The plaintiff Murray P. Whichard has tendered the defendant a deed purporting to convey said land in fee, and has demanded payment of the purchase money, and the defendant has refused to accept the deed or pay the money.

His Honor rendered judgment in favor of the plaintiff, and the defendant excepted and appealed.

Dunning & Moore for plaintiff.
Critcher & Critcher for defendant.

ALLEN, J. The case of *Hobgood v. Hobgood*, 169 N.C. 485, decides every question raised by the defendant in favor of the plaintiff, and upon that authority and the reasoning of *Hoke, J.*, in the opinion, the judgment of the Superior Court is affirmed.

The distinction between this line of cases and the one to which *Burden v. Lipsitz*, 166 N.C. 523, belongs is that in the first those who take the contingent interest are certain, and it is held that they may unite with the owners of the precedent estates and pass a good title, while in the other, as the owners of the contingent interests cannot be ascertained until the determination of the preceding estate, an indefeasible title cannot be made until then.

Affirmed.

Cited: Patterson v. McCormick, 177 N.C. 456; *Hutchinson v. Lucas*, 181 N.C. 55.

(130)

M. C. COBB v. ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

(Filed 27 February, 1918.)

1. Appeal and Error—Issues and Answers.

Issues answered in appellant's favor are necessarily excluded from consideration on his appeal.

2. Evidence—Trespass, Willful—Contempt—Findings of Court.

Upon an issue as to whether a trespass was committed willfully and wantonly, in disregard of plaintiff's rights, the facts theretofore found by the trial judge upon adjudicating the defendant in contempt may not properly be introduced in evidence; but the evidence upon which the adjudication had been made is competent.

3. Trespass, Willful—Punitive Damages—Negligence.

Where punitive damages are sought for a willful and wanton trespass to the damage of plaintiff's land caused by the blasting operations of the defendant, the answer to this issue is dependent upon that of the issue as to the defendant's willfulness and wantonness in continuing to blast, and only actual damages may be awarded if the defendant had only negligently continued to do so.

4. Damages—Punitive Damages—Trials—Discretion of Jury.

It is within the discretion of the jury to award punitive damages for a willful and wanton trespass.

CIVIL ACTION, tried before *Daniels, J.*, at October Term, 1917 of WILSON, upon these issues:

1. Was the plaintiff, M. C. Cobb, damaged by the trespasses of the defendants, as alleged? Answer: "Yes."

2. What amount of damages by way of compensation is the plaintiff entitled to recover? Answer: "$15."

3. Were such trespasses committed wantonly and willfully and in reckless disregard of the plaintiff's rights? Answer: "No."

4. What amount of punitive damages, if any, is the plaintiff entitled to recover? Answer: .....

From the judgment rendered, the plaintiff appealed.

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

F. S. Spruill for defendant.

BROWN, J. This action is brought to recover damages arising out of blasting operations conducted by defendant railroad company upon its quarry near plaintiff's lands. The evidence tends to prove that the effect of the blasts was to throw quantities of loose rock upon plaintiff's land, breaking shingles, injuring houses, causing his laborers to leave work, and materially injuring plaintiff's property.

(131) As the jury found for plaintiff on first and second issues and he did not appeal, the assignments of error are necessarily confined to the third issue.

For the purpose of proving that the alleged trespasses were wanton and willful, the trial judge permitted plaintiff to introduce an injunction order issued by Devin, J., restraining defendant *pendente lite,* and evidence that the defendant violated the restraining order by continuing the blasting operations while the order was in force. *Cobb v. R. R.,* 172 N. C. 60.

Among the other allegations in the complaint, plaintiff avers that defendants were cited for contempt of court for violating said injunction and punished by fine therefor. The defendant moved to strike out this allegation, which motion was allowed, and plaintiff excepted.

During the progress of the trial the plaintiff offered in evidence a rule issued by Judge Conner 8 July 1916, and the judgment of Judge Whedbee rendered upon said rule, and also offered in evidence the rule issued by Judge Connor 11 August 1916, against the defendant railroad and its codefendants, and the judgment of Judge Allen thereon of 8 September 1916. Upon objection, these two rules and the judgment rendered thereon were excluded, and the plaintiff excepted. We think the exceptions cannot be sustained.

The controversy embodied in the third issue was as to the wanton and willful character of the trespass. For the purpose of sustaining plaintiff's contention that the acts of defendant were willful, wanton and in disregard of plaintiff's rights, the court permitted the plaintiff to introduce the injunction order and to prove that the acts were continued while the injunction was in force and, consequently, in violation of it. These facts were clearly relevant to the issue, but we fail to see what bearing the subsequent proceedings in contempt could have. The jurors had before them the injunction order restraining the defendant, together with the evidence of plaintiff and his witnesses, that pending the injunction the stone and debris were thrown from the quarry upon his land. Every fact that the judge who punished defendant for contempt could have had before him was introduced in evidence before the jury. The opinion of the judge in the contempt proceedings was not binding upon the jurors upon the trial of the issues. The judge who tried the case is prohibited by law from throwing the weight of his opinion upon the facts into the jury box. We, therefore, see no reason why the opinion and findings of fact of another judge in contempt proceedings should be permitted to go to the jury for the purpose of influencing their verdict. The cases cited by the learned counsel for plaintiff, *McCoy v. Donley,* 20 Pa. St., 85, and *Windham v. Rhome,* 73 Am. Dec. 116, in our opinion, are not pertinent.

The principle decided in both cases is, as we interpret them, that when a nuisance is not abated after one verdict, a jury (132) may give punitive damages in a second action brought for the continuance of the nuisance, upon the ground that there is failure to abate it after verdict, it is presumed that the defendant's original act was willful, and from which an intention to continue the nuisance is inferred.

The remaining assignments of error are directed to the charge upon the third issue, as follows:

"If you are satisfied that there was merely a negligent operation unaccompanied by willfulness or wantonness, then you would answer it No. Or if the injury of the plaintiff was the result of mere negligence of the operation of the quarry, you would answer it No. You can only answer it Yes if the evidence upon a fair consideration of it satisfies you by its greater weight that the trespasses committed by the defendants were done willfully and wantonly.

I repeat what I said before, that if the evidence satisfies you only that the operation was merely negligent, or that the injury was inflicted as the result of accident, then you would answer it No."

We fail to see error in this instruction. It simply directed the jury to find for plaintiff on that issue if from the evidence they concluded that the defendants' conduct was willful and wanton. Otherwise to find for defendant.

The third was submitted as a basis for punitive damages. Had it been found for plaintiff, the jury could have awarded punitive damages, but even then they were not bound to do so. It was a matter in their sound discretion. But unless the finding upon that issue was for plaintiff, the jury could not award other than actual damage, which had been awarded under the second issue.

In *Hayes v. R. R.*, 141 N.C. 199, this Court said: "This Court has said in many cases that punitive damages may be allowed, or not, as the jury see proper, but they have no right to allow them unless they draw from the evidence the conclusion that the wrongful act was accompanied by fraud, malice, recklessness, oppression, or other willful and wanton aggravation on the part of the defendant. In such cases, the matter is within the sound discretion of the jury." *Smith v. Ice Co.*, 159 N.C. 151; *Mottsinger v. Sink*, 168 N.C. 548; *Hoffman v. R. R.*, 163 N.C. 171; 8 Rul. Case Law, p. 586.

No error.

Cited: Cotton v. Fisheries Co., 181 N.C. 153; *Ford v. McAnally*, 182 N.C. 421; *Baker v. Winslow*, 184 N.C. 6; *Swain v. Oakey*, 190 N.C.

115; *Tripp v. Tobacco Co.*, 193 N.C. 618; *S. v. Lea*, 203 N.C. 34; *Worthy v. Knight*, 210 N.C. 499; *Robinson v. McAlhaney*, 214 N.C. 184; *Harris v. Coach Co.*, 220 N.C. 69.

(133)

LUCY PHILLIPS v. JUNIOR ORDER UNITED AMERICAN MECHANICS.

(Filed 27 February, 1918.)

1. Insurance—Fraternal Orders—Pleadings—Evidence.

The complaint in an action on a membership life insurance policy by the wife alleging the loss of the policy, her inability to find it, and that her husband had been dropped on the defendant's roll at the time of his death, without charge or cause, and against his protest, is insufficient without proper allegation and proof of the lost policy, that recovery was not barred by the contract or lapse of time, and that he had illegally been dropped, and had regularly tendered his fees.

2. Appeal and Error—Briefs—Time of Filing—Rules of Court.

Upon motion of appellant aptly made at the call of the district to which the case belongs, the appellee's brief will be dismissed if not filed on the preceding Saturday by noon, and disposed of without argument by appellee, unless for good cause shown, the time should be extended. Rule 36.

3. Insurance—Fraternal Orders—Pleadings—Demurrer Ore Tenus.

Where the wife of a deceased insured brings action individually and not as administratrix, to recover upon the life insurance policy of her husband, she must allege that she was the beneficiary named therein, or the action will be dismissed *ore tenus*.

APPEAL by plaintiff from *Allen, J.*, at October Term, 1917 of CHATHAM.

R. H. Hayes for plaintiff.
Douglass & Douglass for defendant.

CLARK, C.J. This action was brought by the plaintiff upon a membership life insurance policy issued to her husband by the defendant. The complaint did not set out the policy, but averred that she was unable to find it and that though her husband had been dropped from said lodge and was not on its rolls at the time of his death, he was dropped without charge or cause and against his protest. This would have sufficed, if there was proper allegations and proof to set up the lost policy and to prove, if not barred by the contract in the policy or lapse of time in any way, that he was illegally and wrongfully

dropped from the roll of his lodge, and that he tendered the fees regularly.

But the plaintiff failed to allege in her complaint that she was the beneficiary named in the policy and she did not bring this action as administratrix. The Court, therefore, properly sustained a demurrer *ore tenus* that the complaint did not state a cause of action. The Court, in its discretion, would doubtless have permitted the plaintiff to amend, Revisal, 506; *Fidelity Co. v. Jordan,* 134 N.C. 236, but she did not ask leave to do so and the action was dismissed. Whether the plaintiff may not institute a new action upon a complaint with proper averments is not now before us.

The plaintiff moved to dismiss the appellee's brief filed in this (134) action. The Rules of Court No. 34 (164 N.C.) prescribe that if the appellant's brief is "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 should give further time to print brief."

Rule 36 prescribes that unless the appellee's brief 'shall be filed by 12 o'clock, noon, on Saturday before the week of the call of the district to which the cause belongs, . . . 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." In this case, the brief of the appellee was not filed by the time required, and good cause not being shown, the motion to strike out the same was allowed, and in the absence of a brief, we could not hear oral argument.

This Court has repeatedly held that our rules are made for good cause and must be observed. *Walker v. Scott,* 102 N.C. 487; *Wiseman v. Comrs.,* 104 N.C. 330; *Edwards v. Henderson,* 109 N.C. 83; *Calvert v. Carstarphen,* 133 N.C. 25, and numerous cases there cited, which have been cited since; *Vivian v. Mitchell,* 144 N.C. 477; *Lee v. Baird,* 146 N.C. 363; *Porter v. Lumber Co.,* 164 N.C. 397; *S. v. Goodlake,* 166 N.C. 436.

It happens in this case that the appellee succeeds in the appeal, though by failure of counsel to observe the rule, their client and the Court were deprived of the benefit of an argument from them. It is none the less proper to call attention to the rule in this case and the necessity that the Court is under of enforcing the rules, to prevent a similar penalty in a cause where it might be important to the client and to the Court that the case should be fully presented.

Affirmed.

Cited: S. v. Evans, 237 N.C. 763.

(135)

STATE EX REL. T. J. MARKHAM v. SIMPSON.

(Filed 20 February, 1918.)

1. Public Officers—Terms—Holding Over—Municipal Corporations—Constitutional Law—Statute.

The provisions in municipal charters that incumbents of offices, both elective and appointive, shall hold until their successors are selected and qualified, are recognized by our Constitution, Art. XIV, sec. 5, and our general statute, Revisal, sec. 2368; and whether regarded as a part of an original term or a new and conditional one by virtue of the statute, the holders are regarded as officers *de jure* until their successors have been lawfully elected or appointed and have properly qualified.

2. Public Officers—Presiding Officers—Casting Vote—Municipal Corporations.

A duly qualified presiding officer of a municipal board, who is also a member, may lawfully vote on questions properly coming before the board for decision, and may cast the deciding vote as presiding officer when the law, or valid rule of the body itself, governing the proceedings confers such right upon the presiding officer.

3. Same—Voting for Self—Pecuniary Interest.

While a member of a municipal corporation may not be allowed to vote on private matters directly affecting his own pecuniary interest, this does not prevent his voting for himself on a question of organization of the board of which he is a rightful member, such being a question of public concern, and, at times, within the performance of his duty.

4. Public Officers—Municipal Corporations—Presiding Officer—Holding Over—Officers de Facto.

Semble, in this case, the chairman of a municipal board, having the charter power to do so, lawfully gave his casting vote for the incumbent for mayor; and, *Held*, were it otherwise, such incumbent held the office as an officer *de facto*, with the right to exercise its powers, etc., under color of his former election.

5. Public Officers—Title—Quo Warranto.

Direct proceeding in *quo warranto* is the proper one to test the validity of an election of mayor of an incorporated town by the vote of its governing board, etc., under its charter and the general law applicable.

6. Public Officers—Municipal Corporations—Mayors—Vote—Statutes.

Ordinarily the duties of a mayor of an incorporated town are of an executive or administrative character, not permitting him a vote either as member or presiding officer of the municipal board, unless the privilege is conferred by correct interpretation of the charter or general law applicable.

7. Same—Charters—General Statutes.

Where the charter of an incorporated town does not, by proper construction, confer upon the mayor the right to vote either as a member or

presiding officer of the municipal board, but does confer the right to preside at its meetings, sign contracts, veto ordinances, and other like powers, he may, under the general statute applicable when not inconsistent with the charter, give a casting vote, in reference to appointive officers, in the event of a tie, whose appointment is referred to the board under provisions of the charter.

8. Same—Repealing Acts—Presumptions.

Where the right of the mayor of an incorporated town to vote as a member of the municipal board, and to give his casting vote, as its presiding officer, in case of a tie, exists under the general law applicable, the fact that such power was expressly given in the original charter of the town, and left out of a subsequent act, repealing the former one, and setting forth powers, etc., of the town, will not forbid that such right should be exercised under the general statute applicable when such interpretation is not inconsistent with the new powers, etc., conferred on the town.

CIVIL ACTION, in the nature of *quo warranto,* to determine the (136) question of title to the office of City Attorney of Elizabeth City, N. C., tried by consent on the pleadings and facts admitted before *Kerr, J.,* at September Term, 1917, of PASQUOTANK.

There was judgment for defendant, and realtor and plaintiff, having duly excepted, appealed.

Meekins & McMullans for plaintiff.
E. F. Aydlett for defendant.

HOKE, J. Chapter 341, Private Acts of 1915, entitled "An act to revise and consolidate the charter of Elizabeth City," as a basic proposition, vests the government of the city in a board of aldermen consisting of eight members, two from each of the four wards, to be elected by the voters of the wards, respectively, the election to be held on Tuesday after the first Monday in May, 1915, and every two years thereafter, to hold their positions for the term of two years and until their successors shall have been elected and qualified, "and to be installed" on the first Monday in June following their election. Provision is further made that, on said first Monday in June said aldermen-elect shall qualify by taking the proper oath of office, to be duly entered on the minutes, and shall then organize by electing one of their members chairman, "who shall preside at their meetings and perform the duties of the mayor in his absence or sickness." That, after said board shall have been organized, "as heretofore directed," they shall proceed to appoint certain executive and administrative officers of the city, including the mayor, city attorney, etc., to hold their

offices for the term of the board appointing them and until their successors have been duly elected and qualified.

Pursuant to these provisions, an election was held in Elizabeth City in 1915, and thereafter the eight aldermen-elect, having duly (137) organized, elected one P. G. Sawyer mayor and the realtor of plaintiff as city attorney, who qualified for their respective positions and continued in the discharge of their duties for the term of two years, and further, as hereinafter stated, that at the regular city election in 1917 eight aldermen were chosen who seem to have been equally divided on all debated questions and, in the proceedings to organize on the first Monday in June, 1917, the former mayor presiding, four of the aldermen voted for Alderman Owens as chairman and four for Alderman Cohoon, and thereupon, the said P. G. Sawyer, presiding as mayor, cast the deciding vote for Alderman Owens, who qualified as chairman. The board so organized proceeded to appoint a mayor, four of them, including Alderman Owens, voting for P. G. Sawyer, former mayor, and the other four voting for one W. C. Glover, Esq. That Alderman Owens, as chairman, gave the casting vote for P. G. Sawyer and he appeared and qualified as mayor. That the board, then in meeting presided over by the newly appointed mayor, or as holding over under his former appointment, proceeded to select the other appointive officials and, among others, appointed defendant as city attorney for the incoming term, four of the aldermen voting for said defendant and four voting for W. L. Small, Esq., the mayor giving the casting vote for defendant, who was duly qualified and has since continued in the discharge of the duties of the office.

The provision that the incumbents of offices, both elective and appointive, shall hold until their successors are selected and qualified is in accord with a sound public policy which is against vacancies in public offices and requiring that there should always be some one in position to rightfully perform these important official duties for the benefit of the public and of persons having especial interest therein.

It appears twice in this charter in reference to these appointive offices. Sections 44 and 131 are recognized both in our Constitution and general statutes, Constitution, Art. XIV, sec. 5, and Revisal, sec. 2638, and, whether regarded as part of an original term or a new and conditional term by virtue of the statute, the holders are considered by the authorities as officers *de jure* until their successors have been lawfully elected or appointed by the body having the right of selection, and have been properly qualified, and the realtor of plaintiff having been the former attorney of the city, the question presented is whether, as his successor in the office, defendant has been rightfully appointed. *People ex rel. Richardson v. Henderson,* 4 Wyo. 535 (22 L.R.A. 751);

S. ex rel. Howe, 25 Ohio St., 588; 18 Amer. Rep. 321; *S. ex rel. Carson v. Harrison,* 113 Ind. 663; *People v. Tilton,* 37 Cal. 614; *Smoot v. Summerville,* 59 Md. 84; *Walker v. Ferrel,* 58 Ga. 512.

On the record, as we understand it, his tenure is challenged (138) on the ground (1) that, in the present instance, there had been no valid appointment of P. G. Sawyer as mayor to succeed himself in that office; (2) if otherwise, there had been no valid election of defendant as the mayor had no right to give the casting vote in defendant's favor.

In reference to the first position, while it may not be in accord with strict parliamentary law, it is the prevailing rule in this country that, in the case of these municipal boards, a presiding officer who is also a member has the legal right, as such member, to vote on questions coming properly before the body for decision and to vote a second time as presiding officer when the law or valid rule of the body itself, governing its proceedings, confers upon such officer the right to give the casting vote. *People ex rel. Remington v. Rector,* 48 N.Y. 603; *Whitney v. Common Council,* 69 Mich. 189; 2 McQuillan Munic. Cor., sec. 590. And it is held that the right of such presiding officer to give such vote, when authorized to do so, is not affected because of the fact that the question for decision may be that of confirming or validating his own appointees to office. *McCourt v. Beam,* 42 Ore. 41; *Carrol v. Wall,* 35 Kan. 36. And, furthermore, we are aware of no principle or precedent that prevents a member of either a legislative or municipal board from voting for himself on a question of organization, the matter being referred usually to his own sense of propriety. It is generally understood that such member should not be allowed to vote on private bills or in relation to contracts directly affecting his personal pecuniary interest nor on the question of his own right to a seat, but, being fully recognized as a rightful member, the question of a proper organization is one rather of public concern, and it is not only the privilege but may become the patriotic duty of a member so to vote. We recall an instance in this State where a constitutional convention, charged with the duty of determining questions gravely affecting the weal of the entire Commonwealth, was organized and successfully carried on by means of a vote of this character.

It would seem, therefore, that, if Alderman Owen, who as presiding officer of this meeting is given by the charter the power to preside and otherwise act as mayor, had the privilege of a casting vote, P. G. Sawyer was rightfully elected mayor and presided at the meeting as his own rightful successor. Apart from this, if realtor of plaintiff is correct in his first position, it would not avail him or in any way affect the result, on the facts of this record, for, both under the charter and gen-

eral statutes applicable, P. G. Sawyer, as former mayor, had the full right to act as such till his successor was appointed and qualified, and in any event he would be mayor *de facto* with full right as to third parties and as to these contestants to perform all the duties appertaining to such office while he held the position and under color of an appointment by the board in whom the power was vested. *S. v.* (139) *Lewis,* 107 N.C. 967; *Ellison v. Raleigh,* 89 N.C. 125; *S. ex rel. Norfleet v. Staton,* 73 N.C. 546; *Comrs. v. McDaniel,* 52 N.C. 107; *Magenan & Bruner v. City of Fremont,* 30 Neb. 843. His right to act as mayor could only be questioned by direct proceedings, as in this present suit between realtor of plaintiff and defendant.

For these various reasons and as now advised, we are of opinion that there was a lawful organization of the present board of aldermen on the first Monday in June, 1917; that plaintiff P. G. Sawyer rightfully acted as mayor on the occasion and the issue between these two contestants is restricted to the second proposition whether the said P. G. Sawyer, as such mayor, had the right of giving the casting vote for defendant as city attorney.

The ordinary duties appertaining to the office of mayor are rather executive or administrative in character, and he is usually not allowed a vote either as member or presiding officer of a municipal board unless the privilege is conferred by correct interpretation of the charter or the general statutes applicable. 2 Dillon Mun. Cor., sec. 573; 2 McQuillan, sec. 584.

On this subject, the charter of the city provides, in section 62, that the mayor shall preside at all meetings of the board of aldermen and shall be the official head of the city for the service of civil process. He shall sign all contracts and franchises and other paper-writings authorized and passed by the board of aldermen. In section 63 he is given a veto power on all ordinances, contracts, and franchises which may have passed the board of aldermen, in which case they can only be validated on a *six-eighths* vote and, in case of approval, he is required to signify such approval on the minutes of the board. Section 64 establishes his salary, and in section 65 he is to fill the position of city manager and receive his salary in case of a vacancy of that office or a failure of the incumbent to perform his duties. The right to vote either as a member of the board of as presiding officer, in case of a tie, is nowhere given in express terms, and from a perusal of the sections directly applicable and other cognate provisions, it is clear, we think, that the power is not given to the mayor in the charter either in the one case or the other. *S. v. Miller,* 62 Ohio State 636; 78 Amer. St. 732; *Cate v. Martin,* 70 N.H. 135; 48 L.R.A. 613; 19 R.C.L. 186.

In *Intendent and Comrs. v. Sorrel,* 46 N.C. 49, cited to the contrary,

the act provided that the "intendent should have a *seat in the* board of commissioners and when present shall preside therein, and, in this and other cases of like tendency, there was language in the charter constituting the presiding officer a member of the board or he was understood to have no vote. We are of opinion, however, that the right of casting the deciding vote in this case arises to the mayor by reason of the general law on the subject. In the Revisal of (140) 1905, ch. 73, relating generally to the government of cities or towns, it is enacted, in effect, that a mayor shall have a casting vote in case of a tie and not otherwise. And, in section 2918, that this chapter shall apply to all incorporated cities and towns when the same shall not be inconsistent with special acts of incorporation or special laws in reference thereto."

While the power in question is not expressly conferred in the charter, there is nothing contained therein that is inconsistent with the mayor's right to give a casting vote in case of a tie, assuredly not on all questions other than those appertaining to ordinances, contracts, and franchises, as to which his powers and duties are very specifically stated and under the general statutes referred to he has clearly the right to give such vote in reference to these appointive offices.

It is urged for the realtor of plaintiff that, as this very provision for a casting vote was conferred in express terms, under the provisions of a former charter, that of 1911, and is omitted in the present act, this omission shows an intent on the part of the legislature to withdraw the power and that the later act, which is entitled "An act to revise and consolidate the charter of Elizabeth City," should be construed as repealing the former charter *in toto*. While implied reveals are not favored in the law or to be readily presumed, *State Treas. v. Sanatorium*, 173 N.C. 810, it is also recognized, as realtor of plaintiff contends, that when a subsequent statute covering the entire subject gives clear indication that it was intended as a substitute for the former, it will operate as a repeal of the former law, and it is probably the correct position that the later charter is a repeal of that of 1911, but the principle does not extend to a repeal of a general statute on a subject of this character and which provides in express terms that its provisions shall apply except when inconsistent with the special law.

There are many instances, no doubt a majority of the cities and towns of this State having boards of aldermen or commissioners of even number and some provision of this kind is often essential to the efficient working of a city government. It was, no doubt, left out of the later charter because it was supposed, and rightfully, we think, that the general law would apply except in cases where the charter expressly intended otherwise.

On the record, we concur in the view of the court below and are of opinion that defendant has been rightfully appointed.

Affirmed.

Cited: Glenn v. Culbreth, 197 N.C. 678; *Smith v. Carolina Beach,* 260 N.C. 836; *Freeman v. Commissioners of Madison,* 217 N.C. 214; *Berry v. Payne,* 219 N.C. 177; *In re Wingler,* 231 N.C. 565; *Wrenn v. Kure Beach,* 235 N.C. 295.

(141)

LEWIS T. PERRY, EXECUTOR, v. ROSE E. PERRY ET AL.

(Filed 27 February, 1918.)

1. Wills—Devise—Ademption.

A direction by the testator that his real and personal property, not otherwise disposed of, be sold and the proceeds divided among certain living grandchildren, refers to such as may be living at the time of his death; and when he has sold, in his lifetime, a part of his realty, such sale is an ademption, and the proceeds will pass under another clause of the will particularly relating to the testator's property of this character.

2. Same—Consistent Clauses.

Where the testator directs the sale of his land and the proceeds to be distributed among five children, and in his own lifetime has sold a part of the land, the fact that in a subsequent item he directs that his moneys on hand, etc., shall be divided among the children of only four of these children, does not indicate that the children of one had been inadvertently omitted by him from the latter item.

3. Parties—Guardian Ad Litem—Representation—Supreme Court—Appointment—Statutes.

Where a construction of a will by the court is sought, and it appears that certain of the minors in interest had been served with process but inadvertently a guardian *ad litem* had not been appointed; but it appears that their rights had been thoroughly considered and determined in the Superior Court and presented on appeal, and there are no issuable facts involved, the case will not necessarily be remanded for the appointment of a guardian *ad litem* for the Supreme Court may appoint one under authority of Pell's Revisal, sec. 1545.

4. Wills—Interpretation—Attempt to Defeat.

A party to an action to obtain a construction of a will to ascertain the testator's intent, and who consented thereto for that purpose will not be defeated of his rights thereunder by a clause providing that an attempt to defeat the will or any item thereof shall bar a recovery of any interest in the estate.

PERRY *v.* PERRY.

APPEAL by plaintiff from *Whedbee, J.*, 18 December, 1917, the judgment having been rendered out of term by consent, as of Fall Term, 1917, of WARREN.

This action is to obtain a construction of the will of M. V. Perry and to obtain directions from the Court in what manner said executor shall pay up and settle the proceeds of the bonds which were obtained by said testator after the date of the will by the sale of real estate which had been specifically devised.

In his complaint the executor, Lewis T. Perry, demanded payment for the services rendered by him to the testator under his promise to reimburse the plaintiff in his will. Pursuant to such agreement, the testator devised to Lewis T. Perry a valuable house and lot in the city of Raleigh, in addition to $1,000 worth of North Carolina 4 per cent bonds. After the execution of the will, said testator (142) disposed of all the real property which he had devised and which was thereby adeemed and Lewis T. Perry, in this action, sought to recover for his services upon a *quantum meruit*. The value of his services so rendered was fixed by consent in this action at $7,500, and judgment was entered therefor. By consent of all parties, the court was authorized to construe the will and to give directions to the executor in accordance therewith.

The petitioner joined as parties defendant in this action all the heirs at law of said M. V. Perry, deceased, and all the devisees and legatees named in said will and all the said defendants were duly served with summons.

The children of Lewis T. Perry, *i.e.*, Rose E. Perry, Emma M. Perry, Lewis C. Perry, and Bessie Perry, mentioned in said will were duly served with summons in said action; but, by oversight, no *guardian ad litem* was appointed for them, which oversight was not discovered till after judgment had been entered. The jurge, in settling the case, finds as a fact that the petitioner in his complaint asked for a construction of the will which gave them every right and benefit possible under the same; and that upon trial the counsel for the petitioner argued orally to the court for the construction of said will which would adjudge that his children were entitled to share in the property by virtue of Clause 25 in the will, and that this clause was not superseded by the sale and omission from Clause 30 of said will, which is the proposition presented by this appeal. The court further finds as a fact that every right and defense of said infant defendants were fully presented and argued on behalf of said infants by the counsel for the petitioner, who was their father, and that their rights and defense in said action were protected in as full and ample manner as if a guardian *ad litem* had been formally appointed.

The Court held that the petitioner could recover only upon the allegation of express contract to compensate him for the services rendered, and the case was tried before the jury on this theory. At the close of the testimony for petitioner, the matters in controversy between petitioner and defendants were compromised and a judgment rendered in his favor for $7,500 and his counsel fees. After such judgment, it was agreed between the counsel for the petitioner and defendants that the real estate in Raleigh which had been devised to the petitioner by Clause 6 of the will had been adeemed, and that the only question was the construction of said will and statement of the final account by the petitioner and by consent of all parties, the court was to render judgment out of term as of Fall Term, 1917, and from the judgment so rendered the petitioner appealed.

(143) *Winston & Matthews for plaintiff.*

Gilliam & Davenport, W. E. Daniel, W. D. Pruden, G. E. Midyette, Joseph P. Pippen for defendants.

CLARK, C.J. This case was here, *Perry v. Perry,* 172 N.C. 62, where the facts stated can be taken as supplementary to the facts above set out. Practically, there is but one question presented for our consideration. Item 25 of the will provides: "I further direct that all my estate, both real and personal, not herein disposed of, be sold at such time and places and upon such terms and conditions as my executor may deem best. And the proceeds, together with all money he may have in hand belonging to my estate to distribute the same equally between the living children of Stark Perry, Bettie Felton, Mary Myers, Gaston Perry, and Lewis T. Perry." Item 30 is as follows: "I hereby direct my executor to take charge of all money in hand or deposit, also all North Carolina State (4 per cent) bonds and collect same as heretofore directed, and should not the money received for the said bonds be sufficient to pay all legacies, insurance, taxes, and repairs as directed to be kept paid, then he, my said executor, is empowered and directed to draw on the general fund from time to time as it may be deemed necessary by him to defray the above mentioned expenses. The above mentioned United States bonds are also to be included in this item and subject to the same. And it is my will and desire, and I so direct, that funds of every kind and description arising from whatever source, remaining in the hands of my executor or successor, after delivering up the bequests herein named to legatees aforesaid be a general fund and I direct to be paid to the living children of Stark Perry, Bettie Felton, Mary Myers, and Gaston Perry."

In Item 30, the fund, created largely by the sale of property which in Item 25 had been devised to the children of Stark Perry, Bettie Felton, Mary Myers, Gaston Perry, and Lewis T. Perry, was directed to be paid to the living children of the same, except that the children of Lewis T. Perry, the plaintiff, are omitted in said Item 30.

The contention, as the court below found and as appears by the briefs here, is that:

1. The devise of the real estate should speak as of the date of the execution of the will, and that upon its ademption by the subsequent sale by the testator the devisee named in section 25 should take the proceeds. This, however, is contrary to the well-settled rule that a will speaks as the death of the testator. The subsequent sale of the property by him was an ademption, and in the absence of a codicil or provision providing for such contingency, the proceeds of the sale made by the testator of the realty passed into the class mentioned in section 30, which omits the children of the petitioner.

2. It is contended, in the second place, that inasmuch as the (144) devise of the realty in section 25 is to the children of five parties named and in the bequest in section 30 of the residuary, the children of only four are named as legatees, there was an inadvertence in omitting the children of Lewis T. Perry. There is nothing in the will to indicate that this was a mistake, and there is no allegation in the complaint or answer upon which to base such finding, and if it had been the judge below would have had to instruct a jury to find to the contrary. There was no controversy of fact that required its submission as an issue to the jury.

The court having found as a fact that the four children of Lewis T. Perry had been served with summons, and that their interests had been fully represented in the oral argument by the counsel of their father (the petitioner), and that their rights had been fully considered, there is no ground on which to remand the case to a jury for a finding upon that issue. Their interests were fully discussed orally by counsel below, as the judge finds as a fact and also in the briefs filed in this Court. This Court appointed Joseph L. Seawell, the clerk of this Court, as guardian *ad litem* of said children of the petitioners, Rose E. Perry, Emma M. Perry, Lewis C. Perry, and Bessie Perry, who has adopted the brief filed in this cause by the petitioners, which sets out fully their contentions, and upon consideration of the argument, we affirm the judgment of *Judge Whedbee.*

Revisal, 1545, provides: "The Supreme Court shall have power to 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. Also, to amend by

making proper parties to any case where the court may deem it necessary and proper for the purposes of justice and on such terms as the court may prescribe; and also, whenever it shall appear necessary for the purpose of justice to allow and direct the taking of further testimony in any cases which may be pending in said court under such rules as may be prescribed, or the court may remand the case to the intent that the amendments may be made, further testimony taken or other proceedings had in the court below."

It has been repeatedly held that the Supreme Court may amend as fully as the Superior Court could do, and in the same instances. *Robeson v. Hodges,* 105 N.C. 50, and other cases cited under section 1545 in Pell's Revisal. The power to make parties here includes the power to appoint a *guardian ad litem.*

The Court would take the alternative of remanding the case for appointment of a guardian *ad litem* but for the fact that the judge finds as a fact that the children of the petitioner had been served with
(145) summons and their interests had been represented by the arguments of the counsel for their father, the petitioner, and the absence of anything in the will or in the pleadings or proof that their names had been omitted in section 30 by mistake. Their cause has also been fully presented by the briefs filed here. The judge not only had the same argument below, but in his judgment passed upon the contention made in their behalf. It would be a vain and useless act, therefore, to remand the cause. The provision in item 28 of the will that any person who should attempt to defeat in any particular the will, or any item thereof, should be barred of recovery of any interest in the estate has no application, for these defendants have not so attempted, but are simply concurring in the request of the petitioner for the construction by the Court of the will as written in view of the ademption of the legacies of realty, under the principles laid down in *Balsley v. Balsley,* 116 N.C. 472.

Affirmed.

Cited: King v. Sellers, 194 N.C. 535; *Green v. Green,* 231 N.C. 709.

W. A. COHOON v. JEFFERSON DAVIS ET AL.

(Filed 20 February, 1918.)

1. Evidence—Admissions—Pleadings—Demurrer—Trials.

In an action to recover damages alleged to have been caused by the negligence of the defendant's driver of his team, and there is sufficient evidence of the negligence, a demurrer on the ground that there was no evidence that the driver was employed by the defendant at the time will not be sustained where the plaintiff has alleged it and it is admitted in the answer and the trial has proceeded upon that theory throughout without defendant's objection.

2. Instructions—Evidence—Contributory Negligence—Rule of Prudent Man.

Where the evidence in an action to recover damages for the alleged negligence of the defendant is sufficient to establish contributory negligence on the plaintiff's part, if so found by the jury, it is reversible error for the trial judge to add to an instruction containing the facts showing such negligence, that they should find for the plaintiff if they found that he acted as a reasonably prudent man under the circumstances. *Hinson v. Telegraph Co.*, 132 N.C., 466, cited and applied.

APPEAL by defendant from *Kerr, J.*, at the Special October Term, 1917 of TYRRELL.

This is an action to recover damages for personal injury caused, as the plaintiff alleges, by the negligence of the defendants. The defendants deny negligence, and allege that the plaintiff was injured by his own contributory negligence.

The plaintiff, who was driving a cart at the time, was injured on the night of 18 September 1916, on one of the streets of Columbia, by a collision with a dray belonging to the defendants and (146) driven by one of their employees.

The plaintiff offered evidence tending to prove that the street where the collision occurred was thirty feet wide; that the night was dark; that he was driving a gentle horse in a walk; that he was on the extreme right of the street; that the employee of the defendants, who was going in an opposite direction, approached him driving at a high rate of speed; that the employee was in the middle of the street; that the plaintiff gave notice of his own presence, but that without any notice from the employee and when making no effort to stop, he drove against the cart of the plaintiff, threw him out and seriously injured him.

Defendants introduced evidence tending to prove that their employee was driving at a speed of from four to six miles an hour; that he was on the extreme right of the street as far from the plaintiff as he could go; that the plaintiff was in the shade of a large cypress overhanging the street; that there was a light behind the employee of the

defendants and in front of the plaintiff; that the employee of the defendants could not see the plaintiff on account of his position under the tree and the location of the light; that the plaintiff was about the middle of the street; that the plaintiff saw and heard the employee of the defendants approaching and knew that there was a danger of a collision and made no outcry and gave no notice of his presence.

There was a motion by the defendants for judgment of nonsuit, which was overruled, and the defendants excepted.

His Honor instructed the jury on the second issue, incorporating the facts relied on by the defendants to show contributory negligence, and then added to the instruction: "And you find that a reasonably prudent man would not have done as the plaintiff did on that occasion, you would answer that issue 'Yes,' but if you find from the evidence that the plaintiff was driving as a reasonably prudent man would have on that occasion; that he did what a reasonably prudent man would have done to prevent the injury, then you should answer that issue 'No,' because he would not be guilty of contributory negligence." The defendant excepted. The jury returned the following verdict:

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

2. Did plaintiff, by his own negligence, contribute to his injury? Answer: "No."

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

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

T. H. Woodley and Aydlett & Simpson for plaintiff.

Majette & Whitley and Meekins & McMullan for defendant.

(147) ALLEN, J. The position of the defendants in support of their motion for judgment of nonsuit is that there is no evidence that Combs, who was driving the dray, was engaged in the business of the defendants at the time of the collision. It is true no witness testifies directly to the fact, but the circumstances tend to prove it, and the pleadings and the whole course of the trial show that this fact was not in controversy.

The complaint alleges "that on the 18th day of September, 1916, and prior thereto, John Combs was in the employ of the defendants, his duties being, among other things, to drive the dray or wagon for the defendants in delivering goods and other works connected with the said business of said defendants," and this allegation is admitted in the answer.

The plaintiff testified that at the time of the collision Combs was driving a dray belonging to the defendants and that he was going from the store of the defendants to their stock house, and his Honor in his charge to the jury spoke of Combs more than once as the agent of the defendants, and of his acts as their acts, without objection at the time, and no exception is now taken to this part of the charge.

We do not think this contention of the defendants can be sustained, and being of opinion there is evidence of negligence, the ruling on the motion for judgment of nonsuit is upheld.

The exception of the defendants to the charge on the issue of contributory negligence is well taken.

If the night was dark and the plaintiff in the shade of a tree, if the lights were so located that the plaintiff could see the approach of the employee of the defendants and that he was moving at a high rate of speed; if the plaintiff was in the middle of the street and in danger of a collision, and he did not attempt to turn to the right and make no outcry, and gave no notice of his presence, he was guilty of contributory negligence, and as there was evidence tending to prove these facts, the defendants were entitled to have them submitted to the jury without the qualification of the rule of the prudent man, which, under the evidence in this case, permitted the jury to answer the second issue against the defendants although they might find every fact bearing on the conduct of the plaintiff as the defendants contended, if, upon the whole evidence, the jury thought the plaintiff was acting as a man of ordinary prudence.

The rule of the prudent man is the standard for determining negligence and contributory negligence, and it is frequently sufficient to submit the question to the jury with this as the sole guide, but it is error to superadd this qualification to a statement of facts which themselves, singly or in combination, establish negligence or contributory negligence.

(148) A precedent in point is *Hinson v. Telegraph Co.*, 132 N.C. 466, in which a new trial was ordered on account of a similar erroneous charge.

New trial.

J. A. NORTHCOTT v. ROBERTA S. NORTHCOTT ET AL.

(Filed 27 February, 1918.)

1. Betterments—Estates—Tenant for Life.

A devise of lands for life with limitation over, does not entitle the life tenant to compensation for betterments he has placed on the land during his tenancy, under the equitable principles allowing it, or our statute relating thereto, Revisal, sec. 652 *et seq.*

2. Judgments—Estoppel—Estates—Life Tenant.

Where the right to compensation for betterments placed by the life tenant upon lands has been adjudged against him, or that he "is not entitled to a sale of the land to collect the improvements put thereon by him," the judgment reciting that the "cause is heard by consent on the pleadings, report of commissioner, and other records," with leave to plaintiff to amend his complaint, which was not done, with exception to the judgment appealed from but not perfected; *Held*, the judgment is conclusive between the parties and operates as an estoppel in another action between them upon the same subject-matter.

3. Judgments—Estoppel—Nonsuit—Appeal and Error.

Where the court has by consent considered the action upon the evidence and the pleadings and enters judgment therein for defendant as if upon demurrer, which is excepted to without perfecting the appeal, in another action upon the same subject-matter between the parties it is *Held*, the judgment so entered is equivalent to one of nonsuit under our statute.

4. Judgments—Extraneous Matters—Excuse—Appeal and Error.

Where judgment has been excepted to and the appeal not perfected, the appellant in another action involving the same subject-matter may not dispute the finality and conclusiveness of the judgment by showing he had another cause of action which he had not brought forward.

CIVIL ACTION, tried before *Whedbee, J.*, at October Term, 1917 of HERTFORD.

Plaintiff alleged that Mary A. Mitchell died 19 June 1899, leaving a will in which she devised the land in question, in the town of Winton, to him for life (after the death of her husband), and at plaintiff's death to his children in fee, but if he died without children, to his sister, Roberta S. Northcott, with an exception of part of the lot which is given to Roberta S. Northcott for her life with limitation in case of her death without heirs of her body, to John A. Northcott for his life and then to his children, but not to be sold. Plaintiff further alleges that
(149) he has improved said lot by erecting a fine residence upon it costing $2,800, and fences around the yard, where he and defendants live. His children and Roberta S. Northcott, his sister, were made parties defendant and served with process, a guardian *ad litem* having been appointed for the children, who are minors. It was further

alleged that the interests of the defendants would be materially promoted by a sale of the lot. Plaintiff then prayed for judgment, among other things:

"1. That the plaintiff be allowed to purchase said lot by paying the value of same prior to said improvements, and the money to be invested as the court may direct.

"2. That if the court be of the opinion that such a sale cannot be made, then that said lot be sold in the manner directed by the court, and the proceeds be invested as the court may decree.

"3. For such other relief as plaintiff may be entitled in law or equity."

The case was heard by Judge Winston, who entered the following judgment: "This cause is heard by consent on the pleadings, report of commissioners, and other records referred to in the pleadings, and upon the deed for the land to John A. Northcott and others. The court is of the opinion that John A. Northcott is not entitled to a sale of the land to collect the improvements put thereon by him and so adjudge. To this the said Northcott excepts. On motion of plaintiff to be allowed to do so, leave is given him to amend his complaint. It is adjudged that plaintiff pay the costs of this action up to the filing of such amendment as he desires. It was agreed that the judge should take the papers and render his judgment out of term and out of the county and district. Done at chambers, 14 October 1916."

At October Term, 1917, the cause was heard by *Judge Whedbee,* who entered the following judgment: "This cause being called for hearing, and after having read the pleadings and the judgment rendered by Winston, J., the court is of the opinion that the Winston judgment is a final determination of this action, and it is adjudged that the action be dismissed as of nonsuit, and the plaintiff is taxed with the costs." Plaintiff appealed.

Pruden & Pruden and Winborne & Winborne for plaintiff.
W. D. Boone for defendants.

WALKER, J., after stating the case: We are of the opinion that Judge Winston was right in holding that the plaintiff was not entitled to judgment for a sale of the land to pay for the improvements which he had put upon it. The reason is that he has improved it for the better enjoyment of his admitted estate in it, knowing the length of his term, or the quantity of his interest, and, therefore, when his estate will expire. He is not within the protection of the equitable (150) principle allowing for betterments made by one who honestly and in good faith believed he had a good title and is afterwards de-

prived of the land, when an equity arises for his compensation, at least out of the rents and profits, or the value of use and occupation chargeable against him, and our statute is in affirmance of the principle, Revisal, sec. 652 *et seq.*, but perhaps more liberal in its provisions and broader in its scope. We need not discuss or decide as to the extent of this equitable doctrine, because the benefit of it cannot be claimed by the plaintiff, who shows no equity that entitles him to it. 16 Cyc. 631, says: "If the life tenant himself makes permanent improvements, it will be presumed that they were for his own benefit, and he cannot recover anything therefor from the remainderman or reversioner." Many cases are cited in the note to this text in support of the statement, and among them *Merrit v. Scott,* 81 N.C. 385, where *Smith, C.J.,* said: "We think it clear that improvements of any kind put upon land by a life tenant during his occupancy constitute no charge upon the land when it passes to the remainderman. He is entitled to the property in its improved state, without deduction for its increased value by reason of good management or the erection of buildings by the life tenant, for the obvious reason that the latter is improving his own property and for his own present benefit. This proposition is too plain to need the citation of authority."

Lord Thurlow said that a tenant for life, with remainder over to others, could not lay out a sum of money on the estate and charge it on the reversion or remainder, although the estate itself would be benefited. *Bostick v. Blackney,* 29 Eng. Reprint 362, 364 (2 Bro., ch. 656). And in *Stewart v. Matheny,* 14 Am. St. Rep. 538, the same rule is stated with the reasons for it, that "the holders of the land during the life estate must be held to have known the nature and duration of their estate, and to have improved it for themselves, taking the risk of its duration, and nothing is shown to entitle the life tenant to pay for improvements." *Wilson v. Parker,* 14 Sou. Rep. 264, 266; *Doale v. Wiswell,* 38 Me. 569; *Warren v. Lauman,* 91 Md. 90.

The judgment entered by order of Judge Winston was clearly intended to cover the whole case submitted to him for his decision, and that was based upon all the matters alleged in the complaint, and the question was treated by the parties and the learned judge as if raised by demurrer to the complaint. The judgment, therefore, was equivalent to one of nonsuit, under the statute, whereby the action is dismissed. It was a final decision upon the merits of the case. While the judge stated therein that plaintiff was not entitled to a sale of the land to collect for the improvements placed thereon by him, this does not limit the conclusive effect of the judgment as to all matters alleged

in the complaint. The truth is that plaintiff wanted a sale to himself of the land at its unimproved value, and if that could (151) not be allowed to him, then a sale of it as it stood with the improvement, so that he might have an opportunity to buy the remainder, taking his chance on the price. He was looking out for his own interests, and not for those of the remaindermen; and the court viewed it as an effort on his part to be reimbursed for his outlay, whether the sale was private and restricted, or public and unrestricted. At any rate, the judgment was intended to cover the whole case, and if plaintiff elected not to amend, then he should have prosecuted his appeal. Not having done so, Judge Whedbee properly held and adjudged that he was barred of any recovery in that action by Judge Winston's decree.

The case was not conducted with a very precise regard to due formality. The judgments should have been drawn out in full and signed, but, while this was not done, enough appears to show that the plaintiff has had a full day in court and lost. If the decision was erroneous, he could only be restored to his right by an appeal. He cannot now explain or attack the judgment by showing that he had another cause of action which could have been brought forward but was not. We think the case falls under the principle of estoppel as defined in *McKimmon v. Caulk*, 170 N.C. 54, at p. 56, quoting from *Coltraine v. Laughlin*, 157 N.C. 287; but if not, we fail to see how plaintiff can now relitigate a matter covered and closed by a final judgment, and especially so when it was agreed by the parties that the case be submitted to the judge for his decision and judgment upon all matters embraced within the pleadings. He did consider it and gave judgment for the defendants, and this ends the litigation, no appeal having been prosecuted to this Court.

We, therefore, agree with Judge Whedbee that the proceeding should be dismissed.

No error.

Cited: Hampton v. Spinning Co., 198 N.C. 239; *Smith v. Suitt*, 199 N.C. 8; *Cameron v. McDonald*, 216 N.C. 715; *Hall v. Hall*, 219 N.C. 809; *In re Canal Co.*, 234 N.C. 378.

J. S. LYNCH v. DEWEY BROTHERS, INC.

(Filed 27 February, 1918.)

1. Trials—Nonsuit—Evidence.

The courts in passing upon a motion to nonsuit upon the evidence, will consider the evidence in the light which tends to support the plaintiff's case and reject all that tends to disprove it.

2. Master and Servant—Negligence—Evidence—Contributory Negligence —Assumption of Risks—Res Ipsa Loquitur.

Where the plaintiff sues to recover damages for a personal injury caused by the alleged negligence of the defendant, and there is evidence tending to show that the injury was received while he was working, in the course of his employment, at defendant's planer of an old style, and that a safer machine had been approved and in general use for a number of years, which is so constructed as to prevent the injury complained of, the questions of negligence, contributory negligence and assumption of risks are for the determination of the jury, under the rule of the prudent man. As to whether the doctrine of *Res ipsa loquitur* applies to the facts of this case, *Quare?*

3. Trials—Evidence—Negligence—Questions for Jury—Master and Servant.

Where there is evidence tending to show that the defendant was injured while using a planing machine of an old type which he had negligently been permitted to use in the course of his employment, and that he could have accomplished the same purpose by hand, but not so quickly as in the other way, the question as to whether the plaintiff was negligent in making the choice is one for the jury, as under the facts of the case it was not negligence *per se to use the machine.*

CIVIL ACTION, tried before *Allen, J.*, and a jury, at November Term, 1917 of WAYNE.

The plaintiff was in the employment of the defendant company on
10 August 1917, as pattern maker, and had been there for some
(152) months previous to this date. He was directed to add one-fourth
of an inch to the thickness of a sawdust grate bar. To do this it required a piece of timber one-fourth of an inch thick to be tacked on the old grate bar. While he was at the machine engaged in planing the timber, the latter kicked back and his hand was drawn into the planer and his fingers cut off by the knives.

The following testimony from the record will sufficiently describe the nature of the work and the manner of the injury:

J. S. Lynch, plaintiff, testified: "On 10 August 1917, I was working with Dewey Brothers as pattern-maker, and Mr. George Dewey, foreman of the shop, came into the pattern shop and brought a grate-bar, known as a sawdust grate bar, and asked me to add one-fourth of an inch to the thickness of the bar. To do this it required a piece of tim-

ber one-fourth of an inch thick to be tacked on the old grate bar. I proceeded to get out the timber and make this pattern thicker.
The only timber that we had to work with was one and one- (153)
fourth of an inch thick and this had to be dressed down to one-fourth of an inch thick. I used what is known as the jointer machine to dress the timber down to the proper thickness. I had no other way to dress it down except by hand, which would have been a very slow process, so I dressed it down on this machine, and was just in the act of making the last cut and had started the piece of timber through the last cut when it kicked back and caught my fingers in the machine and cut them. (Plaintiff shows his hand to the jury and shows that two fingers on his left hand are cut off just above the second joint.) The machine that I was using is what is known as the jointer or buzz-planer—I don't know the name of it. It was an old-style machine."

Q. "Now state whether or not that is a modern and approved machine that is used for doing the same sort of work you were doing on that machine?" A. "No, sir." Defendant objects.

"People called them square-head jointers. In other words, the head is a square of iron in which the knives are bolted and revolved at the rate of twelve or fifteen thousand revolutions a minute, or something like that. A round head, or safety-head, jointer is a round piece of steel and the knives are inserted and work so close to the table of the machine that it would be impossible, I should think, for persons to get their hands in the machine with a safety head. They could not possibly get their fingers in a safety-head machine. The machine was working that morning as usual. It is the duty of the one operating the machine to properly adjust it before working on it, and I made the necessary adjustments on this occasion before I attempted to use it. The machine consists of two tables with knives in the center, and you adjust the machine by turning a wheel which runs the table up or down so that the knives will cut off a certain amount. You can make it cut one-thirty-second of an inch or you can take one-half-inch cut at one time. It is not unusual for timbers to fly back on these machines, as the timber did that I was using on this occasion. In running the piece of timber across this machine you have to hold it in place and push it along. You are pushing forward, and when it flies back it will throw your hands back also, and if your hands come across the knives, or where the knives would touch them, they would cut."

Q. "Suppose it were the more modern safety-head machine, what would happen?" A. "Well, you would get cut or probably skinned, but you could not possibly get your hand in the machine. You would get hurt if your hands touched the knives. The round-head machines were

in general use at the time I was injured. They were in general
(154) use at A. T. Griffin Manufacturing Company, Goldsboro Furniture Company, and Wayne Agricultural Works."

Q. "Can you state some place where they do this sort of work at which you observed a safety-head machine in use?" A. "Yes, sir."

Q. "Where?" A. "At A. T. Griffin's."

Q. "A. T. Griffin Manufacturing Company?" A. "Yes, sir, and the Goldsboro Furniture Company, and the Wayne Agricultural Works."

Q. "Have they planers for performing the same kind of work you were performing on this machine?" A. "They have safety-head planers. Is that what you mean?"

Q. "Have you observed this same machine that hurt you since you were injured?" A. "Yes, sir."

Q. "Has its condition changed since you were hurt?"

Defendant objects; sustained, and plaintiff excepts.

"The defendant had knowledge that I was using this machine in my work as pattern maker."

Q. "Can you explain what was the approximate and immediate cause of your hand getting hurt? What was the approximate and immediate cause of your fingers getting cut off?" A. "Well, the immediate cause of my getting my fingers cut off was the machine kicking that board out of my hand and pulling my hand back into the knives. The approximate cause, I should think, would be the fact that it was a machine of this kind—a square-head jointer. If it had been a safety-head jointer I could not have got my fingers cut off. I could not have got them in the machine."

Cross-examination: "I was employed by the defendant as pattern maker, and not as a regular carpenter. I had been using this machine for about five months. I do not know whether they are still manufacturing the square-head machines. There is no difference in the bulk of the machine, except one has the square head and the other has a round head."

Q. "Do you think it is impossible for a man operating a round-head machine to get his hand caught in it?" A. "Yes, sir."

Q. "And get cut?" "No, sir. I don't think it is impossible. It is possible for him to get cut, but it is imposible for him to get his fingers in the machine."

Q. "If the machine is set for one-tenth inch, it would take one-tenth inch off his fingers?" A. "Yes, sir."

Q. "If it is set for one-half inch, it would take off one-half inch?" A. "Yes, sir."

Q. "Can't you tell us, with the machine making 15,000 revolutions

a minute, as you say this machine makes, taking off one-sixteenth of an inch per revolution, how long it would take to (155) cut off your fingers to the extent that they are cut off now?"

A. "Not very long; about a second, I will say."

Q. "Could you get your fingers away in time?" A. "Yes, sir. You could get them away as quick as you could pop your fingers."

Q. "It takes about a second to do that, doesn't it?" A. "Yes, sir."

Q. "Will you describe once more to the jury how you say this accident occurred, and how you had your hand when the accident occurrred, and what size piece of timber it was?" A. "I had my hand on the board; this left hand was at that time about six or eight inches in front of the knives, and I had pushed the board that far, and, of course, had it behind the knives until it went far enough for me to change my hand and put it over there."

Q. "The machine kicked the board back?" A. "Yes, sir; and pulled my hand right back across the knives."

Q. "You stated it wasn't unusual for the machine to kick boards like that?" A. "No, sir."

Q. "You had worked with this machine for a period of five months, knowing it didn't have a safety-head on it?" A. "Yes, sir. I was to dress the board down to one-fourtth of an inch in thickness, and I was making the last cut when I was injured."

R. F. Mintz testified: That he is now a member of the bar and that previous to his entering upon the study of law worked in woodworking machinery for more than seven years. "I worked at the furniture factory. I have operated a jointer machine. There are two kinds; one known as the square-head jointer and one known as the round-head. The square-head machine is by no means as safe as the round-head jointer, for the reason that the square-head machine operates in such a way that it leaves a cut that your hand could easily be caught in between the frame and the jointer, while the round-head does not. It would cut, but if properly adjusted, would cut only a small nibble, just a small bite at the time."

Q. "State, according to your experience and knowledge, whether or not in operating a safety-head machine an operative could get such an injury as Mr. Lynch suffered?" A. "Such a thing would be possible, but I rather think he would have to hold his hand there for some time. I don't believe that if he used the proper precaution that he would get that bad an injury. I have been seeing round-head jointer machines for about four or five years, I guess. I have seen them in use in Fayetteville and Wilmington. I think a round-head machine would perform the same work in the same way as the square-head machine."

Cross-examination: "A round-head machine could easily be adjusted

to take a deep cut, I suppose, and in my opinion it has as much
(156) power as a square-head machine. I do not know of my own knowledge for what purpose this jointer was used down at the foundry of Dewey Brothers, and I do not know what class of timber it was used to work on."

Harrell Pate testified: "I am employed by the Empire Manufacturing Company. They do not have planing machines or jointers where I work. I have seen the jointer machine in operation at the furniture factory. They have round-head jointers there now. The difference between the square-head and round-head jointers is that in the square-head jointer there is a space between each end of the table and the bed where it is low down; there is a space there, and you can get your fingers between the end of the table and the bed, and if you get your fingers in there it keeps drawing them in, and the round-head will not do it. You take a round-head and if your hand strikes it, it will knock it off and will not cut it deep enough to amount to anything. I have observed a safety jointer machine in use at the White Furniture Company at Mebane and Whiteville Furniture Company. I have seen the round-head machine, the first one about eight years ago."

Cross-examination: Q. "According to the testimony of the plaintiff the machine was making 15,000 revolutions per minute at one-sixteenth of an inch. At that rate it would cut off fifteen and ten-sixteenths of an inch per second. How long do you think a man would have to hold his hand there to cut his fingers off?" A. "I don't know."

Q. "I ask you if a round-head machine will cut as deep a cut in a piece of timber as the square-head machine?" A. "No, sir."

Redirect examination: "This joinder machine will sometimes kick the timber back if it happens to strike the end or if there is a knot in it."

There was other evidence to the effect that both kinds of planers would cut the fingers if the board kicked back, but that the round-head machine would not draw the fingers into the machine so as to cut off the hand or the fingers.

At the close of the evidence the defendant moved for a nonsuit, which the court refused to grant. Judgment was entered for the damages assessed by the jury in the verdict, and plaintiff appealed.

Teague & Dees for plaintiff.
J. L. Barham for defendant.

WALKER, J., after stating the case: The judgment of the court was correct. In passing upon a motion to nonsuit, we should consider the

evidence in the light which tends to support the plaintiff's case, rejecting all that tends to disprove it. There was, perhaps, evidence of contributory negligence on the part of the plaintiff, but it was for the jury to determine the effect of it under the doctrine of the or- (157) dinarily prudent man, as it was not of such a nature that reasonable men would not differ in regard to it, and so as to assumption of risk, if that defense was presented in the case at all. It was for the jury to say whether the risk or danger was so obvious and imminent that a man of ordinary prudence, having due regard for his own safety, would not have continued in the service or in the presence of the danger. The essential facts are few. The defendant kept a planer, or jointer, of an old and disused pattern, when there was a newer model approved by those engaged in the same kind of business, that is, planing, and in general use by them. It had been operated in various mills for more than five years, and seems to have been well known, judging from the testimony of the experts. It was a safer machine in that while, if the board being planed should kick back it might inflict an injury to the hands, it would not involve the loss of the hand or fingers, but the wound would be slight.

The plaintiff testified that this very difference between the two machines was what caused his injury. It is strange that the defendant waited so long to install the new model, for the safety of its employees, if for nothing else, as it could, perhaps, have been done for a difference in the cost not exceeding the recovery in this one case. We do not say that defendants must be the "first by whom the new is tried," but they should take care to see that they are not the "last by whom the old is laid aside." Sometimes a little precaution is a good investment, and worth, in the long run, far more than its cost. There can be no doubt that the plaintiff had been permitted to use the machine, and the defendant will not now be heard to say that he was negligent in using it instead of dressing the timber by hand. Whether there was negligence in thus making his choice of methods, was manifestly a question for the jury.

We said in *Dunn v. Lumber Co.*, 172 N.C. 129, 137: "It was not claimed that there was any defect in the hammer dog itself, but that it was not sufficiently secured, or, if this was not so, that a defect in the machine caused it to fly out and drop on the saw. If the plaintiff was not responsible for the movement of the hammer-dog, and the jury found that he was not, it must have been either improperly secured, or some defect in the machine, either in its original construction or in its needed repair, must have caused the hammer-dog to fall on the saw. It is not always a full performance of the master's duty to provide merely for his servant implements and appliances which are

known, approved, and in general use. He will still be liable for any injury proximately resulting from a failure to perform that duty in any other respect. He is not permitted to put defective machines or appliances in the hands of his servants with which to do the
(158) work, even though they may be of the requisite model, or type; and if he is negligent in so doing, and thereby cause injury to the servant, he must answer in damages for the wrong. *Ainsley v. Lumber Co.*, 165 N.C. 122; *Kiger v. Scales Co.*, 162 N.C. 133. This rule has frequently been recognized by us in negligence cases. It is a part of his obligation to furnish appliances, 'which are known, approved, and in general use,' but not necessarily all of it, and if he complies with that part of it, and is otherwise negligent in not supplying a reasonably safe place for the work to be done, or reasonably safe machinery, tools, and appliances with which to do it, he falls short of the legal measure of his duty."

And *Justice Brown* said, in *Deaton v. Lumber Co.*, 165 N.C. 560: "We think that this version of the testimony would justify the jury in drawing the inference of negligence in the manner in which the saw had been placed in its bearings. The manner in which the saw unexpectedly sprang out of its shield and injured the plaintiff, in the way testified by him, is very conclusive evidence that there was something unusually wrong with it, and presents a case where the doctrine of *res ipsa loquitur* will carry the case to the jury. In this case the facts and circumstances attending the injury speak for themselves, and in the absence of explanation or disproof give rise to the inference of negligence. It is evident that the accident would not have occurred if the saw had not unexpectedly sprung out of its protecting shield. Why it did so is not very clear, but the circumstance calls upon the defendant for explanation."

There are many cases in our reports which set forth the duty of the employer toward his employee, and among them is *Hicks v. Manufacturing Co.*, 138 N.C. 319, where *Justice Hoke* said: "An employer of labor to assist in the operation of railways, mills, and other plants where the machinery is more or less complicated, and more especially when driven by mechanical power, is required to provide for his employees, in the exercise of proper care, a reasonably safe place to work and to supply them with machinery, implements, and appliances reasonably safe and suitable for the work in which they are engaged, and such as are approved and in general use in plants and places of like kind and character; and an employer is also required to keep such machinery in such condition as far as this can be done in the exercise of proper care and diligence. *Witsell v. R. R.*, 120 N.C. 557; *Marks v. Cotton Mills*, 135 N.C. 287. True, the employee is said to assume all

the ordinary risks incident to the employment, but it is as well established that dangers attributable to the negligence of the master, when material to be considered, are usually classed under the head of extraordinary risks, and these the employee does not assume. . . . To bring the knowledge of such observed conditions of increased hazard imputable to the master's negligence into the class of (159) ordinary risks which the employee is said to assume, the danger must be obvious and so imminent that no man of ordinary prudence, and acting with such prudence, would incur the risk which the conditions disclose," citing Labatt on Master and Servant, sec. 279a, and other sections; Beach on Cont. Neg., sec. 361; *Sims v. Lindsay*, 122 N.C. 678; *Lloyd v. Hanes*, 126 N.C. 359; *Patterson v. Pittsburg*, 76 Pa. St. 389; *Kane v. R. R.*, 128 U.S. 95.

In *Lloyd v. Hanes, supra*, it is held that there is a wide distinction between more knowledge of danger and voluntary assumption of risk. The latter is a "matter of defense analogous to contributory negligence to be passed on by the jury, who are to say whether the employee voluntarily assumed the risk. It is not enough to show merely that he worked on knowing the danger, but further, it is only where the machinery is so grossly and clearly defective that the employee must know of the extra risk, that he can be deemed to have voluntarily and knowingly assumed the risk."

These principles have been approved and emphasized in more recent opinions of this Court as reported, one of which is very much in point here, *Hux v. Reflector Co.*, 173 N.C. 97. In that case the Chief Justice said: "Upon the above synopsis of the evidence the judge properly refused to nonsuit the case. The machine at which the plaintiff was injured was thirty-five years old; the cogs were exposed and not boxed in any way; there was no safety lever or any other kind of lever to stop the machine. The machine was more dangerous than new machines, and it was not in general use. The plaintiff was doing his duty at the time he was injured; and the defendant's general manager and floor boss both knew the defective condition of the machine and had seen it at work. The case was properly submitted to the jury," citing *Ainsley v. Lumber Co.*, 165 N.C. 122; *Steeley v. Lumber Co.*, 165 N.C. 27; *Kiger v. Scales Co.*, 162 N.C. 133; *Creech v. Cotton Mills*, 135 N.C. 680, and other cases.

If we reject that portion of the evidence which is unfavorable and accept that as true which is favorable to the plaintiff, there is sufficient to sustain his cause of action. There is sufficient testimony of his own for the jury as against the motion to nonsuit. Whether he exercised ordinary care in operating the machine, was not a question of law, but of fact, to be settled by the jury. We may select such

testimony as will justify a verdict for him, as that which is true, and reject what is left, as untrue, because the jury may have done that very thing in passing upon the testimony. Whether he kept his hand upon the machine too long, and whether, if he did, it was negligence for him to do so, was plainly for the jury to decide.

(160) It may be that upon a fair construction of the evidence, and giving the plaintiff the full benefit of that part of it which is favorable to him, the doctrine of *res ipsa loquitur* applies, and, if it does, the nonsuit was properly denied.

We have given careful consideration to the case, and to the able argument of defendant's counsel, and, after doing so, we have been unable to discover any error committed by the court.

No error.

Cited: Alexander v. Cedar Works, 177 N.C. 149; *S. v. Edmonds,* 185 N.C. 724; *Street v. Coal Co.,* 196 N.C. 181.

ERNEST WILLIAMS ET AL v. PUSS WILLIAMS ET AL.

(Filed 6 March, 1918.)

1. Deeds and Conveyances—Intent—Formal Clauses.

A conveyance of land should be construed to effectuate the intent of the donor as gathered from the wording of the entire instrument, and the intent thus ascertained will control the meaning of a formal clause of the deed.

2. Same—Estates—Limitations—Children—Second Marriage.

The granting clause of a deed, to J. "for the term of his natural life, and after his death in remainder to his wife, if she survive him, for her natural life, then to the children of said J."; and in the habendum, "to him and his wife their lives, and to their children," are *Held,* when construed together, to confine the ulterior limitation, after the falling in of the life estates, to the children of J. and his wife living at the time of the execution of the deed, to the exclusion of any interest of his second and later wife and the children of that marriage.

APPEAL by plaintiffs from case agreed, heard at January Term, 1918 of PITT.

On 24 September 1877, Thomas Williams and wife executed and delivered to their son, James W. Williams, a certain deed, marked Exhibit "A" in the case agreed, for the lands described therein. The granting clause in said deed is as follows: "Do give, grant, convey, and con-

firm unto James W. Williams, for the term of his natural life, and after his death in remainder to his wife, if she survives him, for her natural life, then to the children of the said James W. Williams, lawfully begotten in marriage, absolutely, and to their heirs."

The habendum is as follows: "To have and to hold the same in manner aforesaid, to him and his wife their lives and to their children and their heirs in fee simple. We, the said Thomas Williams and wife, reserving for ourselves the use of the turpentine and tar on the said land; and we do further, for ourselves and our heirs, hereby warrant and defend the title hereby conveyed against the lawful claims of any and all persons whatsoever."

Upon the execution of the deed the said James W. Williams (161) and wife went into possession of the land. At the time of the execution of the deed James W. Williams was living with his wife, and at said time they had the following children: Ernest Williams, L. F. Williams, Ella Williams, Jesse Williams, Maggie Williams, and Will Williams. On 21 March 1885, the wife of the said James W. Williams died, leaving surviving her James W. Williams, her husband, and the aforesaid children.

After the death of the wife of James W. Williams, the mother of the plaintiffs, and while he (James W. Williams) was a widower, Thomas Williams and wife, on 17 June 1887, executed to the said James W. Williams the deed which is attached to the case and marked Exhibit "B," the recitals of which are as follows:

"Whereas, Thomas Williams and wife, Mimy Williams, executed to James W. Williams, their son, for a valuable consideration, a deed for one-third interest in and to a tract of land situated in Pitt County, containing two hundred and fifty acres, more or less, said deed was dated on the 24th day of Steptember 1877, and duly recorded in the register's office of Pitt County;

"And whereas, by error of the draftsman, it should have been three hundred acres of land, one-third of which to the said James Williams, and the said Thomas and wife Mimy now desiring to correct said deed so far as they are able, so as to convey and include a one-third undivided interest in the said three hundred acres of land as set forth in the deed of September 24, 1877:

"Now, therefore, this deed, made this 17th day of June, 1887, by Thomas Williams and wife, Mimy, to James W. Williams, all of the County and State aforesaid:

"Witnesseth, That for and in consideration of the above recited premises and the further consideration of the sum of one dollar to us in hand paid, the receipt of which is hereby acknowledged, hath bargained, sold and conveyed, and by these presents doth bargain, sell and

convey unto James W. Williams for the term of his natural life, and after his death in remainder to his wife, if she survives him, for her natural life, then to the children of the said James W. Williams lawfully begotten in marriage, absolutely, and to their heirs in fee simple forever, an undivided one-third interest, part and estate in and to a tract of land situated in Pitt County and said State, and bounded as follows: (Here follows the description.)

"It being intended by this deed to convey with the above conditions and limitations, subject to the life estate in the turpentine and tar on the lands, which is hereby specially reserved unto the said Thomas and Mimy Williams, an undivided one-third interest in the above-described lands and the part assigned for the purposes of this deed, in-
(162) cluded in the following boundaries: Beginning at John S. Williams' northeast corner line and running north, to wit: (Here follows the description.)

"To have and to hold the same in manner aforesaid to him and his wife their lives and to their children and their heirs in fee simple after the life estate above carried out to the said Thomas and Mimy Williams."

After the execution of both the deeds, James W. Williams remarried, to wit: On 25 October 1888, his second wife being the defendant Puss Williams. There was born of the second marriage the following children: C. B. Williams, Marshall Williams, Thad Williams and Daisy Williams, defendants in this action. On 27 May 1917, James W. Williams died, leaving surviving him the following children by his first marriage: Ernest Williams, L. F. Williams, Ella Williams Moore, Maggie Williams Sutton, and Will Williams, together with five grandchildren, the children of Jesse Williams, a child of the first marriage, who died since the death of his mother; and the following children by his second marriage, to wit: C. B. Williams, Marshall Williams, Thad Williams, and Daisy Williams; and also his widow, the said Puss Williams, the second wife.

Maggie Sutton and Will Williams, two of the children by the first marriage, by good and sufficient deeds have conveyed whatever interest they have in and to the lands described to the plaintiff Ernest Williams. Thad Williams, one of the children of the second marriage, by good and sufficient deed, has conveyed to Ernest Williams any interest that he might have in and to said land.

The plaintiffs, who are the children of the first marriage upon the facts agreed, the substance of which is above set out, contended that upon the death of the said James W. Williams they became the owners in fee and entitled to the immediate possession of said land, free of the claims of the second wife and of the second children.

The defendants, the second children, contended that they are entitled to an equal share in said lands with the plaintiffs. The defendant Puss Williams, the widow by the second marriage, contending that she, under and by virtue of the deeds aforesaid, is the owner of the life estate in and to said lands, and that the children of the first and second marriages share equally, subject to said life estate.

The court, upon the foregoing facts and contentions, held that, under and by virtue of the deeds from Thomas Williams and wife to James W. Williams set out in the case agreed as exhibits "A" and "B," the defendant Puss Williams, wife by the second marriage and widow of James W. Williams, was the owner of a life estate in and to said land, and that the children by the first and second marriages own the remainder in fee as tenants in common, and rendered judgment accordingly, from which judgment the plaintiffs, children by the (163) first marriage, appealed, assigning as error that the court adjudged that they were not the sole owners in fee of the land in controversy.

Albion Dunn and Harry Skinner for plaintiffs.
D. M. Clark and F. M. Wooten for defendants.

WALKER, J., after stating the case: It is not at all difficult to construe the first deed if we are permitted to look at the entire instrument and to consider one part of it with another, so that the intention of its maker may be determined by all that he has said, and not only by a part thereof and without special regard to the formal arrangement. This Court has repeatedly held that this should be done in order to extract from the language the true meaning of him who used it. *Campbell v. McArthur,* 9 N.C. 38; *Kea v. Robeson,* 40 N.C. 373; *Rowland v. Rowland,* 93 N.C. 214; *Gudger v. White,* 141 N.C. 507; *Triplett v. Williams,* 149 N.C. 394; *Beacon v. Amos,* 161 N.C. 357; *Brown v. Brown,* 168 N.C. 4; *Gold Mining Co. v. Lumber Co.,* 170 N.C. 273.

We said in *Brown v. Brown, supra:* "We have well-nigh discarded the technical rule of the common law by which a deed was construed and under which undue prominence and effect had been given to its formal parts and their position in the instrument to the sacrifice of the real intention of the grantor, and, further, by which too much importance was attached to the use of technical language in which the meaning and intention were clothed, all of which resulted in defeating the purpose for which the deed was executed. We have gradually enlarged our view and liberalized our methods, which before were somewhat narrow and contracted, and now we seek after the intention by putting a construction upon the deed as a whole, and not paying too much at-

tention to technical forms of expression which tended to conceal the true meaning. We now turn on all the light, while formerly it was to some extent shut out, thereby hiding or obscuring the grantor's meaning and disappointing the intention which, of course, is thwarting the very object of all legal construction. With the evident purpose of doing justice by revealing and not concealing the truth behind ancient and threadbare forms, we have held that all parts of a deed should be given due force and effect. Words deliberately put in a deed and inserted there for a distinct purpose are not to be lightly considered or arbitrarily thrust aside, the discovery of the intention of the parties being the first and main object in view; and when it is ascertained, nothing remains to be done but to execute it without excessive regard for merely technical inaccuracies or formal divisions of the deed. We have adhered to this rule, following the modern English doctrine from
(164) the earliest years of this Court and continuously to the present time, as will appear from our decisions," citing the preceding cases and *Featherstone v. Merrimon,* 148 N.C. 199.

It was said by *Chief Justice Taylor* in *Campbell v. McArthur, supra:* "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."

And *Chief Justice Ruffin* said, at a later period, in *Kea v. Robeson, supra:* "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."

It is clear, from a reading of this deed, giving to each part its proper weight and significance, what the parties intended as to who should take under it. 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 is, "at the four corners of it." See *Real Estate Co. v. Bland,* 152 N.C. 225; *Puckett v. Morgan,* 158 N.C. 344.

An effort should be made to give some meaning, and the correct one, to the deed, if possible. If the effort is doomed to failure by reason of uncertainty or repugnancy, so that we cannot ascertain the meaning by any fair rule of construction, or by reason of its ambiguity of expression, and we are unable to understand from the language of the deed who are the parties or what is the subject-matter, or if they be known, what estate is conveyed, or any other matter essential to its validity, the instrument, of necessity, must fail. The subject (165) is fully discussed in the foregoing cases.

In applying the principle we do not ignore altogether the ancient rules of law for the interpretation of deeds and other instruments, but we do not allow them to absolutely disappoint the clearly expressed intention. They are valuable aids in construction and are retained, and frequently resorted to, for the purpose of construction, where they do not defeat the very object for which they were adopted. The rule, in one aspect of it, is well stated in 1 Devlin on Deeds, sec. 215, as follows: "It may be formulated as a rule that where it is impossible to determine from the deed and surrounding circumstances that the grantor intended the habendum to control, the granting words will govern, but if it clearly appears that it was the intention of the grantor to enlarge or *restrict* the granting clause by the habendum the latter must control."

See *Dodine v. Arthur,* 91 Ky. 53, where it is said: "It is undoubtedly true that in case of repugnancy between the two, and it cannot be determined from the whole instrument with reasonable certainty that the grantor intended that the habendum should control, the conveying clause must, for the reason that words of conveyance are necessary to the passage of the title, and the habendum is not ordinarily an indispensable part of a deed. Hence, in the case above indicated, the conveyancing clause must control. But where it appears from the whole conveyance and attending circumstances that the grantor intended the habendum to enlarge, restrict, or impugn the conveying clause, the habendum must control. It is in such case to be considered as an addendum or proviso to the conveyancing clause, which, by a well-settled rule of construction, must control the conveying clause or premises even to the extent of destroying the effect of the same. This

is so, because it is the last expression of the grantor as to the conveyance, which must control the preceding expression."

See, also, *Ratliffe v. Mars,* 7 S.W. 395; *Fogarty v. Stack,* 8 S.W. Rep. (Tenn.), 846; *Henderson v. Mack,* 82 Ky. 379. And in *Barnett v. Barnett,* 104 Calif. 298, the Court states the rule with reference to a joint consideration of the premises and habendum of a deed, as follows: "For the purpose of ascertaining the intention, the entire instrument, the habendum as well as the premises, is to be considered, and if it appears from such consideration that the grantor intended by the habendum clause to restrict or limit the estate named in the granting clause, the habendum will prevail over the granting clause." *Moore v. Waco,* 85 Texas 206.

All parts of a deed should be given due force and effect. *Doren v. Gillum,* 136 Ind. 134. The premises of a deed are often expressed in general terms, admitting of various explanations in a subsequent
(166) part of the deed. Such explanations are usually found in the habendum. *Carson v. McCaslin,* 60 Ind. 334. Words deliberately put in a deed, and inserted there for a purpose, are not to be lightly considered, or arbitrarily thrust aside. *Mining Co. v. Becklenheimer,* 102 Ind. 76. To discover the intention of the parties is the main object of all constructions. When the intention of the parties can be ascertained, nothing remains but to effectuate that intention. *Elliott v. Jefferson,* 133 N.C. 215; *Salisbury v. Andrews,* 19 Pick. (Mass.), 250; *Walsh v. Hill,* 38 Cal. 481.

Jones on Real Property, vol. 1, sec. 568, says: "The inclination of many courts at the present day is to regard the whole instrument without reference to formal divisions. The deed is so construed, if possible, as to give effect to all its provisions, and thus effectuate the intention of the parties. When an instrument is informal, the interest transferred by it depends not so much upon the words and phrases it contains as upon the intention of the parties as indicated by the whole instrument."

We close this partial array of the authorities with the declaration of this Court, as to the soundness and scope of the rule, especially when applied to a case like the present, as follows: "We concede all that is contended for as to the common law rule of construction, and that it has been followed in this State. But this doctrine, which regarded the granting clause and the habendum and tenendum as separate and independent portions of the same instrument, each with its especial function, is becoming obsolete in this country, and a more liberal and enlightened rule of construction obtains, which looks at the whole instrument without reference to formal divisions, in order to ascertain the intention of the parties, and does not permit antiquated technicalities to override the plainly expressed intention of the grantor, and does

not regard as very material the part of the deed in which such intention is manifested. This is not only the decided trend of modern adjudication, but it is the legitimate and necessary result of legislation in this and other States." *Triplett v. Williams,* 149 N.C. 396.

That case is especially controlling here, as it relates to a similar question of construction. There, in the premises, the land was granted "unto Margaret Greenwood and her heirs forever," while this was the habendum: "To have and to hold the same, together with all privileges and appurtenances thereto belonging to herself, the said Margaret Greenwood, *during her lifetime,* and at her death said land is to be equally divided between the children of said Margaret Greenwood." The Court said that, at common law as decided in previous decisions of this Court, the habendum and tenendum clause could not divest an estate granted in the premises (2 Blackstone's Com., 298; 4 Kent. Com. 468; *Hafner v. Irwin,* 20 N.C. 570), and if the ancient rule was followed, and technical and formal parts of the deed according to the functions assigned to each, were allowed to (167) govern, that result would be reached, though it apparently defeated the intention of the grantor, but that the modern rule was more liberal and, of course, more rational, and that we should not be restricted to any particular clause, but read the deed, as a whole, and then ascertain the real intention of the grantor.

We could not find an authority more directly and fully in point than Triplett v. Williams, supra, as it permits us to construe the habendum with the premises, in order to declare what estate was conveyed by the deed, and, by the same token, what parties were designated to take under it. In *Gudger v. White, supra,* we applied the same rule, following *Kea v. Robeson, supra,* and other previous decisions. Those cases are analogous and are all governed by the same enlightened rule of construction, which has been recognized by Courts, English and American, for far more than a century. The Court said, in *Triplett v. Williams, supra.* at p. 397: "We can see no reason why the manifest intention of the grantor should be so carefully regarded in determining what property his deed covers and so entirely disregard in determining what estate in that property the grantee shall take."

If we apply this rule, now well settled, to the language of the deed in question, there can be no doubt that the grantors intended to convey the land to their son for the term of his natural life remainder to his then wife, if she survived him, for her life, and then over to the children of the first marriage, and that neither the widow of James W. Williams nor the children of the second marriage (her children by him) have any estate or interest in the same. The habendum shows, with absolute certainty the intention to have been that the conveyance

of the land should be restricted to the son, his then wife, and *their children,* which necessarily excludes all others. The grantors evidently meant, at the time they executed the deed, that the heirs of their son would be his children by his wife, who was then living, and their descendants.

The judgment is reversed, and the case remanded, with directions to enter judgment in the Superior Court according to this opinion and the agreement of the parties as appears in the record.

Reversed.

Cited: Hutton v. Horton, 178 N.C. 550; *Seawell v. Hall,* 185 N.C. 83; *Shephard v. Horton,* 188 N.C. 789; *Boyd v. Campbell,* 192 N.C. 401; *Mitchell v. Heckstall,* 194 N.C. 270; *Turner v. Turner,* 195 N.C. 372; *Bryant v. Shields,* 220 N.C. 633; *Ingram v. Easeley,* 227 N.C. 444; *Dull v. Dull,* 232 N.C. 484; *Moore v. Whitley,* 234 N.C. 154; *Sutton v. Sutton,* 236 N.C. 498; *Griffin v. Springer,* 244 N.C. 99, 101; *Powell v. Roberson,* 246 N.C. 608.

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LEORA CREWS v. GEORGE CREWS.

(Filed March 6, 1918.)

1. Alimony—Statutes—Divorce.

The granting of alimony without divorce is now regulated by Statute, Revisal, sec. 1567, independent of the equity jurisdiction under which such proceedings were formerly cognizable.

2. Same—Issues—Trial by Jury—Constitutional Law.

When in proceedings for alimony without divorce the pleadings raise the issues of the validity of marriage between the parties, or whether the husband had separated himself from the wife and failed to provide her suitable or reasonable sustenance, or the husband is a drunkard or spendthrift (Revisal, sec. 1567), the right of trial by jury arises to the defendant, and the case should be transferred by the judge to the civil issue docket for the purpose, Revisal, secs. 529, 717; Const., Art. I, sec. 19.

3. Same—Courts—Questions of Law.

Where in proceedings for alimony without divorce, Rev., sec. 1567, the issues are found for plaintiff by the jury, or are not raised by the pleadings, or are admitted by the parties, or waived in the methods specified and prescribed by law, *i. e.,* by failing to appear at trial, by written consent filed with the clerk or by oral consent entered on the minutes of the court, the amount of the alimony and how the same is to be secured, etc., are questions of fact to be determined by the judge, having regard to the

condition and circumstances of the parties, including also the separate estate of the wife, if she have any. *Easeley v. Easeley*, 173 N.C. 530, cited and distinguished.

4. Alimony—Divorce—Independent Support—Statutes — Abandonment—Pleadings.

Where the pleadings, in proceedings for alimony without divorce, Revisal, sec. 1567, raise the issue as to whether the wife has wrongfully left the home the husband had provided, etc., it should be submitted to the jury for determination, the husband not being required to provide her with an independent support.

5. Alimony—Courts—Evidence—Abandonment—Statutes.

The trial judge may not pass upon the issuable facts in proceedings for alimony without divorce, Revisal sec. ....., upon evidence introduced before him theretofore upon a trial of the husband for abandonment, etc., of which he was acquitted, when the witnesses are present and ready to testify. *Cooper v. R. R.*, 170 N.C. 490, cited and distinguished.

6. Alimony—Judgments—Divorce—Motions — Modification — Termination—Statutes.

A judgment awarding alimony in suits for divorce *a mensa et thoro* or as an independent right under the statute, Revisal, sec. 1567, is not final, and may thereafter be modified on motion and sufficient evidence; and it terminates on the death of either of the parties, or on their reconciliation.

7. Alimony—Judgments—"Estates"—Earnings.

The award to the wife of alimony from the husband's "estate," includes within the statutory meaning of the word, the husband's income, whether arising from permanent property and investments or his earnings from legitimate labor, etc. *Skittletharpe v. Skittletharpe*, 130 N.C. 72, cited and on that point overruled.

SPECIAL PROCEEDINGS for award of "alimony without divorce," (169) under section 1567, Revisal, heard at chambers 9 October 1917, by *Whedbee, J.;* Fall Term, 1917 of VANCE.

It appears that, a few days prior to this time, the defendant, in term, had been tried and acquitted on an indictment of criminal abandonment of the plaintiff. The case on appeal states that, on the call of the present cause, his Honor, on inquiry, being informed that it was the same case which had been tried in term a few days before, said he was familiar with the facts and, over defendant's objection, proceeded to hear and determine the cause "from the evidence heard in the criminal case and which was in his mind at the time of the present hearing," which facts are set out in the record as the basis of his Honor's judgment and tending to show a separation had or, in any event, caused by the wrong of the husband.

On these facts, the court entered judgment as follows:

"This proceeding for alimony being heard by his Honor, Judge H. W. Whedbee, the court, after having heard the evidence and arguments of counsel for both parties, doth find that the parties are living in a state of separation, and that defendant left his wife and three children in New York in June, and returned to this State, and has not since provided for them, and that he has no property and is an able-bodied man, able to earn at least $20 per month, the court doth order that defendant pay to his wife $10 each month, including October, 1917, which shall be paid on or before 15 November, 1917, for the support of his wife and children, and that he be allowed to see the children at all reasonable times, and that this provision shall cease if the plaintiff shall remove the children from the State, without consent of defendant, and defendant is to pay the costs."

From this judgment defendant, having duly excepted, appealed, assigning for errors chiefly:

1. That issues of fact were raised on the pleadings which his Honor had no power to decide.

2. That his Honor had no right to hear and decide the present case on testimony which he had previously heard on the trial of the indictment.

3. That there was no evidence or admission that defendant had separated himself from his wife and failed to provide her with necessary subsistence.

(170) 4. That there was no evidence as to who was the wrongdoer.

5. That power to order monthly payments was not conferred by the statute and, in any event, alimony could only be awarded out of the husband's estate.

T. T. Hicks for plaintiff.

T. M. Pittman for defendant.

HOKE, J. In section 1567, ch. 31, Revisal, entitled "Alimony Without Divorce," provision is made that, "Wherever a husband shall separate himself from his wife and fail to provide her with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, the wife may apply for a special proceeding to the judge of the Superior Court for the county in which he resides, to have a reasonable subsistence secured to her and to the children of the marriage from the estate of her husband, and it shall be lawful for such judge to cause the husband to secure so much of his estate as may be proper according to his condition and circumstances,

for the benefit of his said wife and children, having regard also to the separate estate of the wife."

Prior to the enactment of this statute, and without one, the courts of this State have been classified as among those who formerly afforded this relief in proper cases as an independent source of equity jurisdiction. 2 Bishop on Marriage and Divorce, 5th Ed., sec. 355, citing *Spiller v. Spiller*, 1 Haywood 482, and other cases. A position said by a discriminating author to be now supported by the weight of authority. 1 Ruling Case Law, title Alimony, sec. 17, pp. 878-879. However this may be, our statute, being more inclusive than our equity causes on this particular subject, now affords the rule with us controlling the rights of parties in these cases, and some of our decisions construing the law hold that it is a special proceeding in all of its aspects except that the same is returnable before the judge instead of the clerk, that the issuable facts are: (1) Whether a valid marriage exists between the parties; (2) Whether the husband has separated himself from the wife and failed to provide her suitable or reasonable subsistence. Or, instead of the last, Whether the husband is a drunkard or spendthrift.

When these issues are admitted by the parties or properly established to be in applicant's favor, the amount of the alimony and how the same is to be secured, etc., are questions of fact to be determined by the judge, having regard to the condition and circumstances of the parties, including also the separate estate of the wife, if she have any. But where these essential issues are made by the pleadings, the right of trial by jury arises to the parties and it then becomes the duty of the judge to transfer the same for such purpose to the (171) civil issue docket, *Skittletharpe v. Skittletharpe*, 130 N.C. 72; *Cram v. Cram*, 116 N.C. 288; Revisal, secs. 529, 717, a right guaranteed to litigants under our Constitution, Art. I, sec. 19, and to be waived by them only in the methods specified and prescribed by law, that is, by failing to appear at the trial, by written consent filed with the clerk, or by oral consent entered on the minutes of the court. Revisal, sec. 540; *Cozad v. Johnston*, 171 N.C. 637; *Hockaday v. Lawrence*, 156 N.C. 319; *Hahn v. Brunson*, 133 N.C. 18; *Wilson v. Bynum*, 92 N.C. 718.

The cases cited by appellee as authority for trial by the court, *Easeley v. Easeley*, 173 N.C. 530, and others, were actions for divorce where the issuable facts were determinative of that right and the matter of alimony *pendente lite* being incidental to the main isuue, was to be passed upon by the judge under the express provisions of the statute, but, in this present case, where the right to alimony is the ultimate question to be determined, it held in this jurisdiction that alimony

pendente lite is not allowed. *Hodges v. Hodges,* 82 N.C. 122, and the issuable facts raised by the pleadings must first be tried by the jury unless waived in the manner specified by law.

Considering the record in view of these principles, we think it clear that defendant has properly raised the issuable facts, or one of them, on which plaintiff's right to alimony depends, and no proper waiver being made to appear that such issue must be tried by the jury as the law directs.

In his answer, duly verified, defendant makes averment, among other things, as follows:

"1. That paragraph 2 is not true except as hereinafter stated. There are three children of such marriage now living. The plaintiff during or about the month of September, A.D. 1916, at the instance of her sister, who then resided in the city of New York, left this defendant's home in Vance County, N. C., and went to New York, taking their said children. The defendant followed her about the month of November, 1916, and provided a home for his said wife and children in the city of New York, which they occupied until June, 1917. That during the month of June, 1917, the plaintiff, without cause, abandoned the defendant, and left the home he had provided for her, and without his knowledge or consent, against his will, and in violation of his rights as their father, took the said children away with her, and he has not since that time been able to have communication with her or the said children, though he has repeatedly written to her, asking her to return, and offering to provide for her.

"2. That after the petitioner so abandoned this defendant, he returned to his home in Vance County, and has since employed
(172) himself industriously and steadily in honest labor. On or about the 20th day of July, 1917, the plaintiff came from New York to Henderson for the purpose of instituting criminal proceedings against this defendant and immediately upon her arrival swore out a warrant against him before the Reporder of Vance County, charging him with abandonment and failure to adequately support her and her children begotten by him. That such criminal action was heard first by the recorder, and then by the appeal of this defendant from an adverse judgment of the recorder, was heard and determined at a term of the Superior Court of Vance County, begun and held on the first day of October, 1917. The same was submitted by the court under sections 3355 and 3357 of the Revisal, and resulted in the defendant's acquittal and discharge.

"3. That Paragraph 3 of the petition is not true. This defendant is not only able to work and provide for his wife and children according to his station in life, but does regularly and steadily work and is will-

ing to provide a home for his wife and children, and there to care for them and provide for them as fully and as adequately as his labor and earnings will permit. He has in writing since the plaintiff's return to North Carolina, offered to provide such home and provide for them. She has chosen to ignore such offer, and testified under oath at the hearing of said criminal action in said Superior Court that she was unwilling to return to this defendant and live with him. She left one or more of the children in New York, outside the jurisdiction of the court."

True, we have held that when the husband has separated himself from his wife and failed to provide her reasonable support, the question of whether he was justified in such course is irrelevant to the issue, *Hooper v. Hooper*, 164 N.C. 1; *Skittletharpe v. Skittletharpe*, 130 N.C. 72, and we have held also that when the husband by his cruelty and neglect has forced the wife to leave his home, such conduct may be imputed to him for a separation and abandonment, within the meaning of the law, *High v. Bailey, Admr.*, 107 N.C. 70, but neither the letter nor the meaning of the present statute permits or requires the construction that when a wife wrongfully leaves the home provided for her by the husband an independent right to alimony should arise to her and requiring that under such circumstances the husband should provide her with an independent support.

As heretofore stated, we are of opinion that the answer, properly interpreted, raises an issue in bar of plaintiff's right, and that the same must be determined by the jury pursuant to the law. And the objection that the case was heard and decided from the evidence taken a few days before in the indictment against the defendant for abandonment must also be sustained. There are cases where the testimony of a witness taken on a former trial may be introduced, as when the witness is dead or has since become insane and in some other in- (173) stances where his evidence is not available in person or by deposition, and then it must in some way be again introduced; but we are aware of no principle or precedent that justifies such admission when the witnesses are alive, present, and ready to testify. *Cooper v. R. R.*, 170 N.C. 490; 10 R.C.L.; Law Ev., sec. 143, p. 966.

Objection is further made to the form of the judgment in that it makes provision for alimony by monthly payments and not out of the "estate" of defendant, as the statute in terms directs. In *Skittletharpe v. Skittletharpe*, 130 N.C. 72, the Court, referring to the proper form of judgment in these cases, held that, under the terms of the statute providing that payment should be made from the estate of the husband, a judgment directing monthly payments was improper, and it was further held that judgment in these proceedings should be of a

temporary nature and not permanent or final. So far as a judgment in these cases is not final in its nature and effect, the ruling under our statutes and decisions applicable is undoubtedly correct. A judgment for alimony is never final in the sense that it is always and forever enforcible and cannot be modified on motion and sufficient evidence. Growing out of the obligation of the husband to properly support his wife, it is not allowed with us as a matter of statutory right in divorces *a vinculo. Duffy v. Duffy,* 120 N.C. 346, and whether awarded as an incident to divorce a *mensa et thoro* or as an independent right under the present statute, and whether in specific property or current payments, it terminates on the death of either of the parties or on their reconciliation, and it may be modified, too, on sufficient change of circumstances to justify and require it. *Taylor v. Taylor,* 93 N.C. 418; *Rodgers v. Vines,* 28 N.C. 293. But in holding that the judgment in these cases is restricted to tangible property or rents or issues out of property investments, we think that the case referred to was not well decided.

At the time this present statute was enacted, it was and had long been the accepted definition of alimony with us, that it was "that portion of the husband's estate properly awardable to the wife for her support during the period of separation adjudged or permitted by the law." *Taylor v. Taylor, supra,* and, under the uniform decisions of our Court applicable, it could be assigned and was appropriated both from tangible property and investments as well as from earnings and even the capacity to earn was among the facts to be considered in making a just and proper award of such a claim. *Saunders v. Saunders,* 167 N.C. 317; *Taylor v. Taylor,* supra; *Miller v. Miller,* 75 N.C. 70; 2 Bishop on Marriage and Divorce, 5 Ed. 446.

The term "estate" in this connection has reference to the husband's income, whether arising from permanent property and invest-
(174) ments or the earnings of his legitimate labor, and it was in reference to this established and accepted definition of "estate" that the term was used in the statute, and so far as the form is concerned, the judgment here entered, and notwithstanding the decision to the contrary in *Skittletharpe's* case, is held to be correct.

For the reasons heretofore stated, however, the said judgment must be set aside, that the determinative issues raised by the pleadings be referred to a jury for decision.

Error.

Cited: Allen v. Allen, 180 N.C. 470; *Anderson v. Anderson,* 183 N.C. 143; *Holton v. Holton,* 186 N.C. 361; *Barbee v. Barbee,* 187 N.C. 538; *Vickers v. Vickers,* 188 N.C. 450; *McManus v. McManus,* 191 N.C. 743; *Vincent v. Vincent,* 193 N.C. 493; *Taylor v. Taylor,* 197 N.C. 201;

Hershey Corp. v. R.R., 207 N.C. 124; *Masten v. Masten*, 216 N.C. 25, 26; *Peele v. Peele*, 216 N.C. 298; *Barber v. Barber*, 217 N.C. 425; *Blanchard v. Blanchard*, 226 N.C. 154; *Sparks v. Sparks*, 231 N.C. 493; *Hester v. Hester*, 239 N.C. 100; *Rayfield v. Rayfield*, 242 N.C. 694, 695.

M. P. HUBBARD & CO. v. J. A. GOODWIN.

(Filed March 6, 1918.)

1. **Vendor and Purchaser—Warranty—Breach—Voluntary Rebate—Instructions—Appeal and Error—Harmless Error.**

Where defendant sets up breach of warranty as a counterclaim in an action on notes he had given for fertilizer, which he had sold to others, he may not recover for a voluntary rebate he had made, which he was not compelled to give; and were it otherwise, a charge to that effect is harmless when there is no evidence that such rebate was actually allowed his customer by him.

2. **Vendor and Purchaser—Warranty—Breach—Fertilizer — Damages—Instructions.**

Where a vendor of fertilizer allows a customer a reduction in price on account of grade inferior to that of warranty to himself by his vendor, an instruction is *not* erroneous that, to establish such as a counterclaim in the manufacturer's action for the purchase price, the jury should "find by clear and satisfactory evidence," that the warranty of the plaintiff was identical with that made by the defendant as to quality and results, of the adaptability of the land to the crops, proper tillage, and propitious seasons, etc., and the use of the words "clear and satisfactory evidence" was not an expression of opinion forbidden by the statute.

3. **Courts — Intimation of Opinion — Instructions — Statutes — "Strong Evidence."**

In an action to recover the purchase price of fertilizer, evidenced by notes, the defendant set up a counterclaim for damages for breach of warranty, upon which there was uncontradicted evidence that the defendant in giving the notes told the plaintiff that his crops were as good as ever, and solicited the agency for the coming year: *Held*, an instruction from the court, after placing the burden of proof on plaintiff, that the jury may consider, if they so found the facts, this as strong evidence that deendant's counterclaim was not well founded, is not an expression of opinion forbidden by the statute.

CIVIL ACTION, tried before *Whedbee, J.*, at October Term, 1917 of HERTFORD, upon these issues:

(175) 1. In what amount is the defendant indebted to the plaintiff on account of the execution of the two notes declared on in the complaint? Answer: "$500.12, with 6 per cent interest from 1 January 1916, and the further sum of $486.30, with 6 per cent interest from 15 January 1916." (Answered by consent.)

2. Has there been a breach of the contract of sale of the guano by the plaintiff, as alleged in the answer and counterclaim? Answer: "No."

3. Has defendant Godwin been damaged by said breach, if any, and in what sum? Answer: "Nothing."

From the judgment rendered defendant appealed.

Winborne & Winborne, and W. W. Rogers for plaintiff.

R. C. Bridger, Winston & Matthews, and John E. Vann for defendant.

BROWN, J. The defendant executed the notes sued on for the purchase of certain guano for use on his own crops and for sale to others. He admits the execution of the notes and pleads a counterclaim alleging that the guano was worthless, did not come up to the representations of plaintiff's agent, and failed to produce crops which the agent guaranteed it would produce. Defendant also avers that he sold some of the guano to others giving guarantees and that he has not been able to collect the price owing to the worthlessness of the guano.

There is much evidence tending to support the contentions of both parties which it is unnecessary to set out.

The four exceptions to the evidence are without merit and need not be discussed.

The defendant excepts to this instruction: "That if you find from the evidence that defendant allowed rebate in the price of the fertilizer sold before he was compelled to do so in law, he cannot recover for that; a mere voluntary abatement in price will not entitle the defendant to recover."

We see no error in this. A voluntary abatement in price by the defendant when he was not compelled to do so would not entitle him to recover on his counterclaim. *Britton v. Ruffin,* 122 N.C. 114; *Reiger v. Worth,* 127 N.C. 233.

Besides, the charge is harmless. The evidence fails to disclose that defendant refunded anything to his purchasers or made rebate to any one in consequence of the defective quality of the guano. There is evidence that defendant stated to some of his purchasers that he would give them the same rebate he received from plaintiffs, but no evidence that he did so.

The defendant excepts to this instruction: "That if you find by the

greater weight of the evidence that the defendant sold any of said fertilizer to customer and he made reduction in price on ac- (176) count of their complaints that the fertilizer was off in quality, before you can allow defendant any damages for that, you must first find by clear and satisfactory evidence that Godwin made the same warranty as to quality and results as were made by the plaintiff to him, that the land was adapted to the growth of the crops, that the land was properly tilled and cultivated, and that the weather or seasons were propitious, and that the shortage in the crops was due directly to the worthlessness of the fertilizer."

The exception cannot be sustained, first, for the reasons given above that there is no evidence defendant refunded anything or made rebate in price, although there is evidence that he promised to do so, and therefore, the instruction is harmless; second, the words "Clear and satisfactory proof" do not constitute an expression of opinion. All evidence should be clear and satisfactory to the minds and comprehension of jurors. If it is not satisfactory, or its value comprehended by them, they should not act upon it.

The defendant excepts to the following instruction as an unwarranted expression of opinion upon the facts: "That if you find from the greater weight of the evidence that Godwin at the time he gave the notes, stated to the witness Loud, vice-president of the plaintiff, that the guano was good and his crops as fine as he ever had, you may consider this as strong evidence that his counter-claim is not well founded."

The evidence of Loud, vice-president of the plaintiff, was to the effect that defendant, in August 1915, stated that the guano was all right, that his crops were as good as he ever had, that he wished the witness could see them, and gave his notes for the price of the guano, and applied for the agency to sell the guano to farmers in Eastern North Carolina the next season, etc. This was not denied by defendant.

We do not regard this as an expression of opinion by the trial judge upon the facts submitted to the jury. The issue related to the *bona fides* of defendant's counterclaim. The fact in dispute was the declarations and admissions of defendant to Lourd. Upon that the judge expressed no opinion. He left that to the decision of the jury, and put the burden of proof upon plaintiff to satisfy the jury by the clear weight of the evidence that such admissions were made, telling the jury that if they were actually made such fact is strong evidence of a want of merit in the counter-claim.

We see nothing wrong in that. If such declarations were made before the action was commenced and after the crops had matured, and

then this counterclaim was pleaded, the conclusion naturally follows that there is no merit in defendant's plea and that it is a mere subterfuge to avoid payment of an honest debt. We find precedents in
(177) our reports where certain testimony, if believed to be true, is declared to be strong evidence of the fact sought to be proved.

In *Mauney v. Hamilton*, 132 N.C. 299, this Court said: "As his Honor very properly said to the jury, this testimony is very strong evidence of the fact sought to be proved." There are other cases in which the expression "strong evidence" is used by this Court. Admissions of a party to an action, when fully established, are always regarded as strong evidence of the facts stated in them.

The written evidence of a contract is strong evidence that it truly embodies the agreement of the parties. *Wiles v. Harshaw*, 43 N.C. 308.

In construing the charge of a trial judge, we will consider the entire charge and not isolated sections.

Taking the instructions of the judge as a whole, they fully, clearly and impartially presented to the jury the contentions of the parties and the law bearing thereon.

No error.

Cited: Swift v. Produce Company, 180 N.C. 30; *Beal v. Coal Company*, 186 N.C. 756.

F. K. BORDEN v. SOUTHERN RAILWAY COMPANY.

(Filed March 6, 1918.)

Railroads—Negligence—Crossings—Evidence — Trials — Questions for Jury.

Ordinarily, the question of whether the engineer on a railroad locomotive, by the exercise of proper observation and care, can avoid a collision with a vehicle being driven over a crossing in unobstructed view, is a question of fact for the jury; and in this case, where there was evidence that defendant's team had become frightened and beyond the driver's control, and was struck at a crossing by the locomotive, going twice as fast as the team, it is held that plaintiff's motion for nonsuit was properly overruled.

CLARK, C. J., concurring.

ACTION, tried before *Whedbee, J.*, at January Term, 1918 of WAYNE, for damages for the negligent killing of plaintiff's mule. From a judgment of nonsuit, plaintiff appealed.

Langston, Allen & Taylor for plaintiff.
J. L. Barham for defendant.

BROWN, J. The testimony introduced for the plaintiff tends to prove these facts:

On 11 May 1916, a train of the defendant had gone from the switch on the main line leading west from Goldsboro and was, leaving town, a few hundred feet up the track. Chestnut street (178) crosses to the railroad at right angles and there is a road parallel with the railroad running west from Chestnut Street. This road is about 20 or 25 feet from the railroad at the point where it leaves Chestnut Street and verges toward the railroad until it crosses it at a distance of about 300 or 400 feet further west. This road is very close to the railroad, is on level ground, running with the track, which is perfectly straight. There is no road leading from this one, and a team keeping in this road would have to cross the railroad at the junction point. The team of mules belonging to the plaintiff and driven by a negro came into this road from Chestnut Street going west.

At the time the team came in from Chestnut Street, the train had gone about 600 or 700 feet and was still 300 or 400 feet from the crossing, and the driver lost control of them and though he did his best to pull them from the railroad, they continued running away and came on the crossing just as the train did and one of them was killed.

There was no obstruction between the engine of the train and the team and the train continued to overtake them, going at a rate of speed twice as fast as the team.

We are of opinion that the evidence is sufficient to support the inference that the engineer, by a watchful and careful lookout, could have seen the condition of the team and its driver and possibly in time to have stopped the engine and avoided the accident. The jury are not compelled to draw that inference, or to come to such conclusion unless they are satisfied by a preponderance of the evidence that such is the case. This Court has said in many cases that where live stock is injured by a train and the evidence is such as to warrant it, the question whether the engineer, by keeping a proper lookout, could have prevented the injury, is a question for the jury.

Before arriving at such conclusion, the jury should consider the testimony and all the circumstances surrounding the accident. *Deans v. R. R.*, 107 N.C. 692, and cases cited.

New trial.

CLARK, C.J., concurring: Had this action been begun within six months a nonsuit would have been forbidden on the further ground

that Revisal, 2645, makes the killing or injury of live stock by cars or engine of any railroad "*prima facie* evidence of negligence on the part of the company," if the action is brought within six months. This has been held to embrace oxen yoked to a cart and under control of a driver. *Randall v. R. R.*, 104 N.C. 410. This case was reaffirmed on rehearing after the fullest discussion. See 107 N.C. 748. This has been followed in many cases. Anno. Ed.

(179) These cases hold that the statute applies even when the animal is under the *control* of the driver. Certainly it would apply when, as here, he had lost control. Among late cases is *Hanford v. R. R.*, 167 N.C. 279, where the presumption was applied to a horse which broke lose from a buggy, and *Briley v. R. R.*, 174 N.C. 785, where it was claimed that a cow was killed by running into the train to rejoin the herd.

When the action is brought within the statutory time, a *prima facie* case is raised and it is error to nonsuit.

The public roads belong to the people, who have the prior right over them, The grant to *quasi*-public corporations, operating for private gain, to cross public roads is subordinate to the public right, and must be exercised with due care, not only in running the trains but in locating and safeguarding the crossings. In some instances levers and gongs can be used, but now when our population and the volume of business, both on railroads and public roads are rapidly increasing and will continue to do so, there are few points where to maintain a grade crossing is not negligence *per se*. At the very least, it is a question for a jury, for it is *prima facie* negligence (which prevents a nonsuit) when there is a grade crossing on the edge of a growing, busy town like Goldsboro, the public roads leading into which are crowded with traffic and travel. For nearly two-thirds of a century this defendant has been indulged without these safeguards being required. It is surely now time that all railroads were fixed with notice of the duty they owe to the public at all crossings of "safety first."

Eleven years ago the Corporation Commission by chapter 469, Laws 1907, now Revisal 1097 (10), were given the power to abolish grade crossings. That they have not done so makes none the less all grade crossings a nuisance, for which the railroad company is liable, wherever the volume of traffic on the public roads makes such crossings dangerous or a serious interruption to the free use of the public roads. This matter has been often discussed. *McMillan v. R. R.*, 172 N.C. 857-858; *R. R. v. Goldsboro*, 155 N.C. 365 (affirmed on writ of error, 232 U.S. 548); *Gerringer v. R. R.*, 146 N.C. 35-37; *Wilson v. R. R.*, 142 U.S. 349; *Cooper v. R. R.*, 140 N.C. 229, and other cases.

In a free country, the first consideration always is the safety, convenience, and welfare of its people.

Cited: Goff v. R. R., 179 N.C. 224; *Durham v. R. R.*, 185 N.C. 245.

(180)

RAYMOND MAXWELL v. THE WAYNE NATIONAL BANK ET AL.

(Filed 6 March, 1918.)

1. Reference—Appeal and Error.

The facts found in the report of the referee, accepted and approved by the judge, will not be disturbed on appeal when based on sufficient legal evidence.

2. Equity—Deeds and Conveyances—Reformation—Mutual Mistake.

Equity will correct an error in the description in a deed to lands which, by the mutual mistake of the parties, includes a greater acreage than the grantor intended to sell or the vendee contemplated in his purchase, when the proof is clear, convincing and satisfactory.

3. Same—Intent.

The intent of the vendor and purchaser of lands is essential in passing upon the question of mistake in the description of the lands embraced in the boundaries given in the deed.

4. Equity—Deeds and Conveyances—Reformation—Mutual Mistake—Breach of Warranty.

When the reformation of a deed is sought for mutual mistake in the description given therein of the boundaries of the land conveyed, the questions of breach of covenant and warranty in the deed have no application.

CIVIL ACTION, pending in the Superior Court of WAYNE, heard out of term, 29 December 1917, by consent, by *Allen, J.*, upon exceptions to report of referee filed by plaintiff.

His Honor overruled the exceptions and adopted the findings of the referee, both of law and fact, and confirmed his report. Plaintiff excepted and appealed.

Henry A. Grady, Robinson & Son, and W. T. Dortch for plaintiff.
Langston, Allen & Taylor and Dickinson & Land for defendants.

BROWN, J. This action is brought to recover damages for a breach of covenant of warranty in sale of land and to have the damages as-

sessed credited upon the purchase money notes, and in meantime to restraining the exercise of the power of sale in the deed in trust.

It appears that G. M. Maxwell, acting for himself and his son, the plaintiff, purchased from the Goldsboro and Seven Springs Securities Company a large tract of land known as the Seven Springs property, containing over seven hundred acres, and had the deed executed to plaintiff. The consideration was $40,000, ten thousand being paid in cash and thirty thousand secured by deed in trust upon the property. The deed is dated 25 January 1912, and contains full covenants of warranty and seizin.

(181) It is admitted that the boundaries of the land as set out in the deed cover 61 lots or parcels of land, the possession of which has never been had by plaintiff, and that the grantor, the Seven Springs Company, had no title thereto when the deed was executed. A list of the said lots is attached to the complaint as Exhibit B, and they constitute what is known as the town of Whitehall.

Among other defenses set up in the answer, the defendants allege that the lands described in Exhibit B were included in the deed to plaintiff by the mutual mistake of the Goldsboro and Seven Springs Securities Company and the plaintiff, and that it was not intended by either the plaintiff or said grantor that any of the lands described in Exhibit B should be included in the lands conveyed in said deed. Defendants ask a correction of the mistake and reformation of the deed.

The referee finds as facts: "That in the negotiations leading up to the sale of said property, and in the actual conveyance of same to plaintiff, neither the plaintiff nor the defendant Securities Company, or any of its stockholders or directors, considered the Whitehall lots, Nos. 1 to 41 on the Eagle map, as constituting any part of the Seven Springs property, or that they were to be conveyed by the deed; that the plaintiff did not intend to buy nor the defendant Securities Company to sell said lots, and that they were not considered by either party in fixing the purchase price for the property intended to be conveyed and known as the Seven Springs property; that the defendant Securities Company intended to convey only such property as it acquired from its grantor, except such portions thereof as it had conveyed, which were to be excepted in the deed, which property was not understood to embrace any of the lots in question; that the plaintiff intended to buy the Seven Springs property, which he understood to comprise the hotel and springs, some outhouses and barns, the Seven Springs farm and some woods land, including altogether about 715 acres on the south side of Neuse River, the general quality of which the plaintiff knew and which was not understood by him to embrace the lots in question; that the plaintiff has received under his deed substantially what was intended to

be bought and sold, and that the lots and small tracts in question were included within the general boundaries in the deed through the mutual mistake of the parties plaintiff and defendant Goldsboro and Seven Springs Securities Company."

This finding is approved by the judge, and in our opinion is supported by the overwhelming weight of evidence; in fact, there is practically nothing in the record tending to prove to the contrary, as plaintiff's own testimony strongly supports defendant's contention.

The lots in controversy embrace the town of Whitehall, which has been incorporated for forty years and which has been known to plaintiff, as he admits, as long as he can remember. They em- (182) brace the post office building, the church building, the public school building where plaintiff went to school years ago, practically all of the business houses in the town, and some property which plaintiff himself, since the date of his deed from the Seven Springs Company, has purchased.

The plaintiff's evidence shows that he has never made claim to any part of the Whitehall lots since he purchased the Seven Springs Hotel and farm. He bid at a commissioner's sale in 1912 and endeavored to purchase one of these lots. We copy a few lines from the testimony of plaintiff:

Q. You did not intend to buy that store in this trade, did you? A. I did not consider buying the store at all. When making the deal, I did not know the property lines and did not know the boundary lines of the Seven Springs property.

Q. It was an absolute shock to you to know that store was embraced in the deed? A. I did not know it was in the deed at the time.

Q. It was a great surprise when you found it out? A. When I found it out, I supposed it was included in the exceptions then.

Q. It was a great surprise to find it was not included in the exceptions? A. *Yes, it was a surprise to find it was not included in the exceptions.*

Q. *That is true as to the rest of this property, is it not?* A. *Yes.*

Again he testified:

Q. You knew that neither you nor the other parties contemplated at the time the contract was made buying or selling the United States post office there? A. At the time I bought this property I didn't know if the property lines of the Seven Springs property included or excluded the town of Whitehall, so buying Whitehall could not enter my mind.

Q. If it could not enter your mind, you didn't contemplate buying it? A. *After I found that out, I naturally supposed that these various lots were included in the exceptions in the deed.*

Q. You still didn't think you bought it? A. *If I thought it was included in the exceptions I couldn't think I bought it.*

Plaintiff further admits in his evidence that the original contract of sale, in pursuance of which the deed was executed, contains what was intended to be purchased. This contract described the property in general terms as the Seven Springs property. The evidence further shows that plaintiff owns and occupies under his deed what has always been known as the Seven Springs property.

The plaintiff's evidence shows conclusively that he did not contemplate purchasing the town of Whitehall and did not pay a price at all commensurate with its value. The property he received and is in possession of, according to his own evidence, is well worth the
(183) $40,000 he paid for it; in fact, he doubts if he would take $75,000 for it. The town of Whitehall, according to the evidence, is worth $35,000 to $40,000—about as much as the plaintiff paid for the Springs Hotel and farm. It is too plain for further discussion that plaintiff never paid for or contemplated purchasing Whitehall, and made no such claim until it was discovered that the lots comprising it were inadvertently not excepted from his deed.

The relief asked by defendants is the correction of an error in a deed brought about by the mutual mistake of all parties to the deed. This is a recognized head of equitable jurisprudence, and the power is constantly exercised by the courts. It is well settled that where a deed described the land conveyed by metes and bounds and by mutual mistake of the parties covers land which the vendor did not intend to sell, nor the vendee to buy, the mistake will be corrected. *Newsome v. Bufferlow,* 16 N.C. 381; *Pugh v. Britton,* 17 N.C. 34; *Pharr v. Russell,* 42 N.C. 222; *Day v. Day,* 84 N.C. 408; *Warehouse Co. v. Ozment,* 132 N.C. 845; *King v. Hobbs,* 139 N.C. 172; *Sills v. Ford,* 171 N.C. 733; Eaton's Equity, sec. 618.

Mutual mistakes occur generally in the description of property conveyed. To ascertain whether a mistake has been made in describing property in a deed, it is essential to know the intent of the parties, the one in selling and the other in buying, respecting the subject-matter of the conveyance; and if the deed fails to express their intention, there is a mutual mistake relievable inequity by way of reformation, where the proof is clear, convincing and satisfactory. The subject is fully discussed and many authorities cited in notes to 65 Am. St. Rep., 508, and 117 Am. St. Rep., 244.

The *weight* of the evidence is not before us on this record, but if it were we should be compelled to say that defendants have made out their case upon plaintiff's own testimony.

The court having found that the Whitehall lots were included in the

deed by mutual mistake of the parties, there is no breach of the covenants of warranty and seizin. Therefore the authorities cited by the learned counsel for plaintiff have no application. They relate to actions of law for damages for breaches of covenants of seizin and warranty and have no application in cases where the equitable relief of mutual mistake is set up.

The judgment of the Superior Court is

Affirmed.

Cited: Martin v. McBryde, 182 N.C. 182; *Lee v. Brotherhood,* 191 N.C. 361; *Strickland v. Shearon,* 191 N.C. 566; *Crawford v. Willoughby,* 192 N.C. 271; *Sheets v. Stradford,* 200 N.C. 38; *Insurance Co. v. Edgerton,* 206 N.C. 408; *Oliver v. Hecht,* 207 N.C. 485.

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SERECTA JENKINS ET AL V. J. B. GRIFFIN ET AL.

(Filed 6 March, 1918.)

1. Mortgages—Sales—Powers—Notice—Advertisement—Statutes.

Revisal, sec. 641, requiring notice under mortgages, etc., for thirty days is, by express terms, prospective in effect and is amended by the Laws of 1909, ch. 705, prescribing publication in a newspaper "once a week for four weeks"; therefore it does not affect mortgages made prior thereto, coming under the provisions of Revisal, sec. 1042, requiring that whether advertised in a newspaper or otherwise, the sale "shall be advertised by posting a notice at some conspicuous place at the courthouse door," etc., for twenty days, etc.

2. Mortgages—Sales—Powers—Execution of Presumptions.

While powers of sale under mortgage are closely scrutinized by the courts and held to the letter of the contract, the law presumes the regularity of the sale in the execution of such powers and places the burden of proof on the party claiming a failure of proper notice or advertisement to show it.

3. Same—Mortgagee's Deed—Recitals—Presumptions—Statutes.

A recital in the mortgagee's deed to lands that the sale was duly advertised is *prima facie* evidence of its correctness; and *Held,* in this case, an advertisement of the sale under the power of the mortgage for thirty days at the courthouse door and three other public places, and a publication in a newspaper of four weeks, was a sufficient compliance with a provision in the mortgage requiring advertisement for "thirty days, or as the law directs."

4. Limitations of Actions—Mortgages—Principal and Surety—Statutes.

Where sureties on a note join in a mortgage on land in which they

with the maker of the note hold the fee, the fact that the three-year statute bars the note does not prevent the mortgagee from foreclosing, the statute applicable being ten years after forfeiture of the mortgage, or after the power of sale became absolute, or after the last payment made thereon. Revisal, sec. 391 (3).

5. Same—Interpretation of Statutes—Prospective Effect.

While formerly there was no bar to the execution of a power of sale contained in a mortgage of lands, mortgages then executed are made subject to the ten-year statute, Revisal, sec. 311 (3), by Revisal, sec. 1044.

APPEAL by plaintiffs from *Whedbee, J.*, at Fall Term, 1917 of HERTFORD.

This is an action to set aside a sale made pursuant to the power contained in a mortgage and to have the deed executed to the purchaser removed as a cloud on the title of the plaintiffs.

Serecta Jenkins on 10 January 1898, was indebted to defendant, J. B. Griffin in the sum of $127.32. On that date, to secure said debt, she executed a note to said Griffin for the debt and secured the same by a mortgage on a tract of land in which she had a dower right,
(185) her two daughters, Mary and Elizabeth, the owners of the fee, joining in the execution of the note and mortgage. Serecta Jenkins made the following payments on said note: 16 December 1899, $12; 12 March 1904, $10; and 14 April 1906, $11.

The mortgage provided that in case of default in the payment of the debt, the land conveyed might be sold after first advertising the land for *thirty days*, or *as the law directs.*

The defendant J. B. Griffin sold said land at the courthouse door in Winton on 14 April 1916, under said mortgage, and the defendant E. G. Griffin bid off said land at $265, and J. B. Griffin made a deed therefor to E. G. Griffin, dated 14 April 1916, not acknowledged before clerk until 13 July 1917 and recorded 18 July 1917.

The plaintiffs contend that the sale was not properly advertised, and that the right to sell was barred at the time of the sale by the ten and three years statute of limitations.

At the conclusion of the evidence, his Honor rendered judgment of nonsuit, and the plaintiffs excepted and appealed.

Winborne & Winborne for plaintiffs.

John E. Vann and Midyette & Burgwyn for defendants.

ALLEN, J. The objections to the validity of the sale made under the power contained in the mortgage of 1898 are:

1. That the sale was not properly advertised.
2. That Mary and Elizabeth, who signed the mortgage, were sureties,

and that the right to sell as to them was barred by the three years statute at the time of the sale.

3. That the right to sell was barred at the time of the sale as to all the parties by the statute of ten years.

(1) The mortgage does not state where the notices of sale shall be posted or at how many places. It simply authorizes a sale at the courthouse door in Hertford County "after first advertising the same for thirty days, or as the law directs."

The statute in force when the mortgage was executed is section 1042 of the Revisal, as follows: "All property, real and personal, sold under the terms of any mortgage or other contract, express or implied, whether advertised in some newspaper or otherwise, shall be advertised by posting a notice at some conspicious place at the courthouse door in the county where the property is situated, such notice to be posted at *least twenty days before the sale,* unless a shorter time be expressed in the contract."

Revisal, sec. 641, requiring notice under mortgage, etc., for thirty days, was not enacted until 1905, and it is not retroactive, as it expressly says "that no real property shall be sold under (186) execution, deed in trust, mortgage or other *contract hereafter executed.*"

Revisal, sec. 641, was further amended by Acts 1909, ch. 705, by prescribing as to newspapers "once a week for four weeks."

Powers of sale in a mortgage are contractual, and there are many opportunities for oppression, courts of equity are disposed to scrutinize them and to hold the mortgage to the letter of the contract. It is essential to the validity of a sale under a power to comply fully with the requirements as to giving notice of the sale. *Eubanks v. Becton,* 158 N.C. 234.

This is the rule, but in its enforcement "The presumption of law is in favor of the regularity in the execution of the power of sale; and if there was any failure to advertise properly, the burden was on defendant (here on plaintiffs) to show it." *Cawfield v. Owens,* 129 N.C. 288; *Troxler v. Gant,* 173 N.C. 425.

How have the plaintiffs sustained this burden?

The deed to the purchaser was introduced, and it recites that the sale was duly advertised, which recital is *prima facie* evidence of its correctness (*Lunsford v. Spaaks,* 112 N.C. 608), and in addition, the uncontradicted evidence is that the notice of sale was posted at the courthouse door and at three other public places in Hertford County for thirty days and published in a newspaper of the county for four weeks.

The only evidence tending to impeach the regularity of the adver-

tisement is that there was an attempt to advertise at a fourth place in the county, and that the notice at this place was posted twenty-eight days, excluding the day of posting and the day of sale. It would be a harsh rule to hold that this slight irregularity would destroy the title of the purchaser if the mortgage required the notices to be posted at the courthouse door and *four* other places; but it does not do so, and in our opinion his Honor held correctly that an advertisement for thirty days at the courthouse door and three other public places and a publication in a paper for four weeks was a sufficient compliance with a provision in the mortgage to advertise "the same for thirty days, or as the law directs."

(2) Admitting that Mary and Elizabeth are sureties, and that an action on the debt would be barred as to them within three years, it does not follow that the right to foreclose the mortgage in court or under the power is barred.

The Court said in *Minzel v. Hinton,* 132 N.C. 662, "It is well settled that an action upon the debt may be barred without affecting the right to maintain an action to foreclose the mortgage given to secure it. *Capehart v. Detrick,* 91 N.C. 344. This because the bar of the statute affects only the remedy and not the right," and upon this point (187) the Court was unanimous, *Clark, C.J.,* saying in his dissenting opinion: "It is true that the mortgage is not necessarily barred when the debt is;" and *Douglas, J.,* in his: "If the note is not under seal, it may be barred in three years, and yet the mortgage securing it might not be barred in less than ten years."

At the time the mortgage was executed there was no bar to the execution of the power of sale *(Minzel v. Hinton, supra),* but the General Assembly has changed the law in this particular by providing that the power of sale "Shall become inoperative, and no person shall execute any such power when an action to foreclose such mortgage or deed of trust for the benefit of creditors would be barred by the statute of limitations" (Rev., sec. 1044), and Rev., sec. 391, subsec. 3, bars actions to foreclose a mortgage or deed of trust unless commenced "within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same."

It is evident, therefore, that the sale may be made, although the debt is barred at any time within ten years from the last payment; and as the last payment was on 14 April 1906, and the date of sale was on 14 April 1916, the power of sale was executed within ten years, applying the rule of excluding the first day and including the last. Rev., sec. 887; *Cook v. Moore,* 95 N.C. 1; *S. c.,* 100 N.C. 294.

This also disposes of the third contention of the plaintiffs. Affirmed.

Cited: Berry v. Boomer, 180 N.C. 69; *Jessup v. Nixon,* 186 N.C. 103; *Douglas v. Rhodes,* 188 N.C. 584; *Freeman v. Ramsey,* 189 N.C. 796; *Whitley v. Powell,* 191 N.C. 479; *Brown v. Sheets,* 197 N.C. 272; *Lumber Company v. Waggoner,* 198 N.C. 222; *Phipps v. Wyatt,* 199 N.C. 731; *Biggs v. Oxendine,* 207 N.C. 603; *Little v. Harrison,* 209 N.C. 361; *Elkes v. Trustee Corporation,* 209 N.C. 833; *Spain v. Hines,* 214 N.C. 434; *Edwards v. Hair,* 215 N.C. 664; *Pearce v. Watkins,* 219 N.C. 642; *DeMai v. Tart,* 221 N.C. 110; *Insurance Company v. Boogher,* 224 N.C. 567; *Jones v. Percy,* 237 N.C. 242.

ERNEST S. ASKEW, GUARDIAN, ETC., v. J. H. MATTHEWS, ADMR., ETC.

(Filed 6 March, 1918.)

1. Dispositions—Return to Clerk—Evidence.

While it is better to send depositions taken in an action to the clerk at once, who, upon proper application, may compel the commissioner to return them after unreasonable delay, there is no requirement of law that they be returned to the next or any particular term of court.

2. Gifts—Possession—Title—Wills.

Where the donor has given possession of personal property to another to be delivered to a third person after his death, whether such third person is entitled to the property after the donor's death depends upon whether the words or expressions of the donor, when parting with the possession, were sufficient to pass the title as well as the possession.

APPEAL by plaintiff from *Whedbee, J.,* at the August Term, 1917 of BERTIE.

This is an action brought by Ernest Askew, guardian of Rosa Askew and Sallie Askew, against J. H. Matthews, administrator of Eliza Hoggard, to recover two notes of $1,250 and $500, re (188) spectively, and one-half interest in a note for $2,000. The notes sued for were the property of Eliza Hoggard during her lifetime. It was contended by plaintiff that at the time of her death, they were in possession of plaintiff and were the property of plaintiff's wards, having been given to them by Eliza Hoggard prior to her death.

Issues were submitted to the jury and answered as follows:

1. Did the deceased Eliza Ellen Hoggard in her lifetime give and

devise to plaintiff's wards the notes described in the complaint? Answer: "No."

2. If so, did the said Eliza Ellen Hoggard at the time thereof have mental capacity sufficient to make such gift? Answer: .....

3. Is the plaintiff the owner of the notes sued for in this action and entitled to the possession thereof? Answer: "No."

The evidence for the plaintiffs tended to prove that Eliza Hoggard, about ten days before her death, told the plaintiff Ernest Askew to take the notes in controversy from her trunk and keep them for the benefit of Rosa and Sallie Askew, and that he did so, and the evidence of the defendant was that no such conversation took place, and that the said Hoggard did not give the notes to the plaintiffs.

During the progress of the trial, the defendant was permitted to introduce a deposition taken by the plaintiffs prior to the August Term of court, but which was not filed with the clerk until after said term.

The plaintiffs objected to the introduction of the deposition upon the ground that it ought to have been returned to the August Term of court. The objection was overruled, and the plaintiffs excepted.

His Honor charged the jury, among other things, as follows:

"If you find that this transaction occurred as plaintiff contends, then the question will be: Did Eliza Ellen Hoggard intend for the gift to take effect at once, in any event, immediately? If so, it was a gift, and the plaintiff would be entitled to recover; but if she did not so intend, and only intended for it to be effective after her death, retaining the right to recall it during her life, then it would not be a gift, for that would be making a will."

To this part of the charge the plaintiff excepted.

"Bear in mind that one can give a thing to one person, intending it to take effect at once, but to be by that person held and delivered after death of the donor. So if Eliza Ellen Hoggard gave the notes to Askew, intending the gift to them to take effect at once, and told him to keep them and give them to his children when she died, that would be a valid gift, and you should so find, because all right and title passed. Miss Hoggard had the right to constitute Askew her agent to keep these papers and to deliver them to his children after her death.
(189) To hold the notes absolutely for the children, the title must have passed at that time with the possession. Whether a gift or not was intended depends on what was said and done by her at the time, and that is what you are to try. The burden is upon the plaintiff to satisfy you by the greater weight of the evidence that this transaction occurred as plaintiff claims it occurred; that she told him to take the notes for his children, and at that time she made the gift

to take effect at once and not in the future, and that she simply created him her agent to hold the notes and to deliver them to the children at her death or at some future time. If you are so satisfied from the evidence and by its greater weight, you will answer the first issue 'Yes,' but if plaintiff has failed to so satisfy you, then you will answer the issue 'No.' "

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

Pruden & Pruden, Gillam & Davenport, and Murray Allen for plaintiff.

F. Craig and Winston & Matthews for defendant.

ALLEN, J. The objection to the introduction of the deposition cannot be sustained.

It was held more than eighty years ago in *Duncan v. Hill,* 19 N.C. 291, that a deposition need not be made returnable to the next term of court, and the statute has not since been amended to require it to be returned to any particular term.

It is desirable and best for the deposition to be sent to the clerk at once upon its completion, and in the event of unreasonable delay, the court can, upon proper application, compel the commissioner to make return.

The objection, which is in substance a motion to quash or reject the deposition for irregularity, was also made during the progress of the trial, and not before it was begun, which is not permitted by our statute, Rev., secs. 1647-8.

The charge of his Honor is in accordance with the precedents here and elsewhere. "Delivery is essential to a gift of personal property, . . . whether it be *inter vivos,* or *mortis causa.* This means passing over the property with intent to transfer the right and the possession of the same. *Newman v. Bost,* 122 N.C. 524; *Wilson v. Featherstone,* 122 N.C. 747; *Medlock v. Powell,* 96 N.C. 499"; *Duckworth v. Rorr,* 126 N.C. 676, approved in *Patterson v. Trust Co.,* 157 N.C. 14, where the Court says: "The authorities in this State are in full support of the position contended for by defendant, that in order to a valid gift of personal property, there must be an actual or construc- (190) tive delivery with the present intent to pass the title," citing the above cases and *Adams v. Hayes,* 24 N.C. 361, and *Gross v. Smith,* 132 N.C. 604.

No error.

Cited: In re Tart, 180 N.C. 106; *Thomas v. Houston,* 181 N.C. 93; *Parker v. Mott,* 181 N.C. 439; *Buffaloe v. Barnes,* 226 N.C. 318; *Sinclair v. Travis,* 231 N.C. 352.

W. K. ALLEN ET AL v. COMMISSIONERS OF MUDDY CREEK DRAINAGE DISTRICT.

(Filed 13 March, 1918.)

1. Drainage Districts—Necessary Expenses—Judgments—Mandamus—Assessments.

A judgment against a drainage district for necessary service rendered by the drainage engineers in its formation and given after the completion of its organization is enforcible by mandamus to compel the levy of an assessment upon the lands in the district for that purpose, irrespective of whether the commissioners have directed an issuance of bonds for the expenses of the districts.

2. Drainage Districts — Summons—Pleadings—Admissions — Judgments —Estoppel.

Summons issued against the individual commissioners of a drainage district and "the board of drainage commissioners," with allegation that it is "a corporation duly created, organized, and existing under and by virtue of the drainage laws of the State of North Carolina," is an action against such district; and where this allegation is admitted and judgment rendered against it, the corporation is estopped, in proceedings for mandamus to enforce the judgment, to set up any defense which might have been raised in the former action.

APPEAL by defendants from *Stacy, J.*, at January Term, 1918 of DUPLIN.

This was an action by the plaintiffs, drainage engineers, who performed services and incurred necessary expenses for the defendant corporation both before and after its organization. These services were necessary to the establishment of said district before the prayer of the landowners could be granted by the court creating the district. The plaintiffs have obtained judgment for the sums due them, but the corporation commissioners and the owners of the land in said district have failed and refused to pay such judgment.

This proceeding is for a mandamus to compel the drainage commissioners to levy an assessment upon the lands in said district for that purpose. The court signed judgment of mandamus and the de-
(191) fendants appealed.

Stevens & Beasley and C. D. Weeks for plaintiffs.
E. K. Bryant for defendants.

CLARK, C.J. The court properly directed a mandamus to issue to the drainage commissioners to levy an assessment upon the lands in said district to pay off the judgment due the plaintiffs. The judgment having been rendered against the commissioners of said drainage district,

it is not an open question that it is an obligation of said district and the proper method is to compel the levy of an assessment to pay off the judgment.

Had these expenses been incurred for the formation of a district, whose organization was not completed, it may be that the plaintiffs would have been restricted to the petitioners at whose instance they had done the work. But in this case the proceeding eventuated in the organization of the corporation and further, there has been a judgment rendered against said corporation for the indebtedness. The defendants put up the defense that they have not directed the issuance of bonds whereby money can be raised for such purpose. It is not necessary that such bonds should be issued. That is a matter for the corporation, but if it does not choose to issue the bonds, it is open to the plaintiffs to proceed to have an assessment ordered upon the lands in said district to raise a fund for the payment of this judgment.

The corporation was a party defendant to the judgment and also to this proceeding. The summons is against G. B. D. Parker, N. H. Williams, and O. W. Quinn, and the Board of Drainage Commissioners of Muddy Creek Drainage District. Paragraph 2 of the complaint avers that the "Board of Drainage Commissioners of Muddy Creek Drainage District is a corporation duly created, organized, and existing under and by virtue of the Drainage Law of the State of North Carolina, and that G. B. D. Parker, N. H. Williams, and O. W. Quinn are the duly elected and appointed drainage commissioners of said drainage district." This allegation is made and admitted in the answer to the action in which the judgment was obtained and also in this proceeding for a mandamus. The corporation is a defendant. *Jones v. Comrs.*, 85 N.C. 278.

The court found the facts and properly held that the defendants are estopped in this proceeding to set up any defense which might have been raised in the action in which judgment on the indebtedness was rendered, and that the lands in said district are subject to an assessment for the payment of said indebtedness and ordered that the drainage commissioners should levy and cause to be collected a sufficient assessment upon the lands within the bounds of said district for the payment of the judgment.

Affirmed.

Cited: Casualty Company v. Commissioners of Saluda, 214 N.C. 238.

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VIRGINIA D. SHAW ET AL V. MAURY WARD ET AL.

(Filed 13 March, 1918.)

Limitation of Actions—Trusts—Slaves—Title—Possession — Reentry — Ouster.

Title to lands may be conveyed in trust to the use of those who may not lawfully hold it *sui juris*, and the statute of limitations will not begin to run against the remainderman in a devise in trust for the support of certain named slaves for life, until the death of the last survivor of them in favor of their heirs or assigns; and were it otherwise it would require a reentry and ouster in order to set the statute in motion, the claimants being in possession under the will. The date of the emancipation of slaves discussed by CLARK, C. J.

APPEAL by defendants from *Stacy, J.*, at August Term, 1917 of DUPLIN.

Timothy Newkirk, in his will probated in Duplin in October 1859, among other devises provided: "I give and bequeath to my friend, John D. Powers, my plantation known as the 'Wells' place, to be used for the occupancy, support, and maintenance of certain negroes which I have conveyed to said Powers by and of gift for and during the term of the natural life of said negroes. At their decease my will and desire is that said plantation belongs to the children of said John D. Powers by his present wife, Francenia C., except forty acres around the dwelling of John Q. A. Boney on which he at present resides. I hereby bequeath said forty acres of land to the children of said Boney."

Said negroes were named in the conveyance to Powers referred to in said devise and were named Cass, Flora, and Swan. They were slaves at the time the will was probated and from that time on remained in possession and occupancy of the land. Swan Newkirk, the survivor of them, died in 1915, whereupon proceedings were immediately instituted by the plaintiffs who hold the title which they claim then devolved upon the children of John D. Powers and his wife, Francenia C., by the terms of said will.

The defendants are Timothy H. Newkirk, who claims as the heir of Swan Newkirk, and the other defendants, Maury Ward and C. C. Vann, are purchasers under a deed from Swan Newkirk executed in 1907.

Verdict and judgment for the plaintiffs. Appeal by defendants.

Stevens & Beasley, Henry E. Faison, H. D. Williams, and E. R. Preston for plaintiffs.

George R. Ward and John D. Kerr, Sr., for defendants.

CLARK, C.J. Three actions were brought, as each of the defendants claimed to hold in severalty a part of said tract. But as the same question was involved in all three actions the court, in (193) the interest of justice and in its discretion properly consolidated the actions into one.

The contention of the defendants is that inasmuch as Cass, Flora, and Swan were slaves at the time of the probate of the will of Timothy Newkirk, their former master, that neither of them could take or hold under the will of Timothy Newkirk, and that therefore their possession of the land was adverse after emancipation, not only as to John D. Powers, but to the remaindermen under said will, and therefore, the plaintiffs' cause of action was barred by the statute of limitations.

We can not agree with the contention that because slaves could not hold property that a devise of these premises to John D. Powers, trustee, to hold the same for their occupancy, support, and maintenance was void. If it had been, it would have been void prior to emancipation, and on the occurrence of that event the said Cass, Flora, and Swan would have become tenants at will of John D. Powers and could not make their possession adverse except by a surrender of their occupancy and a reentry and assertion of adverse possession.

But it is not true that a trust is void because its beneficiaries are *non sui juris*. There are too many instances upheld by the courts of devises which have been made by eccentric testators of property to trustees to be held for the support and maintenance of dumb animals, such as favorite dogs or cats or horses or trusts for the support of idiots or other incompetents, and even for the support of aliens in those States where they can not own realty, to require a citation of authorities that the fee simple is in the trustee for the purpose of the trust, and that the statute of limitations cannot run against him by reason of the occupancy of the property when so directed, or receipt of the proceeds by the beneficiary; still less against the remaindermen, whose title, as in this case, accrues only after the expiration of the trust. This trust was valid prior to the emancipation and became none the less so because that event made the beneficiaries *sui juris*.

In this case we have the anomaly that all three of the defendants are claiming under the survivor of the beneficiaries in said trust, one of them claiming by descent and the other two by conveyance. They can have no greater rights than he had.

The learned judge properly told the jury that the *cestuis que trustent* who were in "ocupancy" only under the will and not in legal "possession" could not set the statute in motion unless they had disavowed the trust, left the premises and reentered claiming adverse possession. Not having done this, they were at no time subject to action and the

statute did not begin to run until the death of the survivor. As counsel stated, this is a novel case, and it may be that the defense is presented "To see how it would strike the Court."

(194) It is not, in the view we take of it, material at what precise date slavery ceased to exist in North Carolina, but as it is discussed in the brief, it may be well to recall as a matter of history that on 17 October 1865, the convention of this State adopted an ordinance abolishing slavery, which was submitted to the people and ratified at the polls 7 November 1865, since which date involuntary servitude except for crime, has had no existence in North Carolina. Furthermore, the Thirteenth Amendment to the United States Constitution, which abolished slavery throughout the Union, was ratified and officially proclaimed as taking effect from 18 December 1865. As a matter of fact, after the proclamation of President Lincoln of 1 January 1863, slavery ceased everywhere within the lines of the Union Army, including that part of North Carolina which was in the occupation of the Union forces. It ceased in effect in the rest of this State after the surrender of Lee and Johnston, but of course this had no legal efficacy until the amendments to the State and Federal constitutions at the dates above named. After the surrender of Johnston, 2 May 1865, the employers of the State generally, if not universally, paid wages to the former slaves.

Under the act of Congress known as the "Reconstruction Act" (which denied to the United State Supreme Court any power to pass on its validity, *ex parte McCardle*, 74 U.S. 506), General E. R. S. Canby, "Commanding District No. 2," (North and South Carolina), issued his proclamation for the election on 17 October 1867, of members of a State Convention for this State, at which time, two years after Emancipation, the negroes voted for the first time. The convention met in January, 1868, and the Constitution made by it was ratified at the polls at an election 21, 22, and 23 April 1865.

The Fourteenth Amendment to the United States Constitution, which made all persons "born or naturalized in the United States," and subject to the jurisdiction thereof, citizens of the Union and of the State, was proclaimed ratified 28 July 1868, and the Fifteenth Amendment, which prohibited discrimination in suffrage "on account of race, color, or previous condition of servitude," was proclaimed ratified 30 March 1870.

No error.

(195)

D. B. TEAGUE, TRUSTEE OF DIXON & STEWART, v. HOWARD GROCERY COMPANY.

(Filed 13 March, 1918.)

1. Assignments for Benefit of Creditors—"Property"—Contracts—Statutes.

Our statutes requiring the trustee in a general assignment for creditors to recover property "conveyed or transferred by the grantor or assignor" in preference, within the four months period, includes within their meaning both real and personal property, and the general methods by which the title is passed or interest therein created, and extends to an executed contract of sale. Revisal, sec. 967 *et seq.* 1 Greg. Sup., pp. 109-110.

2. Same—Preference.

Our statutes regulating general assignments for creditors prohibits and avoids, as a wrongful preference, any and every disposition of real or personal property, absolute or conditional, by which a creditor, in consideration of an existent or antecedent debt, within four months of a general assignment by his debtor, acquires title to such debtor's property, or any interest therein or lien thereon, when he knew or had reasonable grounds to believe that his grantor or assignor was insolvent at the time the transfer or conveyance was made. Revisal, sec. 967 *et seq.* 1 Greg. Sup., pp. 109-110.

3. Same—Possession Retained—Contracts—Title.

It is not required that possession of specific personal property be given the purchaser in order to make an executed contract of sale, or the title passes according to the intent of the parties as expressed in the contract between them; and, in the absence of specific agreement, the presumption is that the title passed at the time of the purchase without such delivery.

4. Same—Instructions—Appeal and Error.

Where the trustee in a general assignment for creditors brings his action to set aside as a fraudulent and void preference a transfer of the assignor's property for an antecedent debt, made within the four-months period, wherein the assignor retained possession until a later time, and the evidence is conflicting as to whether it was then agreed between the parties that the title should presently pass, it is reversible error for the trial judge to instruct the jury that the transaction was void within the meaning of the statute, if the creditor had knowledge of the insolvency of his debtor at the time the goods were delivered to him. Revisal, sec. 967 *et seq.* 1 Greg. Sup., pp. 109-110.

CIVIL ACTION, tried before *Allen, J.*, and a jury, at September Term, 1917 of LEE.

The action was to recover certain personal property, a buggy and harness, an automatic oil can, and a safe, or the value thereof, which

plaintiff trustee, in a general assignment or deed of trust for creditors by Dixon & Stewart, alleged had been sold and delivered to defendants in payment of an existent debt within two weeks of the assign-
(196) ment and under circumstances constituting a wrongful preference within the meaning of the statute.

It was admitted that on 2 December 1915, the firm of Dixon & Stewart, doing a general retail business in the county, made a general assignment for the benefit of creditors, designating plaintiff D.B.T. as trustee, and there was evidence on the part of plaintiff tending to show that about two weeks before making said assignment such firm bargained and sold to defendant, a corporation doing business in Sanford, N. C., for an existent debt, the personal property in question, and when the defendant knew or had reasonable ground to believe that the firm of Dixon & Stewart was insolvent; that said property was not delivered at the time it was bargained for, but the buggy and harness a day or two after the sale and the oil can and safe about ten days thereafter, to wit, on Friday before the following Wednesday, the latter being the day of the assignment.

Defendant corporation, admitting that it had acquired title to part of the property about two weeks before the assignment and for an existent debt, alleged that the same was purchased and acquired by them at the time specified in good faith and for full value and without notice or knowledge or any reason to believe that the assignees or any of them were solvent.

There was also testimony on the part of defendant permitting the inference that, as to the buggy and harness, defendant had acquired title to that some eight or nine months prior to the assignment.

There was evidence on the part of defendant tending to support these averments of their answer and in order to a proper presentation of their position defendant company, in apt time, tendered an issue as follows: "1. Did the Howard Grocery Company, at the time it purchased the property or any part thereof described in the complaint and agreed to credit the account of Dixon & Stewart with the value thereof, know or have reasonable grounds to believe that said firm was insolvent?" together with two other issues identical with the second and third issues submitted by the court.

The first issue as presented by defendant was refused by the court and the cause submitted on issues as follows:

1. Did the Howard Grocery Company, at the time they received the property or any part thereof described in the complaint and agreed to credit the account of Dixon & Stewart with the value thereof, know or have reasonable grounds to believe that said firm was insolvent?

2. If a part, what part?

3. What was the value of such property so received with such knowledge or reasonable grounds of belief?

The change in the first issue being that his Honor substituted (197) the "time when the goods were received for the time when the goods were purchased" as that when the knowledge of insolvence by the purchaser should affect the result, and defendant excepted.

In reference to this first issue, the court charged the jury that if they found "from the evidence and the greater weight thereof that at the time the defendant received the articles from Dixon & Stewart they knew or had the reasonable ground to believe that they were insolvent," they would answer the first issue "Yes." And further, that "there was no sale until actual delivery; and, although the defendant may have agreed to purchase the articles as testified, and at that time had no knowledge of the seller's insolvency and no reasonable grounds for such belief, if the jury should find from the greater weight of the evidence that prior to the delivery it did acquire such knowledge or had such reasonable grounds for belief," they would answer the first issue "Yes."

There was verdict for plaintiff, assessing value of the property at $125. Judgment accordingly, and defendant excepted and appealed, assigning for error: (*a*) The substitution of the first issue. (*b*) The portions of the charge excepted to.

Teague & Teague for plaintiff.
Hoyle & Hoyle for defendant.

HOKE, J. Our statute regulating general assignments for creditors, Revisal, secs. 967 *et seq.*, as amended by Laws 1909, ch. 918, 1 Gregory's Supplement to Pell's Revisal, 109-110, makes provision, among other things, that it shall be the duty of trustee in such cases to recover for the benefit of the estate property which may have been conveyed by the grantor or assignor in fraud of his creditors or which may have been conveyed or transferred by the grantor or assignor for the purpose of giving a preference. A preference under this section shall be deemed to have been given when poperty has been transferred or conveyed within four months next preceding the registration of the deed of trust or deed of assignment, in consideration of the payment of a preexisting debt, when the grantee or transferee of such property knew or had reasonable ground to believe that the grantor or assignor was insolvent at the time of making such conveyance or transfer. The word "convey" more usually refers to real estate, "comprehending the general methods by which title thereto is acquired," but it may be of even more extended meaning. The word "transfer," applying to both

kinds of property, may be held to include the general methods by which title thereto is passed or interest therein created, including, beyond question, an executed contract of sale. *Godwin v. Bank,* (198) 145 N.C. 320, approving the broad and inclusive definition of the term "transfer" contained in the Bankruptcy Act, U. S. Statutes at Large, vol. 30, ch. 541, sec. 1; *Vann v. Edwards,* 135 N.C. 661-668.

And, on proper consideration of the present statute, its terms and purpose, it is clear that the Legislature intended to prohibit and avoid, as a wrongful preference, any and every disposition of real or personal property, absolute or conditional, by which a creditor, in consideration of an existent or antecedent debt and within four months of a general assignment by his debtor, acquires title to such debtor's property or any interest therein or lien thereon, when he knew or had reasonable ground to believe that his grantor or assignor was insolvent at the time the transfer or conveyance was made. *Wooten v. Taylor,* 159 N.C. 604.

On the present record, there are facts in evidence tending to show that this transaction was an executed contract of sale, having reference to designated and specific pieces of property, and if these facts should be accepted by the jury, it is well understood that present physical delivery of the property is not necessary to the transfer of the title but that the same passes according to the intent of the parties as expressed in the contract between them, and further, that, in the absence of specific agreement on the question, the presumption is that the title passed at the time of the purchase and without such delivery. *Richardson v. Insurance Co.,* 136 N.C. 314; *Jenkins v. Jarret,* 70 N.C. 255; Tiffany on Sales, pp. 82-83; Benjamin on Sales, 7th Ed., p. 728.

In the citation to Tiffany, the correct position, in both aspects of the matter, is tersely stated as follows: "When there is a contract of sale of specific goods, the property in them is transferred at such time as the parties to the contract intended it to be transferred. (2) When there is a contract for the sale of specific goods, unless a different intention appears, the property in the goods passes to the buyer when the contract is made."

This being true, and with facts in evidence on the part of the defendants tending to show an executed contract of sale was made between these parties two or three weeks, perhaps more, before the assignment, and with delivery of a part some days thereafter, and of the remainder four or five days before the assignment, with additional evidence of insolvency disclosed after the trade, and even evidence tending to show that defendant bought the buggy and harness seven or eight months before, we are of opinion that there was error to de-

fendant's prejudice in restricting their knowledge of the debtor's insolvency and their reasonable belief on that subject to the time when the goods were actually received by defendants, for, if they had no such knowledge or belief at the time of title acquired, the (199) transaction would not constitute a preference within the meaning and purport of the law.

The defendants, therefore, are entitled to have this essential fact determined on an appropriate issue and under a proper charge concerning it and to that end a new trial is awarded.

New trial.

Cited: Richardson v. Woodruff, 178 N.C. 49; *Watts v. Railroad,* 183 N.C. 13; *Winborne v. McMaham,* 206 N.C. 34.

LEE J. TAYLOR, ADMINISTRATOR OF EARL K. TAYLOR, DECEASED, v. J. W. STEWART AND JAMES STEWART.

(Filed 13 March, 1918.)

1. Verdict—Pleadings—Trials.

The verdict of the jury should be construed on appeal from a judgment rendered thereon with reference to the trial and issuable facts raised by the pleadings.

2. Judgments—Negligence—Issues—Answers.

Where damages sought to be recovered against a father and son for a wrongful death are apparent from the pleadings and trial as depending upon the negligence of the son, running an automobile at the time of the injury with the permission of the absent father, and the jury have found by their verdict that the son was not negligent, without answering the issue as to the negligence of the father, a judgment in favor of them both is properly entered.

APPEAL by plaintiffs from *Calvert, J.,* at the October Term, 1917 of CRAVEN.

This is an action against the defendants, James Stewart and his father, J. W. Stewart, to recover damages for wrongful death.

The material facts are stated in the report of the former appeal, 172 N.C. 203.

The complaint alleges, in substance, that the intestate of the plaintiff was killed by being run over by an automobile driven by the defendant James Stewart; that James Stewart was only thirteen years of age and inexperienced, and that he was running at a high rate of

speed; that the father, J. W. Stewart, while not present at the time of the death and injury, had permitted and authorized his son to run the automobile.

The defendants denied that there was any negligence and also denied that the death of the intestate was caused by the automobile. The jury returned the following verdict:

1. Was the plaintiff's intestate killed by the negligence of the defendant James Stewart, as alleged? Answer: "No."
2. Was the plaintiff's intestate killed by the negligence of the defendant J. W. Stewart, as alleged?

(200) 3. Did L. J. Taylor, the father, and Mrs. L. J. Taylor, the mother, of plaintiff's intestate, by their own negligence contribute to the death of said intestate? Answer: "No."

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

His Honor rendered judgment upon the verdict in favor of both of the defendants and the plaintiff excepted and appealed, contending that the verdict does not support a judgment in favor of the defendant J. W. Stewart.

Neither the evidence nor the charge of the court is sent up as a part of the record.

C. L. Abernathy, E. M. Green, and W. D. McIver for plaintiff.
Moore & Dunn, D. L. Ward, and Ward & Ward for defendant.

ALLEN, J. The verdict of the jury must be construed with reference to the trial (*Kearney v. R. R.*, 158 N.C. 532), and it is permissible and proper to examine the pleadings for the purpose of ascertaining the issuable facts and the ground on which the liability of the defendants depend, and when we do so, it is apparent that the right to recover against the defendant J. W. Stewart is dependent on the negligence of his son James, who was driving the automobile at the time of the injury and death.

The plaintiff, in effect, alleges that the death of his intestate was caused by the negligent act of James, and that the father is responsible because he permitted or authorized his son to run the automobile, and as thus understood, the finding upon the first issue is determinative of the right to recover against both defendants. This is the conclusion reached on the former appeal in this action, where the Court, before discussing the liability of the father upon the ground that he had authorized the act of the son, says: "Taking all of these circumstances into consideration, the question of proximate cause must be submitted to the jury. If they should find that death of the plaintiff's intestate was an unavoidable accident, which a prudent chauffeur, authorized

by law to run a machine, could not by the exercise of reasonable care have avoided, then the defendants were not liable; but if they should find from all the evidence that the proximate cause of the intestate's death was the fast driving and lack of attention and due care upon the part of the thirteen-year-old boy, driving the machine in violation of law, then he would be liable."

No error.

Cited: Land Co. v. Maxwell, 176 N.C. 142; *Tyree v. Tudor,* 181 N.C. 217; *Fry v. Utilities Co.,* 183 N.C. 293; *Wynne v. Allen,* 245 N.C. 426.

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(201)

BURT BROWN, BY HIS NEXT FRIEND, v. KINSTON MANUFACTURING CO.

(Filed 13 March, 1918.)

1. Master and Servant—Employer and Employee—Duty of Master—Safe Place to Work—Evidence—Negligence—Accident.

The plaintiff, employed to assist in loading slabs upon railroad cars, conveyed to him for the purpose, upon a triangular, slanting "slide" 50 or 70 feet long, was injured by some of the slabs coming down the slide upon him unexpectedly, and in his action to recover damages of his employer there was evidence in his behalf that it was caused by a defective or knotted rope, operating a "tipple," used for the purpose of sending down the slabs when wanted for the purpose of loading; and in defendant's behalf that the plaintiff had been instructed and knew how to operate the rope controlling the "tipple," and that his injury was caused by his own negligence therein: *Held,* the court having properly charged the jury upon the law of negligence, contributory negligence, and the negligence of a fellow servant, the verdict in plaintiff's favor should be sustained under the rule that when a thing which causes injury is shown to be under the defendant's management and the accident would not ordinarily happen if proper care had been observed by him, it furnishes evidence of the defendant's negligence in failing to exercise the care required of him. *Cochran v. Mills Co.,* 169 N.C. 63, cited and applied.

2. Negligence—Personal Injury—Physician—Duty of Servant.

The plaintiff cannot recover for his pain and suffering solely caused by his own neglect to call in a physician or his inattention to the wound, in his action to recover damages for a personal injury. The charge of the court in this case is approved.

3. Damages—Personal Injury—Earning Capacity.

As an element of damages to be awarded in a personal injury case, the jury may estimate the amount of the plaintiff's diminished earning

capacity as of the present time. *Fry v. R. R.*, 159 N.C. 357, cited and applied.

4. Instructions—Charge as a Whole—Appeal and Error.

A charge by the court to the jury should be construed as a whole, each part in connection with the others, and if correct when so construed error assigned as to one portion thereof, separately construed, will not be upheld on appeal.

CIVIL ACTION tried before *Stacy, J.*, and a jury at November Term, 1917 of LENOIR.

Plaintiff, about fifteen years old, was employed by the defendant to handle blocks and slabs at its mill, and especially at the end of a slab and block sile to assist in placing the blocks and slabs on the railroad cars. The slide was between 50 and 70 feet long, and at the highest point was 30 feet from the ground, and the base was 40 feet, the slide being triangular in shape. At the top of the slide there was a "tipple," which was swung to it and controlled by a rope, for the purpose (202) of discharging to the ground at that point such blocks and slabs as were not required for loading the cars, or when the hands were loading cars at the other end of the slide. While plaintiff was engaged with others in loading cars with the slabs and blocks collected at the lower end of the slide, the tipple at the upper end was moved and placed so that instead of performing its ordinary function it turned the blocks and slabs into the slide unexpectedly to the plaintiff and he was seriously and permanently injured in his foot. He alleges, further, that this injury was caused by the negligence of the defendant in not securing the tipple with a sufficient rope to hold it in its proper position, or in using a rope for that purpose which was defective and knotted, having broken before, and being unfit to keep the tipple in its proper place so that it would not discharge blocks and slabs in the slide and thereby injure the employees who were working at its lower end.

The defendant denies the negligence and avers that the device by which the blocks or slabs were dropped to the ground was a simple one and its operations well known to and easily understood by the plaintiff, and that if he was injured while engaged in this work it was the result of his own inattention and neglect, there being no danger in doing the work provided ordinary precaution is taken by the employee for his safety; that he was properly instructed as to the method of doing the work in safety and was required to stand away from the slide until all the blocks had dropped from it and were piled on the ground or on the car, and then to place them in position, his duty being to pick up the blocks and slabs and put them in another place.

Upon the allegations thus made and denied issues were submitted to

the jury and answered in favor of the plaintiff, the jury assessing his damages at $1,000. The defendant appealed from the judgment.

J. F. Liles and G. G. Moore for plaintiff.
Cowper & Whitaker and J. L. Hamme for defendant.

WALKER, J., after stating the facts: We cannot see anything in this case to distinguish it from the many of a like kind decided by this Court regarding the law of negligence as bearing upon the respective and reciprocal duties and obligations of master and servant. The real question in the case is whether the plaintiff was injured by the negligence of the defendant in furnishing him with a machine or appliance which was unfit for the reasonably safe performance of his task by reason of some defect in a part of the apparatus. There is evidence from which the jury could infer that if the slide had been in proper condition the work would not have been hazardous, and if due care, which is ordinary care, had been exercised by the defendant, the injury would not have resulted and this brings the case fairly (203) within the rule stated in *Cochran v. Mills Co.*, 169 N.C., at p. 63, as follows: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have control of it use the proper care, it furnishes evidence, in the absence of explanation by the defendant, that the accident arose from want of such care," citing numerous cases.

This rule must not be supposed to require that plaintiff, or the party alleging negligence in the construction of a machine at which he is employed to work, must rely altogether upon this *prima facie* showing by him of ngligence, for he may resort to other proof for the purpose of particularizing the negligent act and informing the jury as to the special cause of his injury. This has frequently been done, and the right to make such proof cannot now be questioned.

It would seem in this case that the negligent act of the defendant which caused the injury was the failure to have the slide in proper condition and to secure the tipple or tilt by a rope sufficiently strong to prevent the blocks and slabs from being thrown into the slide at any unexpected time. The plaintiff contended, upon the evidence, that the rope was weak and had been broken before, so that it had knots in it, and that on this occasion it broke while he was at the other end of the tilt, and he was injured by the descending blocks without any fault on his part.

Defendant denies that it was negligent, and alleges that it was the duty of plaintiff to tie the rope and so fasten the tilt as to prevent

blocks from being thrown from it down the slide, and that plaintiff failed to perform this duty and also failed to occupy a position of safety, as he had been instructed to do, while performing his work.

With respect to these contentions, the court charged the jury fully and correctly as to the law arising thereon, and the jury have found, therefore, that the injury was not due to the fault of the plaintiff in failing to properly tie the rope to the tilt, but to the fault of the defendant in using for the purpose of securing the tilt in its right place a defective and unsafe rope, and further, that plaintiff was not guilty of negligence in that he disregarded instructions as to the manner in which he should perform his work, and the court sufficiently stated to the jury the law as to any negligence on the part of Claude Moore, plaintiff's fellow-servant, for he told the jury that "plaintiff was not entitled to recover for any negligence of his fellow-servant," and, besides, the instruction was a substantial response to plaintiff's request and almost in its very language. The court also gave proper instructions as to plaintiff's contributory negligence, and all these instructions were certainly as favorable to the defendant as it had the
(204) right to expect that they would be or should have been. The charge must be taken as a whole and so construed, and it is not permissible to select certain detached portions of it and assign error; but we should consider those parts in connection with others which precede and follow them, or the context; and this is true both as to the cause of action and the damages in a case of negligence.

We have examined the charge of the court with care, and find that the law arising upon the evidence was fairly and fully explained to the jury. In regard to the aggravation of the injury by plaintiff's neglect in the treatment of his wound, and his failure to call in a physician sooner that he did, the court charged the jury exactly in response to the defendant's request, and instructed the jury that for any excess of injury or suffering caused by such neglect on his part, he could not recover any damages. This is the language of the court: "The defendant asks me to instruct you that if you should find from this evidence that the plaintiff, by reason of his own carelessness, caused his injury to be greater than it would have been had he exercised proper care in looking after it, then he would not be entitled to recover for any damage which was due to his negligent failure to take care of his own foot. That might be so if the evidence warranted that conclusion. The plaintiff says that it does not; the defendant says that it does. If you find as a fact from this evidence that the plaintiff by his own negligence caused the injury to be greater than it would have been but for his negligence, then you would not allow him anything for whatever additional damages he has sustained by reason of his own negligence." The court

then stated the contentions of the parties with respect to this matter and explained the bearing of the evidence upon it and left it with the jury to determine the facts. The instruction was a full compliance with the law.

The expression, "That might be so if the evidence warranted the conclusion," which follows the instruction given at defendant's request, must evidently mean that the plaintiff could not recover for any part of the injury or suffering caused by his own neglect, and if the jury found, upon the evidence, that a part of it was so caused, they should not allow anything for it; and the meaning is made perfectly clear when we consider what immediately follows, *viz.*, "The plaintiff says that it does not warrant it, while defendant says that it does," and the court then proceeds to explain the contentions of the parties so that the jury might find the fact according to the evidence. There was no expression of opinion and no statement by the court that there was no evidence which would support defendant's contention as to this phase of the damages.

The assignment of error closes with the word "conclusion" in the foregoing quotation from the charge, and if this was all that was said by the learned judge, there might be some ground for criticism, but it was not, and this shows the necessity for examining the (205) charge, not disconnectedly, but as a whole or at least the whole of what was said regarding any special phase of the case or the law. In this instance, the judge properly arrayed the contentions and gave to each party the benefit of full and correct instructions in regard to them, both upon the evidence and the law, and the jury have found the facts against the defendant.

The instruction as to the method of assessing the amount of damages, that is, by estimating the amount of his diminished earning capacity, and so forth, as of the present time, was in strict accordance with the rule as stated in *Fry v. R. R.*, 159 N.C. 357. The other exceptions are without merit, as the evidence admitted was competent.

The motion for a new trial because of newly discovered evidence is denied. *Johnson v. R. R.*, 163 N.C. 431, 453.

No error.

Cited: S. v. Wentz, 176 N.C. 749; *Fox v. Army Store,* 216 N.C. 470.

JOHN MOORE AND WIFE v. THE ROWLAND LUMBER COMPANY.

(Filed 13 March, 1918.)

1. Railroads—Lumber Roads—Fires—Negligence — Evidence — Nonsuit —Trials.

Upon motion as of nonsuit upon the evidence in an action against a lumber company operating a steam railroad, to recover damages to land alleged to have been caused by fire negligently set out by the defendant's locomotive, evidence that the defendant operated its road for handling logs on its right of way, that the right of way was in a foul and inflammable condition and the fire was seen buring thereon and into the crossties; that it spread therefrom to the plaintiff's lands, causing the damages complained of, and that the defendant's locomotive had passed the place about two hours prior to the time the fire was discovered, is *Held* sufficient to take the case to the jury upon the question of whether the fire was negligently set out by the defendant's locomotive in its foul right of way.

2. Appeal and Error—Evidence—Harmless Error.

Upon a motion to nonsuit, the erroneous admission of evidence will not constitute reversible error when there is other evidence in the case that would render it immaterial or harmless.

CIVIL ACTION, tried before *Stacy, J.*, and a jury at January Term, 1918 of DUPLIN.

The plaintiffs brought this action for the purpose of recovering damages for the burning of timber, and other property on their land, which they allege was caused by the defendant's negligence in permitting live sparks or cinders to escape from its engine. Defendant moved,
(206) at the close of the testimony, that the action be dismissed for want of proof, and we, therefore, set out so much of the evidence as pertains to that question.

John Moore testified: "The fire that burned a part of this land occurred on June 24, 1914. I had the burned area surveyed by L. Middleton; 17 acres. It is a part of the 137-acre tract; it adjoins L. M. Cooper on the east side. I am familiar with the Cooper tract. The defendant built a spur track across the Cooper tract, extending in a north and south direction; a space was cut out about 20 or 25 feet on which to build this spur track, somewhere near 25 feet; I never did measure it; the right of way was cut out about 25 feet; the defendant went out there to cut the timber off; cut off the stumps and laid the track, put down the cross-ties and laid the rails on them. The right of way had not been burned or raked off; it was in a foul condition, having litter, grass, and straw where the fire originated on Mr. L. M. Cooper's land. I first heard of the fire at my home about three o'clock in the afternoon, and I went over there right away. The woods were

on fire when I got there, and burning right over on the west side of the right of way, towards my land; in some places it was burned between the cross-ties, and in some places burning in the cross-ties. The defendant was hauling timber across this spur track. The weather was pretty dry at that time. My timber that was burned was mostly long-leaf, round timber, never been boxed; the fire got over on my land from Mr. Cooper's land. It burned across the end of Mr. Cooper's land on to my land that lies immediately west of it. . . . I didn't go far enough to see where the fire was burning when I first got there; it was burning all along the railroad, on the island and in the marsh next to the railroad, or pond, I call it, and on the outside of the branch, not in it."

Thomas McGowan testified: "I know where the Cooper land is. I remember when this fire got out; one day after dinner before I had got out to work. I went on the front porch and saw a smoke. I got the hands, and one man went with me to the fire; when I got there it was burning on both sides of the tramroad, and some of the ties were burned; it was burning on the L. M. Cooper land. I then turned and went back home. We were sitting at the dinner table when we heard the train blow; I don't know where it was when it blowed; I heard one blow. I won't say that the defendant was using the track this day, I hadn't seen them. The defendant put the track down there to haul timber. I have seen the defendant using that track and hauling logs; a short time before the fire I saw the engine hauling logs. I don't know whose land they got the logs from that they were hauling over this spur track; I won't say they were using it daily. I heard trains running there practically every day. I heard it blow every day, I reckon. I have been on the premises several times since the fire. I saw (207) the burn. The woods are burned on both sides of the track there a good long ways; I went to see and the fire burned across L. M. Cooper's onto mine and Mr. Moore's, too; that was the same fire. When I heard the train blow I did not take any notice of the direction."

L. M. Cooper testified: "A week or more after the fire I went out there and looked at the burned area in the marsh; it had burned a little on both sides of the tramroad, on the east side was not burned much. On the west side the further it got from the railroad the wider it got; it was burned on both sides of the railroad up to the cross-ties, and at the ends the burned place was very narrow at the tramroad; I suppose 50 or 75 yards. The fire occurred in June, 1914. I did not see the smoke."

W. B. Murray testified: "My land, the plaintiffs', and Cooper's join. The train of the defendant was out there that day. I heard it; I may have seen it; something like the middle of the day; I remember very well hearing the train, might have seen it. I know it was there; they

were hauling logs off of my land across this spur bank. Don't know how many loads they had made that day. I think it was as much as 12 or 1 o'clock when I left the woods; the train was running; carrying logs across. There was a branch they were speaking of this old mill being on, between my land and Cooper's. The reason I know the train was in there I heard it going. I saw it; I remember the cars with logs on them, and its hard pull. I noticed the engine because it pulled like it was heavily loaded; it exhausted like any other engine with a train that is heavily loaded; that is why I noticed it."

C. D. Haddock testified: "On 24 June 1914, I was working on the W. B. Murray land; the man who has just been on the stand. Was working for T. H. Garrity, who is employed by the defendant. I remember the fire on that day. I recall the engine and train going out of that switch through Mr. Cooper's land that morning about 11 o'clock. I went to the fire; when I got there it was on Mr. Cooper's land; when I got there the fire was burning in the middle of the railroad and on both sides; it had burned some 50 or 75 yards from the track and over a hundred yards up and down the track; it was burning on both sides of the track and in the woods towards the outer edge of the Cooper tract. I ate dinner that day on the Murray land between a half and three quarters of a mile from the point where I afterwards saw the fire. It was in a northeasterly direction from me, and towards the camp. I don't know where Mr. Garrity was. I saw Mr. Garrity going towards the loading machine a while before he came after me to go to the fire. I suppose this was half past twelve or one o'clock when he told me to get the hands and go down to the fire; about a half an hour after I had eaten dinner. It was about one o'clock when Mr. Garrity
(208) came by for me. The train had passed that point about 11 o'clock, and this was two hours after the train passed."

There was testimony as to damages and as to some other matters not pertinent to the motion for a nonsuit.

The jury returned a verdict in favor of the plaintiff and from the judgment thereon the defendant appealed.

Gavin & Wallace for plaintiffs.
Stevens & Beasley for defendant.

WALKER, J., after stating the case: It is well settled that, upon a motion for a nonsuit, under the statute, the evidence must receive that construction which is most favorable to the plaintiff (*Finch v. Dewey*, at this Term), and so considered, we think that there was at least some evidence to establish the defendant's liability. Questions strikingly like this one have so often been considered by this Court that it would be

useless, and certainly furnish no valauble precedent, if we should again review our previous discussions of them.

The allegation of the plaintiffs is that the fire originated on L. M. Cooper's land, and burned his timber, and then extended to his land with the same result. This the defendant denies, and contends that there is no evidence as to where the fire started, and certainly none to the effect that it was caused by its engine or begun on its right of way. We are of the opinion that there is some evidence that the fire was caused by sparks from the defendant's engine which fell on its right of way, which was foul, and ignited combustible material there, and that it extended from there across the Cooper land to the plaintiffs' premises, where it destroyed the timber and caused the damage complained of. It seems to us, without a close analysis of all the evidence, that the testimony of the plaintiff himself is sufficient, as against the motion for a nonsuit, to carry the case to the jury. He testified: "The right of way had not been burned or raked off; it was in a foul condition, having litter, grass, and straw where the fire originated on Mr. L. M. Cooper's land. I first heard of the fire at my home about 3 o'clock in the afternoon, and I went over there right away. The woods were on fire when I got there and burning right over on the west side of the right of way towards my land. In some places it was burned between cross-ties, and in some places burning in the cross-ties. The defendant was hauling timber across the spur-track, and the weather was very dry at the time." This was, at least, sufficient for a fair inference by the jury that the fire was caused by defendant's engine dropping live cinders and sparks on its foul right of way. If we confine ourselves to such evidence as favors the plaintiff, there was no apparent cause for the fire except the defendant's engine. There was (209) other evidence, which strengthened the plaintiffs' case, and while the jury were not bound to find that the fire was caused by the engine, or that it was started on the foul right of way by sparks or hot coals from the engine, there is ample evidence in the record to warrant such a finding.

We cannot do better than quote what is said in the recent case of *Simmons v. Roper Lumber Co.*, 174 N.C. 220 (93 S.E. Rep., 736, 738), as the two cases are very much alike, and if there is any difference between them the evidence in this case is much stronger for the plaintiffs than was the evidence in *Simmons v. Roper Lumber Co.* for the plaintiff who sued there. We said in the *Simmons* case: "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 casual 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," citing *McMillan v. R. R.*, 126 N.C. 725; *Williams v. R. R.*, 140 N.C. 623.

(210) In *Ashford v. Pittman*, 160 N.C. 45, at p. 47, the Court holds that circumstantial evidence is sufficient to show the origin of the fire, and that it does not require the testimony of an eye-witness for the purpose, and the same was decided in *Williams v. R. R., supra*, where it was said with reference to facts quite similar to those in this case: "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 southwest across the track, the fire being on the south side. Two witnesses testified that they first saw the smoke about 30 minutes after the defendant's engine passed. How long before that the fire began no one knew; but there was no fire before the engine passed. 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."

So in *Deppe v. R. R.*, 152 N.C. 79, *Justice Manning* comments upon the necessity of permitting the cause of the fire to be shown by circumstantial evidence, as being the only kind of proof available to establish the fact, especially if the fire started in the daytime when sparks can rarely be seen.

And in *McRainey v. R. R.*, 168 N.C. 572, *Justice Allen* makes similar observations concerning the sufficiency of circumstantial testimony in such cases, the question there being "whether there was any evidence that the fire, of which the plaintiff complains, originated from the defendant's engine and passed to his land causing him damage," citing *Fitzgerald v. R. R.*, 141 N.C. 535; *Henderson v. R. R.*, 159 N.C. 583; and *Hardy v. Lumber Co.*, 160 N.C. 116.

Several of the cases we have mentioned were decided upon facts substantially like those in this record, except that in this case we also have some direct evidence of the fact sought to be established. We think, though, that the case of *Simmons v. Roper Lumber Co., supra,* fully answers the defendant's contention upon his motion to nonsuit, and that it is, in its turn, sustained by ample authority. Of course the evidence should have proper relation with the fact to be proved, and reasonably tend to show the fact. Sherman & Redfield on Negligence, sec. 58. It must not be conjectual or give rise only to a mere guess, or speculation, as to what was the cause of the fire. *Byrd v. Express Co.*, 139 N.C. 273, as this is not a sufficient basis for an inference by the jury as to the controverted fact.

The exceptions as to evidence are without merit. Even if there was any error in the rulings, which is not conceded, it was harmless. There was sufficient evidence for the jury, not considering that (211) which is the subject of the four exceptions.

We conclude that the case has been decided upon its clear legal merits in favor of the plaintiffs, and there is no ground for a reversal.

No error.

ALLEN, J., did not sit on the hearing of this case.

Cited: Stone v. Texas Co., 180 N.C. 559; *White v. Realty Co.*, 182 N.C. 538.

B. W. BLANTON ET AL. v. H. E. BONEY.

(Filed 20 March, 1918.)

1. Wills—Devise—Lands—Vague Description—Descent and Distribution—Intestacy.

A devise in this case of "forty acres of land to include the dwelling and the old field" is *Held* sufficient description to identify the lands; but if otherwise the plaintiffs would take an undivided interest as heirs at law of the deceased, as in case of intestacy.

2. Appeal and Error—Record—Exceptions.

The defendant in an action to recover land may not take advantage of the position that a conveyance of the land had been made according to a parol division, etc., when the fact has been found against him by the jury, and there is no exception of record to present the question.

APPEAL by defendant from *Stacy, J.*, at the August Term, 1917 of DUPLIN.

This is an action to try the title to 40 acres of land, and to recover rents and profits, the plaintiffs claiming to be the owners of five-sevenths of the land as the heirs of Abram Blanton, Sr., and admitting that the defendant is the owner of two-sevenths by purchase from two of said heirs.

The 40-acre tract in controversy is a part of a large tract of 259 acres owned by Abram Blanton, Sr., who died about 1874, leaving a will which provides as follows:

"I give and bequeath to my beloved wife, Mary Jane Blanton, forty acres of land to include the dwelling-house and the old field, in lieu of dower, of the premises on which I now live.

"I also give to the same all of my personal property, all of the above for the term of her natural life, then to be the property of my body heirs."

The defendant reserved several exceptions to present the contention that the description of the land in the will is too vague to admit parol evidence to identify it.

(212) The plaintiffs offered evidence tending to prove that Abram Blanton, Sr., left seven children surviving him, and that they are the heirs of five of these children, and that the defendant has bought the interest of two of the children. Mary Jane Blanton, widow of Abram Blanton, died in 1908.

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

H. D. Williams for plaintiffs.

George R. Ward and Stevens & Beasley for defendant.

ALLEN, J. The principal contention of the defendant in the Superior Court was that there was a division by parol of the lands of Abram Blanton among his heirs, and, as conveyances had been executed in recognition of this partition, that the plaintiffs could not now claim the two shares set apart to the two children under whom the defendant claims, but the fact as to the parol division has been found against the defendant by the jury, and no exception in the record presents the question of the effect of the conveyances on the claim and title of the plaintiffs.

The description of the land in the will is certainly sufficient to pass the land covered by the dwelling house and the old field, but, if altogether void for uncertainty, the title of the plaintiffs would not be affected, because they are the heirs of Blanton, and if no land is described in the will, they would take as heirs as in case of intestacy.

No error.

Cited: Warehouse Co. v. Warehouse Corp., 185 N.C. 525; *Freeman v. Ramsey*, 189 N.C. 797; *Burchett v. Mason*, 233 N.C. 308; *Seawell v. Seawell*, 233 N.C. 740; *Armstrong v. Armstrong*, 235 N.C. 737.

KINSTON MANUFACTURING COMPANY v. E. B. FREEMAN.

(Filed 20 March, 1918.)

Attachment—Judgments—Courts—Nonresidents—Garnishment.

A judgment of the Federal Court is not liable to garnishment in the State court; and where it is alleged that a nonresident has property in this State by virtue of such judgment, and process by advertisement has been attempted, and proceedings in attachment instituted, the attachment will be dissolved on motion by special appearance made in the cause in the State court, and as the demand or debt merges in the judgment, no distinction between the two may be drawn. *LeRoy v. Jacobosky*, 136 N.C. 458, cited and distinguished.

APPEAL by plaintiff from *Stacy, J.*, at November Term, 1917 of LENOIR.

This action was instituted by the plaintiff against the defend- (213) ant upon a note alleged to have been executed by the defendant to J. T. Deal and assigned by J. T. Deal to the plaintiff. The plaintiff is a North Carolina corporation. The defendant is a resident of the State of Virginia. The summons was not personally served upon the defendant. At the time of the institution of the action the plainiff sued

out a warrant of attachment, alleging that the defendant had property within the State of North Carolina, and caused garnishment proceedings to be issued against the Kinston Manufacturing Company (the plaintiff) and the Ellington-Bryant Timber Company. It appears from all the facts in the record, and from the complaint, that the only property of the defendant against which the attachment and garnishment proceedings were issued was a judgment recovered by the defendant E. B. Freeman against the Kinston Manufacturing Company, the plaintiff, and Ellington-Bryant Timber Company for $7,500 in the United States District Court for the Eastern District of North Carolina, from which judgment appeal was then pending from said district court to the United States Circuit Court of Appeals. The defendant E. B. Freeman entered a special appearance and moved to dissolve the attachment, on the ground that the judgment in his favor in the Federal Court is not subject to be attached in this action now pending in the Superior Court of Lenoir County. The motion was allowed and the plaintiff excepted and appealed.

Cowper & Whitaker and J. L. Hamme for plaintiff.
Ward & Ward, W. H. Taylor, and Dickinson & Land for defendant.

ALLEN, J. The single question presented by this appeal is as to the power of the courts of the State to attach a judgment recovered in the Federal Court and the authorities are practically unanimous against the contention of the plaintiff that such an attachment is valid.

Sanborn, J., says in *Meness v. Matthews,* 197 F. 635 (C. C. A.): "It is the general rule supported by the great weight of authority and specifically approved by the Supreme Court of the United States, that a judgment recovered in the court of one jurisdiction is not subject to garnishment in proceedings in a court of another jurisdiction. *Wabash R. C. v. Tourville,* 179 U.S. 322; Drake on Attachment, sec. 625; 14 A. & E. Eng. L. 716. And consistently with this rule it has been held by what appears to be the unbroken weight of authority that a judgment in a Federal Court is not subject to garnishment in an attachment suit brought against the judgment creditor in a State court. *Mack v. Winslow,* 59 F. 316; *Franklin v. Ward,* 3 Mason 136; *Thomas v. Woolridge,* 2 Woods 667; *Harvey v. Mining Co.,* 15 F. 649;
(214) *Burrill v. Leston,* 2 Speers (S. C.), 378; Drake on Attachment, Sup."

The decided cases in support of the rule are collected in the note to *Elson v. R. R.,* 1914 A. Anno. Cases, 955, in which the editor says: "The rule is well settled, in accord with the reported case, that a judgment debtor is not liable to garnishment in a jurisdiction other than

that in which the judgment is rendered (citing cases) . . . It has likewise been held without conflict that the rule forbidding the garnishment of a judgment of a foreign jurisdiction applies as between State and Federal courts," citing cases.

Mr. Justice Bradley states the reasons underlying the principle in *Thomas v. Woolridge*, 2 Woods 667, as follows: "A court has not done with a case when judgment has been rendered. Many things have often to be done besides issuing execution, many adjustments of rights have to be made which require that the court should keep the supervision and control of its own judgment in its own hands. Any interference by other courts with this control, or with the prerogatives of executing its judgments and decrees in its own way, is calculated to excite jealousies between the courts concerned. We think the rule is a good one and ought to be sustained. It is not without sanction in the decisions of the United States courts. Besides that of *Justice Story* in *Franklin v. Ward*, 3 Mason 136; 9 Fed. Cases, 5055, which is referred to in the brief of counsel, the case of *Wallace v. McConnell*, 13 Peters, 136 (10 Law Ed. 95), is very much to the point. There a debt was attached in the State court after suit had been brought upon it in the United States Court, and the attachment was set up by way of a plea *puis darrein* continuance. This plea was demurred to and overruled, and the Supreme Court, on error, affirmed the judgment. The Court held that to sustain such an attachment would produce a collision in the jurisdiction of the courts that would embarrass the administration of justice; but if the attachment had been issued before the commencement of the suit in the Federal Court, it might have been pleaded in abatement, if still pending, or in bar if judgment had been rendered thereon. This case virtually decides the one before us and precludes further discussion."

In 12 R.C.L. 807, the additional reason is given that the court in which the attachment is sought is without power to protect the debtor from the subsequent enforcement of the judgment recovered in another jurisdiction.

The distinction attempted to be drawn by the plaintiff between the debt and the judgment and his claim that he is not seeking to attach the judgment but the debt, is without merit, as there is no debt except as evidenced by the judgment, the demand or debt being merged in the judgment.

It is also clear that the case of *LeRoy v. Jacobosky*, 136 N.C. (215) 458, does not sustain the position of the plaintiff as in that case the judgment was rendered in the same jurisdiction, and the attachment was against the proceeds of the judgment which had been paid to the clerk, and not against the judgment.

Affirmed.

N. B. MILLS ET AL. v. BOARD OF COMMISSIONERS OF IREDELL COUNTY.

(Filed 20 March, 1918.)

1. Constitutional Law—Amendments—Time Effective—Statutes.

The recent constitutional amendments, though prior ratified by the people of the State, became effective on 10 January, 1917, chiefly on the ground that the act of the Legislature providing for the election, so specified and the vote of the people thereunder approving the same thereby determined the time.

2. Same—Counties—Bridges.

A legislative enactment relating to the building of bridges by a county over a nonnavigable stream or river does not necessarily come within the purview and control of the recent amendment to our Constitution, Art. 2, sec. 29.

3. Same—Bond Issues—Taxation.

The recent amendments to our Constitution prohibiting "local" legislation in certain respects as to counties, etc., does not deprive the Legislature of its power to authorize county commissioners to raise money by the issue of bonds or by current taxation, to carry out the necessary measures for the orderly and proper government of their counties, and an enactment to authorize a county to issue bonds for the necessary purpose of building bridges in connection with an adjoining county over a nonnavigable stream dividing them, is not prohibited by the recent amendment to our Constitution, Art. 2, sec. 29. *Brown v. Comrs.*, 173 N.C., 598, cited and applied.

4. Same—"Local" Laws—Interpretation—Limit of Taxation.

The term "local" as used in the recent amendments to our Constitution, is of comparatively recent use and importance, and has received no fixed or generally recognized meaning; and is sufficiently ambiguous to admit of interpretation by reference to the context, the purpose appearing in the terms of the law and the attendant relevant circumstances; and when so construed in relation to Article 2, sec. 29, the local legislation refers to the building, maintenance and control of specified and designated highways, bridges, etc., and does not prevent legislation authorizing the raising of proper funds by the sale of bonds of a county or by taxation therein, required for the public good, where the limit of taxation allowable to the county by the Constitution for ordinary State and county purposes may have been reached by the county in question.

5. Same—Municipal Corporations—Clerical Errors—Transportation of Sections.

Constitution, Art. 8, secs. 1 and 4, the latter section being a recent amendment, have no relation to the question of the constitutionality of a legislative enactment authorizing a county to issue bonds, etc., for the building of bridges over nonnavigable rivers or streams, sec. 4, being in terms restricted to cities, towns, and incorporated villages. *Semble*, sec. 4, was in advertently misplaced and properly belongs under Article 7, en-

titled "Municipal Corporations," instead of under Article 8, entitled "Corporations Other than Municipal."

ALLEN, J., dissenting.

CONTROVERSY submitted without action before *Long, J.*, in (216) IREDELL, 28 January 1918.

On full presentation of facts, the controversy submitted was whether plaintiffs, citizen residents and taxpayers of said county, were entitled to an injunction against defendant board, restraining them from the proposed issuance and sale of bonds of the county to the amount of $40,000, pursuant to chapter 575, Public-Local Laws of the General Assembly of 1917, ratified 5 March 1917, for the purpose of rebuilding bridges over the Catawba River between Iredell and Catawba counties in conjunction with the authorities of the latter county, the determinative question being whether said act was in violation of the recent constitutional amendments prohibiting certain local and special and private legislation on the subject, contained chiefly in the Constitution, Art. 2, sec. 29. It was also made to appear as one of the relevant facts that the taxation of Iredell County already authorized and levied by said county was to the limit allowed by the Constitution and Laws unless the act in question should be upheld.

There was judgment in denial of plaintiff's right to relief and plaintiffs, having duly excepted, appealed.

W. D. Turner for plaintiff.
Caldwell & Caldwell for defendant.

HOKE, J. In several cases coming before us at the last term, *Read v. Durham*, and others, it was held, *Associate Justice Walker* delivering the opinion, that the recent constitutional amendments were valid as parts of our organic law, and that the same became effective on 10 January, 1917, as provided by the statute submitting such amendments for ratification to the people, this on the ground chiefly that as the act providing for the election fixed upon 10 January as the (217) day, the people, in ratifying the amendments pursuant to the act, thereby determined the date in accord with its provisions.

The act in question here, chapter 575, Public-Local Laws 1917, authorizes and empowers the commissioners of Iredell County to issue bonds in the sum of $40,000, "for the purpose of building bridges over the Catawba River jointly with the county of Catawba," payable seriatim to the amount of $4,000 per year till the full obligation is discharged and the levy of a specified tax for the purpose of 5 cents on the hundred dollar's worth of property and 15 cents on the poll. Rati-

fied on 5 March 1917, it comes within the purview and control of the Constitution as now amended, and the question presented is whether the statute is a constitutional enactment and chiefly in view of Article 2, sec. 29, by which the Legislature is prohibited from passing any "local, private or special act or resolution" relating to various enumerated subjects, among others, "authorizing the laying out, opening, altering, maintaining, or discontinuing highways, streets, or alleys, or relating to ferries and bridges, relating to nonnavigable streams, relating to cemeteries, relating to pay of jurors," etc.

Shortly after these amendments were ratified, a case was presented involving the question whether, in view of these provisions, "An act authorizing the commissioners of McDowell County to issue bonds for road purposes in North Cove Township, in said county," was a valid law. *Brown v. Comrs.*, 173 N.C. 598. The statute was upheld, and it was decided, *Associate Justice Brown* delivering the opinion, that there was nothing in these amendments which prohibited the Legislature from authorizing county commissioners or other governmental boards to raise money by the issue of bonds or by current taxation to enable them to carry out the necessary measures for the orderly and proper government of their counties, or even more restricted territory. As well said in the opinion, "these and similar provisions are construed not to weaken or destroy the power of the General Assembly in its necessary control over the subordinate divisions of the State government, but to prevent cumbering the statute books" (and it may be added, taking the time of the General Assembly) "with a mass of purely private or local legislation."

It is said in some of the decisions on the subject that the significance of the term "local" in constitutional provisions of this character is comparatively of recent use and importance and has received no fixed or generally recognized meaning. Like other legislation or written instruments sufficiently ambiguous to permit of construction, it must be defined by reference to the context, the purpose appearing in the
(218) terms of the law and the attendant circumstances relevant to its true interpretation. In Lewis' Sutherland Statutory Construction, it is said (2d edition, sec. 199, p. 358): "That special laws are those made for individual cases. . . . Local laws are special as to place"; and further (at section 200): "It seems impossible to fix any definite rule by which to solve the question whether a law is local or general, and it has been found expedient to leave the matter, to a considerable extent, open, to be determined upon the special circumstances of each case." It is well understood that our General Assembly, at session after session, was called on by direct legislation to authorize a particular highway or street or to establish a bridge or ferry at some

specified place. Such questions being not infrequently at the instance of rival parties or opposing interests, were urged and debated with great earnestness by their respective advocates and renewed and protracted to such an extent that they were of serious detriment to the public interests and, at times, prevented full and proper consideration of vital public measures. The Legislature in these cases was in fact called on to usurp, or rather to exercise, functions which were more usually and properly performed by the local authorities, and it was in reference to local and special and private measures of this character that these amendments were adopted, and, as stated in *Brown's* case, *supra,* it was never intended to prohibit legislation authorizing the raising of proper funds by the sale of bonds or by taxation for measures required for the public good, though such funds should be for improvements in some fixed place or in restricted territory determined upon by local authorities in pursuance of general laws on the subject. It is now very well known that the limit of taxation allowable by the Constitution for ordinary State and county purposes has been very generally reached by the different counties in the State, and for any additional demands or unexpected emergency authority to exceed these limits can only be conferred by legislative enactment. *Commissioners of Johnston County v. Lacy,* 174 N.C. 141; *Bennett v. Commissioners of Rockingham County,* 173 N.C. 625; *Moose v. Comrs.,* 172 N.C. 419; *R. R. v. Comrs.,* 148 N.C. 220.

An interpretation of these recent amendments which would destroy or impair the legislative power to the extent suggested would be of such serious and threatening consequence that it should not be sanctioned except by provisions so plain of meaning that no room for a different construction is allowable.

We are clearly of opinion that this well-considered case of *Brown v. Comrs.* is fully supported by the authorities cited and is decisive of the questions presented on this record.

It is suggested that the legislation in question is in some way in contravention of Article 8, sections 1 and 4 of the Constitution, the latter section being also one of the recent amendments referred (219) to, but we do not see how either of these sections is in any way involved in the present appeal.

While it is not desirable nor ordinarily permissible to decide questions of this nature otherwise than on an issue directly presented (*Commissioners of Johnston County v. Lacy,* 174 N.C. 141), it may not be improper to suggest that this Article 8 is entitled "Corporations other than municipal," and section 1 would seem clearly to have reference to private or business corporations, and does not refer to public or *quasi*-public corporations acting as governmental agencies; and while

section 4 does impose on the Legislature the duty of providing for the organization of cities, towns and incorporated villages, it is evidently misplaced and belongs rather under the preceding Article 7, entitled "Municipal Corporations." It no doubt received its present placing by a slip of the paster when the instrument was originally printed, and has been left there because no occasion has been presented for its removal; but whether belonging properly to one place or the other, it can have no effect on the facts of this record as it is, in terms, restricted to cities, towns and incorporated villages, and the existence and power of counties in the premises is in no way affected.

There is no error, and the judgment for defendants is

Affirmed.

Cited: Parvin v. Commissioners, 177 N.C. 510; *Martin Co. v. Trust Co.,* 178 N.C. 32, 33; *Commissioners v. Trust Co.,* 178 N.C. 172; *Commissioners v. Pruden,* 178 N.C. 396, 397; *Dickson v. Brewer,* 180 N.C. 406; *Kornegay v. Goldsboro,* 180 N.C. 446, 447; *Watts v. Turnpike Co.,* 181 N.C. 134, 135; *Trustees v. Trust Co.,* 181 N.C. 308; *Commissioners v. Bank,* 181 N.C. 350; *Huneycutt v. Commissioners,* 182 N.C. 321; *In re Harris,* 183 N.C. 634, 635; *Coble v. Commissioners,* 184 N.C. 348, 351; *Armstrong v. Commissioners,* 185 N.C. 409; *State v. Kelly,* 186 N.C. 373, 374, 376; *Reed v. Engineering Co.,* 188 N.C. 44; *Day v. Commissioners,* 191 N.C. 782; *Webb v. Port Commission,* 205 N.C. 673; *In re Assessments,* 243 N.C. 500; *Candler v. Asheville,* 247 N.C. 409.

J. A. TURNER v. W. M. PERSON AND A. L. BATTLE.

(Filed 20 March, 1918.)

1. Evidence—Family History—Birth of Child—Declarations—Physicians—Repute—Tenant by the Curtesy.

Where the controversy depends upon whether the father is tenant by the curtesy in his wife's land by the birth of a child alive of the marriage, and those who were present are all dead, including the family physicians, it is competent for the father to testify to the fact, and of declarations made to him by the physicians at the time, at least in corroboration of his testimony; also a brother-in-law not interested in the action is competent as to family repute, and testimony by a third person, at least in corroboration, of such general reputation in the community.

2. Evidence—Birth of Child—Presumptions—Instructions—Appeal and Error.

Where the controversy depends upon whether the father was tenant by

the curtesy in his wife's lands by the birth of a child of the marriage alive, the proof that the child was born raises the presumption that it was born alive, and a peremptory instruction to the contrary by the court is reversible error.

3. Evidence—Family History—Birth of Child—Declarations—Repute—Statutes—Registration of Births.

Declarations of family physicians and general family repute as to whether a child was born of a marriage alive, making the father a tenant by the curtesy in his wife's lands, are received from necessity as the best evidence, but they are more restricted, as such, since the enactment of our statute requiring registration of births and deaths.

(220)

APPEAL by plaintiff from *Lyon, J.*, at November Term, 1917 of FRANKLIN.

B. T. Holden, Yarborough & Beam for plaintiff.
W. M. Person and Manning & Kitchin for defendants.

CLARK, C.J. The sole question involved in this case is whether or not a child born of a marriage between S. J. Parham and Hattie M. Parham was born alive. If it was, S. J. Parham was tenant by the curtesy in the lands described in the pleadings, and the judgment against him is a lien upon such lands. If it was not, then he had no interest in the lands and they are not affected by any lien by reason of said judgment.

The only persons present at the birth of the child were its mother, paternal grandmother, and the attending physicians, and they are now all dead. The judgment creditors offered as evidence that said child was born alive the testimony of the father, who testified that a child was born of his marriage to Hattie M. Parham; that he was not present at the birth, and all those who were are now dead. The judgment creditors then offered to show by the witness the declarations to him of the attending physicians (now deceased) that he child was born alive. The evidence was excluded, and the judgment creditors excepted.

The judgment creditors then offered E. H. Malone, a brother-in-law of S. J. Parham and Hattie M. Parham, and proposed to prove by family reputation that the child was born alive. This evidence was excluded and the judgment creditors excepted. It was then proposed to show that the child was born alive by general reputation in the community, and this evidence was excluded and the creditors again excepted.

The court instructed the jury that the judgment was not a lien upon the land, and the judgment creditors excepted and appealed.

There are exceptions to the general rule that hearsay evidence is incompetent, and the most usual one is as to matters of pedigree and family history, which can be proven both by showing general reputation and also by declaration of members of the family.

(221) In 4 Chamberlayne Evidence, sec. 2981, it is held that general reputation in the neighborhood is admissible on the question whether a child was born dead or alive, and for this it cites *Wiess v. Hall* (Texas Civil Appeal, 1911), 135 S.W. 384. This case contains a very full discussion of the subject, with full citation of authorities, and a writ of error was denied by the Supreme Court. The sole question involved there was whether the child lived a few months or was born dead. The objection to the testimony was that it did not purport to be family repute nor to come from a member of the family, and hence was not an execution to the general rule as to hearsay testimony. The testimony was given by a witness who was living at the time in the neighborhood, and who testified, "The general report in the neighborhood at the time was that the child was born dead."

The court called attention to the fact that the question was not as to the relationship of the child, nor whether it was the issue of the marriage, but simply, as here, to "the single uncomplicated issue whether it was born alive or dead." The court adds that the occurrence was many years before the trial, and that all the persons who might be supposed to have actual personal knowledge of the fact, except the mother and half-sister, were either dead or had disappeared. As in this case, the father is the only survivor. The Court in the Texas case said that such corroborative testimony "was therefore not only the best, but the only, evidence obtainable. The evidence is also free from suspicion. The witnesses have absolutely no interest in the controversy and no conceivable motive to testify falsely. They were in a position to know the facts testified about; that is, the general repute. The fact to be proven is plain and simple and free from complications. . . . It occurred in a thinly settled country neighborhood where such fact would be likely to attract attention among the neighbors and be more or less discussed. Taking all these circumstances together, there cannot be the slightest doubt that the testimony is logically relevant and would be considered valuable by any one searching for the very truth of the matter. In such case we think it would be discreditable to the administration of justice to refuse to admit the testimony"; adding, that to exclude it would be to restrict the evidence of the testimony to the mother and the half-sister.

This case cites *Ringhouse v. Keever*, 49 Ill. 471: "In a population as unstable as ours, and comprising so many persons whose kindred

are in distant lands, the refusal of all evidence of reputation in regard to death, unless the reputation came from family relatives, would sometimes render the proof of death impossible, though there might exist no doubt of the fact, and thus defeat the ends of justice."

The Texas Court further said: "If such evidence be admissible to prove the death of the child, clearly it would be admissible to prove that it was born dead. In the seeming conflict of authori- (222) ties upon this question, we prefer to follow those in support of its admissibility as more in consonance with right, justice, and common sense. Such evidence is held admissible by Prof. Wigmore in his valuable work on Evidence, 2 Wigmore Ev., par. 1605, where the author says, speaking directly of this character of evidence: 'It seems finical to exclude from any consideration whatever, in a legal investigation, a class of evidence which is not only much relied upon in practical affairs, but is also sufficiently within the general rule of two exceptions (reputation and family history) to the hearsay rule. Such evidence was once in England orthodox enough, and its use has been vindicated on grounds of public policy and of principle by many American courts, as admissible in certain classes of cases.'"

Among the cases cited are *Henderson v. State,* 14 Tex. 503; *Flowers v. Haralson,* 6 Yerg (Tenn.), 494; *Jackson v. Etz,* 5 Cow. (N.Y.), 314; *Arents v. R. R.,* 156 N.Y. 1. Hearsay is always admissible to prove death, birth, marriage (except on indictments of bigamy), and other facts of family relationship and history when there is no direct evidence obtainable, or in corroboration or contradiction, upon the ground that it is the best evidence obtainable. 4 Chamblerlayne Ev., secs. 2910-2981.

To the same purport, *Hoyt v. Lightbody* (98 Minn. 189), 116 Am. St. 366, where it is said: "The evidence of a witness whose knowledge with reference to the subject was derived from an intimate acquaintance with the family is admissible as to such facts of family history as marriage, kinship, name, and death," citing cases. 1 Greenleaf Ev., secs. 114a to 114g holds that declarations in such matters are competent *ex necessitate,* and that this can be shown either by declarations of a member of the family or by reputation in the family.

E. H. Malone, a brother-in-law, was competent to prove such reputation in the family. We are also of the opinion that the declarations of the attending physicians (since dead) made to the father at the time, that the child was born alive, are competent at least as corroboration of the father's testimony. They were disinterested, they were cognizant of the facts and their declarations, if believed, would be conclusive. The weight of the testimony depends upon the credit the jury would attach to the testimony of the father who testified that he declaraions were

made to him at the time. It is a question any one seeking the truth would naturally ask. It is not a question of competency, but of credibility, which is for the jury.

The first question any one would be likely to ask is, "What did the physicians present at the birth report to the father of the child?" It was their business to know and report to the father. Declarations of living persons made in the course of business and in the discharge of duty are competent. Much more is this true, where both duty
(223) and opportunity gave them knowledge of the fact and as they are now dead hearsay of their declarations is the only means of corroboration for the consideration of the jury. *Ewell v. Ewell,* 163 N.C. 238, and cases cited; *Gilliland v. Board of Education,* 141 N.C. 485; *Norris v. Edwards,* 90 N.C. 385; *Clements v. Hunt,* 46 N.C. 401; *Mofitt v. Witherspoon,* 32 N.C. 192.

There should be no question that E. H. Malone, the brother in law, who has no interest in the action, was competent to prove the reputation in the family that the child was born alive and also the testimony of E. S. Ford in corroboration that he knew the same fact by general reputation in the community. *Dowd v. Watson,* 105 N.C. 476; *S. v. Best,* 108 N.C. 747.

In any view, it was error to instruct the jury to answer the issue "No," for it was in evidence that the child was born, and the law presumes it to have been born alive. In trials for concealing the birth, it is held that proof of birth places the burden of proof that it was born dead upon defendant, and *a fortiori* this must be true in a civil action. The other side could have offered evidence of the same character that the child was not born alive, and it was for the jury to determine the truth of the matter.

Births and deaths are usually witnessed by very few, and therefore, *ex necessitate,* they can often be proven only by reputation. In *Flowers v. Haralson,* 14 Tenn. (6 Yerg.) 494, *Catron, C.J.,* says: "General reputation of such facts is not only competent, but highly credible, 3 Stark Ev., 1117," and discusses the matter from the standpoint of its absolute necessity in order to ascertain the truth where the witnesses are dead. The same evidence was admitted in *Arents v. R. R.,* 156 N.Y. 1. An admirable summary of the many instances in which reputation is competent proof are summed up in 10 R.C.L. 961-965.

The ground upon which such testimony is used is that of necessity as being the best evidence obtainable, and indeed, often the only evidence available after the lapse of time. Since our statute requiring a registration of births and deaths, such evidence as this of the declarations of the attending physicians (if dead) and of reputation in the family or in the neighborhood will be less necessary and therefore less

competent except in limited cases as on proof of omission in the registration. Indeed, such reports are themselves hearsay and competent only because official and made in the line of duty. The weight of this testimony was a matter for the jury with opportunity to offer testimony of the same nature in rebuttal and its rejection was

Error.

Cited: Bowman v. Howard, 182 N.C. 665; *State v. Jeffreys,* 192 N.C. 190; *Burgin v. Dougherty,* 198 N.C. 814.

(224)

IN RE WILL OF A. MARCELLUS STOCKS.

(Filed 20 March, 1918.)

1. Wills—Probate—Evidence.

Evidence that a witness wrote the paper-writing offered for probate as a will, saw the testator sign it, held his hand when he made his mark, that the other witness signed it, that it was signed by the testator in the presence of both on a table by his bedside in his room, and that the writing was witnessed by both at the testator's request, is sufficient to justify the jury in drawing the inference that the writing was executed according to law.

2. Wills—Probate—Mental Capacity—Opinion—Evidence.

Witnesses are competent to testify to the mental capacity of a testator to make a will, if they knew the testator well, had conversations or business transactions with him, and testify that in their opinion, based thereon, he knew what he was doing, what property he had, and to whom he wished to give it.

3. Wills—Evidence—Deceased Persons—Statutes.

Transactions or conversations with a deceased person upon which witnesses have based their opinion as to his mental capacity to make a will, testified to in proceedings of caveat, are not incompetent under Revisal, sec. 1631.

4. Wills—Evidence—Probate—Affidavits—Corroborations.

Affidavits of witnesses attesting a will on the probate before the clerk, are competent in corroboration of the testimony of these witnesses at the trial.

5. Wills—Mental Capacity—Before and After—Evidence.

Where the issue is the mental capacity of the testator at the time of making a will, evidence of his capacity within a reasonable time before and after is competent.

IN RE WILL OF STOCKS.

APPEAL by caveators from *Calvert, J.*, at September, 1917, Special Term of PITT.

Harry Skinner, Albion Dunn, and W. F. Evans for caveators.
E. G. James & Sons and Harding & Pierce for propounders.

CLARK, C.J. The testator, Marcellus Stocks, died in June, 1914, leaving three daughters, all married, and two wills. In the first will he left his entire property to his three daughters, subject to the life estate of his widow. The only change made by the last will is that the share of land given by the first will to Ludie McLawhorn was located between the share given his daughter Jane Briley and the share given his other daughter, Eva Nobles. In the last will, he exchanged the shares of land which had been given to Jane Briley and Ludie
(225) McLawhorn. There was evidence that his motive in this was because the husband of his daughter Ludie McLawhorn had given the testator some trouble and he did not wish to locate that share between the other two daughters.

The appeal of the caveators is based on 69 Exceptions, which they group under 6 heads.

The first group presents the question whether there is any evidence to support the finding on the first issue, "Was the paper-writing offered for probate as the last will and testament of Marcellus Stocks signed and executed according to law?" The evidence fully justified the finding of the jury. The witness Manning testified that he wrote the paper-writing and saw the testator sign it, and held the pen when he made the mark. The other witness to the will testified "that is my signature. The will was signed in testator's room, on his table, right by his bed. . . . I am not positive who signed it first, Mr. Manning or myself." He also testified that the witnesses signed at the request of the testator.

The second group of exceptions is, "Was there evidence in the record of undue influence?" Upon perusal of the record we do not find any evidence to support this objection.

The third group of exceptions all go to the question whether the witnesses were qualified to express an opinion as to the mental competency of the testator. These witnesses, ten in number, all testified that they knew the testator well; had conversations or business transactions with him, and from what they saw of him and their dealings with him, seeing him, hearing him talk, and association with him, in their opinion he had mental capacity to know what he was doing, what property he had and to whom he wished to give it. *In re Boach's Will,* 172 N.C. 522; *In re Thorpe,* 150 N.C. 487.

The fourth group of exceptions is upon the ground that the evidence

excepted to was incompetent under Revisal, 1631. But these exceptions cannot be sustained, for the testimony did not embrace transactions or conversations between the witness and the deceased, but was offered to show the condition of the testator's mind.

The fifth group of exceptions is Exception 64 as to the competency of the affidavits of the attesting witnesses to the will made on the probate before the clerk. These affidavits were admitted only in corroboration of the attesting witnesses at this trial and the court so instructed the jury at the time that the affidavits were offered.

The sixth and last group of errors assigned embraced Exception 67, which is to the charge of the court: "You will consider the testimony as to testator's lack of testamentary capacity, if you find that he lacked it, some time before executing the will, or some time afterwards, merely as tending to show whether or not at the time he executed the will he had this testamentary capacity." In *McAllister v. Rowland* (Minn.), Ann. Cases, 1915, B, 1005, it is said: "Where the (226) issue is the mental capacity of the testator at the time of making the will, evidence of incapacity within a reasonable time before and after, is relevant and admissible."

The case turned almost entirely upon questions of fact and upon a full examination of the above exception, we find

No error.

Cited: Plemmons v. Murphey, 176 N.C. 676; *In re Hinton,* 180 N.C. 211; *White v. Hines,* 182 N.C. 280; *Graham v. Power Co.,* 189 N.C. 386; *Nelson v. Insurance Company,* 199 N.C. 450; *In re Will of Brown,* 203 N.C. 349; *In re Will of Hargrove,* 206 N.C. 310; *In re Will of Kestler,* 227 N.C. 217; *In re Will of York,* 231 N.C. 71; *In re Will of Tatum,* 233 N.C. 728; *S. v. Kimmer,* 234 N.C. 449.

HARVEY WILLIAMS v. KINSTON MANUFACTURING COMPANY.

(Filed 20 March, 1918.)

Railroads—Logging Roads—Comparative Negligence—Statutes — Damages.

A logging road operated by steam, but for the exclusive purpose of transporting logs, etc., over the company's own tracks on its own cars, for the furtherance of its own business, to an independent common carrier, by rail, which receives the logs and independently transports them, is in no sense a common carrier by railroad within the meaning of the

"act relating to the liability of common carriers by railroad to their employees" (ch. 6, Laws 1913), and the doctrine of comparative negligence in awarding damages does not apply. *Hemphill v. Lumber Co.*, 141 N.C., 498, cited and distinguished.

CIVIL ACTION, tried before *Stacy, J.*, at November Term, 1917, of LENOIR, upon these issues:

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

2. If so, did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: "Yes."

3. What damages, if any, is the plaintiff entitled to recover of defendant? Answer: "$100."

From the judgment rendered defendant appealed.

G. V. Cowper and J. L. Hamme for defendant.
No counsel for plaintiff.

BROWN, J. The plaintiff was injured while working on a logging railroad of the defendant while the logging train was shifting cars from its own tracks to its own siding, to the end that the Kinston Carolina Railroad and Lumber Company might haul the cars to Kinston. These two companies have no connection with each other. By a special contract, the Kinston Carolina Railroad and Lumber Company hauls the logs of the Kinston Manufacturing Company over its own in-
(227) dependent road and with its own employees from the point where they are left by the defendant's logging train to Kinston.

The only assignment of error relates to a charge of the court and to the refusal of the court to render judgment for the defendant upon the issues as found by the jury. The court charged that regardless of how they answered the second issue, that is, whether "Yes" or "No," they would proceed to consider the third issue, for that the court charged the jury that the provisions of chapter 6, Laws 1913, were applicable to the case, and that while the defendant could set up contributory negligence against the plaintiff, as alleged in its answer, such contributory negligence would not defeat plaintiff's right to recover damages, provided the first issue was answered "Yes," but that such damages would be diminished by the jury in proportion to the amount of negligence attributable to the plaintiff.

The only question presented is as to whether chapter 6, Laws 1913, applies to a purely logging road. This chapter is entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases." Section 2 of the act provides that "in all ac-

tions hereafter brought against any such common carrier by railroad to recover damages for personal injury, etc., the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."

This statute differs very materially from section 2646 of the Revisal. The latter applies "to any servant or employee of any railroad company." In *Hemphill v. Lumber Co.*, 141 N.C. 487, this statute is held to apply to a logging road upon the ground that it is a railroad and that its employees engaged in its operation are exposed to the same dangers and risks as all railroad companies, whether operating as common carriers or in the conduct of a purely private business.

In the opinion the *Chief Justice* says: "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 employee engaged in the operation of its trains are exposed to the same dangers and risks . . . 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 railways and logging roads are railroads, *i. e.*, roads whose operations are conducted by the use of the rails, and come within the general term 'railroads.'"

The difference between that statute and the act of 1913 is very marked. The former applies to all railroads, while the latter applies only to a common carrier by railroad. A common carrier is one who, by virtue of his calling, undertakes for compensation to (228) transfer personal property from one place to another for all persons as choose to employ him. Second Words and Phrases, p. 1313.

The distinguishing feature of a common carrier is that he holds himself out as ready to engage in the transportation of goods for hire as a business. A common carrier by railroad, operating under charter, is affected with a public use, and is to a certain extent under the control of governmental authorities.

All the evidence shows that the defendant is what is commonly called a logging railroad, which is held to be a private road constructed for the convenience and accommodation of lumbermen. *Tompkins v. Gardner Co.*, 69 Mich. 58.

The defendant does not hold itself out to the public as a carrier of anything, either of freight or passengers, but was constructed and is operated solely as an aid to the manufacturing business of the defendant. We think his Honor erred in his instructions to the jury. Upon the issues as found by the jury the defendant is entitled to judgment.

Error.

Cited: Moore v. Iron Works, 183 N.C. 439; *S. v. Lumber Co.,* 186 N.C. 126; *Corporation Commission ex rel Granite Co. v. R. R.,* 187 N.C. 430; *Stewart v. Lumber Co.,* 193 N.C. 140; *Moore v. Rawls,* 196 N.C. 128; *Cashatt v. Seed Co.,* 202 N.C. 384; *Gurganus v. Manufacturing Co.,* 204 N.C. 529.

COOPER GUANO COMPANY v. R. B. SOUTHERLAND ET AL.

(Filed 20 March, 1918.)

1. **Trusts—Partnership—Misappropriation of Funds—Evidence — Prima Facie Case—Burden of Proof.**

A member of a partnership is presumed to have peculiar knowledge of the dealings of his firm, and upon the findings of the jury by the greater weight of the evidence that the defendant firm received goods as the plaintiff's agent in trust to hold the proceeds of resale to the payment of his debt, and that other of the firm's debts had been paid therewith, a *prima facie* case is made, and the burden of proof by the greater weight of the evidence is shifted to one of the firm claiming that this was done without knowledge or consent, to show it.

2. **Arrest and Bail—Trusts.**

Arrest and bail will lie for a wrongful conversion of trust funds.

3. **Appeal and Error—Trust Funds—Misappropriation—Verdict.**

As to whether it is material for a member of the firm to have knowledge of a wrongful conversion by the other of property held in trust by the firm, *Quaere?* But the question does not arise on appeal when it has been established on the trial that the defendant did willfully and knowingly misappropriate the trust property, etc.

CIVIL ACTION, tried before *Stacy, J,* at August Term, 1917 of DUPLIN, upon these issues:

(229) 1. What amount, if any, have the defendants paid on notes sued upon? Answer: "$679.45."

2. Did said R. B. Southerland knowingly and willfully misappropiate and misapply $563.57 worth, or any amount of said Cooper Guano Company's goods to his own use, or to the use of Wallace Southerland Company, by taking same to pay rent due M. McD. Williams? If so, what amount? Answer: "Yes, $563.57."

3. Did R. B. Southerland knowingly and willfully misappropriate and misapply and convert to his own use, or to the use of Wallace Southerland Company $76 worth, or any amount, of Cooper Guano Company's goods by using same in settling debts due by firm of Wal-

lace Southerland Company to T. W. Smith? If so, what amount? Answer: "$76."

4. Did R. B. Southerland knowingly and willfully misappropriate, misapply and convert to his own use, or to the use of Wallace-Southerland Company $30 worth, or any amount, of Cooper Guano Company's goods by using same to settle debt due by the firm of Wallace Southerland Company to C. T. Southerland? If so, what amount? Answer: "Yes, $30."

Judgment of nonsuit was rendered against defendant Effie Southerland. Judgment was rendered against defendant R. B. Southerland for $597.77, with interest from 1 May 1912. The judgment contained the following adjudication:

"It is now, on motion of plaintiff's counsel, considered and adjudged upon the complaint and the answer and the findings of fact by the referee and the verdict of the jury all being considered by the court, that the said defendant R. B. Southerland wrongfully, knowingly, and willfully misappropriated, misapplied and converted to his own use the amounts hereinbefore set out.

"And it further appearing to the satisfaction of the court that the facts stated in the complaint necessarily import liability to arrest, and that the cause of action stated in the complaint and the cause of arrest are identical."

Defendant appealed.

Gavin and Wallace for plaintiff.
Stevens and Beasley for defendant.

BROWN, J. The facts are that the defendant is the surviving partner of Wallace Southerland & Co., a firm doing business at Faison, N. C. Wallace Southerland died in August, 1912. Early in 1912 plaintiff entered into a contract with said firm for the sale of fertilizer. A paperwriting was executed by which said firm became the agents of plaintiff. Under that contract plaintiff shipped to the firm a large quantity of fertilizers. The contract contained this provision:

"And it is further agreed that all fertilizers shipped to you, (230) as well as all notes, accounts, cash, and other proceeds from the sale of said fertilizers, which may at any time be in your possession, or in the possession of any representative, are our property, to be held by you as our agent in trust for the payment of your obligations to us."

A settlement was had on 1 May 1912, and the firm gave its notes to plaintiff as evidence of balance due. The firm turned over to plaintiff the accounts for fertilizer sold Williams, Smith, and C. T. Southerland. It afterwards was ascertained that these accounts were not ow-

ing by the parties, that the firm owed said parties and had used plaintiff's fertilizer in paying them, as was found by the jury.

Although the two unpaid notes are set out in the complaint as evidence of the balance due plaintiff, the action is substantially one for the wrongful conversion of the property of plaintiff as the complaint contains all the averments appropriate in such action.

In his argument in this Court counsel for defendant stated that the only point before us related to the sufficiency of the evidence as to the knowledge of such misappropriation by this defendant, it being contended that the illegal use of the fertilizer in applying it to debts of the partnership was the act of Wallace Southerland, the deceased copartner.

The point is practically presented by exception to the following instruction to the jury:

"If you find as a fact that there was a misappropriation, and that it was due willfully and knowingly by one partner, then the law presumes that the other partner knew it, and casts upon that other partner the burden of going forward and showing to the jury by the greater weight of the evidence that he did not know it. The burden, however, rests with the plaintiff to satisfy you, and that by the greater weight of the evidence, that there was a misappropriation of its property, and that the party who misappropriated it did it willfully and knowingly, and if you find those facts from this evidence, and you are satisfied by its greater weight, the law steps in and helps the plaintiff by saying the other partner is presumed to know it, then the other man, in order to exculpate himself, must come forward and show to your satisfaction that he did not know about it. It is a question for you under this evidence whether or not R. B. Southerland knowingly and willfully misappropriated any part of the funds used in paying the rent to M. McD. Williams, if you find any was misappropriated in that way."

In discussing this exception, it must be remembered that this is not an indictment for embezzlement, where the burden of proof is upon the State to satisfy the jury beyond a reasonable doubt of defendant's guilt, but that it is a civil action for damages for a breach of
(231) trust, where the intent of the defendant is immaterial. *Gassler v. Wood,* 120 N.C. 69; *Grocery Co. v. Davis,* 132 N.C. 98.

That the contract entered into between defendant and plaintiff created the defendant a trustee and agent for plaintiff and subject to the ancillary proceeding of arrest and bail for a wrongful conversion of the trust property has also been decided. *Boykin v. Maddry,* 114 N.C. 101; *Powers v. Davenport,* 101 N.C. 286; *Guano Co. v. Bryan,* 118 N.C. 576.

When the plaintiff offered evidence establishing the written contract and that the fertilizers were delivered to defendant's firm in pursuance of the same, and that the defendant's firm had, upon demand, failed to account for the fertilizer, but had appropriated a part of it to the payment of the firm's debts, a *prima facie* case was made out and the burden of proof shifted to the defendant to satisfy the jury that his firm had accounted fully for the fertilizer, or if it had been applied to the payment of the firm's debts that it was done without his knowledge or consent.

This latter fact is not within the knowledge of plaintiff and is not well susceptible of proof by it, but is peculiarly within the knowledge of the defendant. As a partner in the business, he is presumed to have an intimate knowledge of the firm's business. He is presumed to know what property, if any, the firm holds in trust or as agent for another, and what disposition is made of it. Also, what debts the firm owes and how they were paid.

If the firm's debts are discharged by using trust funds or other trust property in their payment, the law presumes that each partner is cognizant of it and if one seeks exoneration and denies complicity, the burden is on such partner to exculpate himself. We are of opinion that the charge of the court was free from error.

This is practically an action in tort, and it has been held that whenever a firm is answerable for the tort of any member, the liability of the partners is joint and several and therefore not dependent upon personal complicity. 30 Cyc. 535. If that be so, then it would be immaterial whether this defendant had knowledge of the wrongful conversion of the trust property by his copartner or not. But as the jury have found that defendant did *willfully and knowingly* misappropriate the trust property, the point does not arise and we will not decide it.

No error.

Cited: Manufacturing Co. v. McQueen, 189 N.C. 314; *Fertilizer Co. v. Hardee*, 211 N.C. 656.

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J. H. SIMMONS ET AL. v. GOLDSBORO LUMBER COMPANY, W. A. WIMSATT ET AL.

(Filed 20 March, 1918.)

Instructions—Deeds and Conveyances—Title—Adverse Possession.

In an action to recover land where there is evidence that defendant had been in adverse possession under color of title for a sufficient time and the jury has so found under proper instructions from the court, it is not error by the judge to treat as invalid a deed with which the defendant has not connected his paper title.

APPEAL by plaintiffs from *Stacy, J.*, at April Term, 1917 of JONES.

W. D. McIver and R. A. Nunn for plaintiffs.
A. D. Ward, Thomas D. Warren, J. K. Warren, and A. D. MacLean for defendants.

CLARK, C.J. The complaint alleges title to seven adjoining tracts of land, numbered from 1 to 7. The plaintiffs claim under Thomas Hall and attempted to deraign title by introducing certain grants to Kedar Knight and deeds to Thomas Hall and also some of the deeds in Wimsatt's title to prove the common source. The plaintiff White testified that he was one of the heirs of Thomas Hall, had lived in Jones County all of his life and that so far as he knew none of the heirs of Hall had ever had possession of the land, or paid taxes on it, or asserted any other right to it, in consequence of which he and his associate Simmons had obtained a deed from the other heirs in 1913 for $50, although the land was worth at least a hundred times that sum. All the evidence corroborated these particulars.

No question of boundary is involved and the correct location of each tract by the court surveyor as shown on his maps is admitted. There are seven tracts shown on the map, numbered 1 to 7, inclusive, but adjoining No. 3 is a triangle of 30 acres at its southwest corner which is separated from No. 3, thus making eight tracts in all. These tracts may be grouped in two, according to their source of title, *i. e.*, tracts 1, 2, the triangle to 3, 5, 6, and 7 are known as the "Williamson" or "Whitford" land, and tracts 4 and 3 (except the 30-acre triangle adjoining No. 3) as the "Foy" land.

As to the above tracts known as the Williamson or Whitford land, the defendants' record of title is based on a deed from Brown to Williamson in 1853, and descent from Williamson to his two daughters who married John N. and Hardy Whitford, the division between Hardy Whitford and the children of John N. in which this land was allotted

to them and his widow, who in 1893 conveyed to Smith and Moore, who in 1902 conveyed the same to defendant Wimsatt. (233) As to tract 4, the defendants' record of title is based on deeds from Hatch, Sheriff, under execution against John Simmons to Stanley in 1824, Stanley to Jarman in 1825, Jarman to Frees in 1826, which tract was conveyed by Clerk and Master in Equity to Foscue in 1860, Foscue to Foy in 1862, who conveyed to Wimsatt in 1902.

Tract No. 3, except the triangular piece, was devised to John Foy in 1803 and passed by a succession of mesne conveyances to the defendant Wimsatt in 1903. The above chains of title are set out in the record, and so far as they fall short of a perfect paper title, the defendants rely upon color and possession, of which the proof is sufficient and conclusive, and the court would have been warranted in instructing the jury to find for the defendants. The only doubt as to sufficiency of possession is as to Tract No. 1, and there trees were worked for turpentine. However, the issue, "Are plaintiffs the owners of any part of the land described in the complaint, and if so, what part?" was submitted under instructions presenting fully and fairly every phase of the evidence to the jury, who returned their verdict in favor of the defendants.

Upon examination of the exceptions, we find nothing requiring discussion except it may be exceptions 17 and 27, to the court's refusal to charge, "The deed of Lemuel Hatch, Sheriff, to John Simmons, dated 2 January 1820, is void on its face." The plaintiffs claim that this deed purports to be made by authority of a *fieri facias* bearing test second Monday in September, 1819, and returnable to the next term on second Monday in December, while the deed recites that the sale was made 31 December, which was more than six days after the second Monday in December and therefore after the adjournment of that term.

The defendants, however, do not connect themselves with this deed, and it is immaterial whether it be color of title or not. The court did not refer to this deed in its charge, but treated it as invalid by instructing the jury that they should find that the plaintiffs were the owners of the land unless defendants established title by color and possession. The jury so found, and that necessarily disposes of exceptions 17 and 27.

After examination in detail of all the assignments of error, we find nothing of which the plaintiffs can complain. There has been, as found by the jury under a very careful and full instruction from the court, possession by the defendants of each of the tracts under color of title for more than the statutory period.

No error.

(234)

IDA I. WEATHERSBEE ET AL. V. C. E. GOODWIN ET AL.

(Filed 27 March, 1918.)

1. Mortgages—Title—Trusts.

A mortgage of lands conveys to the mortgagee the legal title, in trust for the security of his debt.

2. Same—Default—Possession.

A mortgagee of lands, or his assignee, after default by the mortgagor, is entitled to the possession, but accountable to the latter for the rents and profits thereof.

3. Ejectment—Mortgages—Title—Burden of Proof.

Where the plaintiff claims title to land by deed and mesne conveyances from the original owner, and the defendants, in possession, claim under a prior mortgagee made by him and mesne conveyances, the burden is on the plaintiffs, in this action of ejectment, to show they had in some way acquired the title and the right of possession, as the mortgagees had taken possession after default in payment of the mortgage debt. As to whether the bar of the statute, Revisal, sec. 390, applies, the action not being one to redeem, *Quaere?*

4. Same—Limitation of Actions—Adverse Possession—Burden of Proof—Trials—Instructions.

Where those claiming the right to possession of lands under a deed and mesne conveyances from the original owner rely upon adverse possession under color of title, as against those claiming possession under his prior mortgage and mesne conveyances, after default, a charge that the plaintiff would be entitled to recover should the jury find he had been in adverse possession of the land for seven years from the date of the deed, is not to his prejudice under the evidence in this case. The possession of the mortgagor is not adverse to the mortgagee. *Parker v. Banks*, 79 N.C. 480, reviewed.

5. Appeal and Error—Evidence—Harmless Error.

The exclusion of immaterial evidence upon the trial, which could not have changed the result, is not reversible error on appeal.

6. Ejectment—Mortgages—Title—Constructive Possession.

Where the *locus in quo* is not in the actual possession of any one, it is in the constructive possession of one having the legal title to the lands, and this is sufficient in ejectment for a recovery against one who has no superior title.

CIVIL ACTION, tried before, *Bond, J.*, and a jury at April Term, 1917 of NEW HANOVER. Plaintiffs appealed.

C. D. Weeks and George H. Howell for plaintiffs.

W. P. Gafford and W. P. Mangum Turner for defendants.

WALKER, J. The action was brought for the recovery of land. (235) The plaintiffs claimed title under Isaac Spicer, by a deed from his widow and heirs at law, dated 15 December 1890, and mesne conveyances to them, he having died after the year 1875. Defendants claimed from Isaac Spicer under a mortgage made by him to John C. Millis 15 February 1875, and duly probated and registered 4 April 1881, and mesne conveyances to them. There was evidence that John C. Millis took possession of the premises after default in payment of the debt, and he and those claiming under him remained in possession for some years; and also evidence that defendants entered into possession under the deed from the widow and heirs, and held the possession for several years. We deem it unnecessary to recite the evidence in the view we take of the case. It is familiar learning that, at least, after default of the mortgagor in paying the debt secured by the mortgage, the mortgagee is entitled to the possession and is accountable to the mortgagor for rents and profits; and, nothing else appearing, the mortgagee, or his assignee, who has the same right, is entitled to recover upon the mere strength of the legal title so held by him. *Wittkowski v. Watkins,* 84 N.C. 457.

The doctrine is thus stated in 27 Cyc. 1234: "By the strict doctrine of the common law, a mortgage is entitled to the immediate possession of the mortgaged premises, in the character of the legal owner, and therefore, unless his right in this respect is waived or controlled by stipulation in the mortgage, he may, even before breach of condition, maintain ejectment and oust the mortgagor. But according to the modern equitable doctrine, which regards the mortgage as nothing more than a lien or security, the mortgagor is entitled to remain in the possession and enjoyment of the estate at least until breach of condition, even without the clause now commonly inserted in mortgages securing this right to him."

We have adopted the common-law rule, that a mortgage carries the legal title to the mortgagee, which he holds in trust for the security of his debt. A mortgage of land is not a mere pledge or chattel security. It was said in *Williams v. Teachey,* 85 N.C. 404: "In many of the States the strict legal relations of the parties resulting from the making of a mortgage have been changed, 'for the most part by statute,' remarks a recent author, 'so that a mortgage is regarded as a mere pledge, and the rights and remedies under it are wholly equitable, so that a second system has grown out of the first.' 1 Jones Mortg., sec. 17. It is held that the mortgage though conveying land, passes but a chattel interest incidental to and partaking of the nature of the debt intended to be protected, and hence upon the death of the mortgagee it may be assigned by his personal representative. *Ib.,* 796. Such is not the law

in this State, and the distinction is maintained between the legal
(236) estate in the mortgagee and the equitable estate in the mortgagor, created by the execution of the mortgage deed, while the latter is subject to dower and to sale under execution," citing *Hemphill v. Ross,* 66 N.C. 477; *Ellis v. Hussey, ib.,* 501; *Isler v. Koonce,* 81 N.C. 378. See, also, *Dameron v. Eskridge,* 104 N.C., at p. 625. As the mortgagee of land has the legal title, he is entitled to the possession. *Parker v. Banks,* 79 N.C. 480.

It follows that, in this case, the defendants were entitled to recover, unless the plaintiffs could show that in some way they had acquired the title and right to the possession. The burden of establishing their right to a recovery was upon them, as plaintiffs, at the outset, and when the facts as to the conveyances appeared, or were admitted, as here, it of course remained with them. They contend that they have acquired the title as against the mortgagee and his assignees, the defendants, by the lapse of time, but if that can be set up in this action (it not being an action to redeem), under Revisal, sec. 390, susecs. 3 and 4, it does not appear whether or not the debt was paid, or if paid, at what time; and besides, the mortgagee or his assigns were in possession. But they further contend that about 1890 they acquired at least color of title by the deed from the widow to her assignor, James Cowan, and from him by mesne conveyances executed in 1893 and 1894 to herself. She testified that her former husband, James Cowan, and herself were in possession of the property, the lot being 200 feet wide, from 1891 until she sold a part of it to Mr. B. R. King, 132½ feet of the lot at the corner, and she then kept the remainder, or 67½ feet at the western end herself, and continued in possession of it, except that C. E. Goodwin, in 1894, entered upon it, as she was told, and built a house or houses there. That she was absent from Wilmington, where the lot is situated, for two or three years about the time that Goodwin built the house upon it, and upon her return she discovered that Goodwin had built houses there and rented them, and afterwards in 1907 and 1908 she commenced this suit.

The court charged that if the plaintiff had continued in adverse possession of the land for seven years from the date of the deed, which she claimed to be color of title, she would be entitled to recover, and they would answer in her favor, that she is the owner of the land described in the complaint and entitled to the possession thereof, it being admitted that the title to the land is out of the State. This instruction was in plaintiff's favor, and all, and perhaps more, than she had any right to expect from the court, and the jury found against her. The assignments of error cannot be sustained.

First assignment: The testimony of Lucy Faires, which was (237) excluded, was not material in the view we take of the case; and if it was, it could not have changed the result.

Second assignment: We have not regarded the alleged possession of J. C. Millis, the mortgagee, as material, but have considered him as holding the legal title in trust for the plaintiffs, who are the assignees of the equity of redemption (*Dickerson v. Simmons,* 141 N.C. 325), and the trust as still open. But notwithstanding this contention, which we have favored, the mortgagee had the legal title, though in trust, and was entitled to the possession, and was constructively in possession, if there was no actual possession by any one (*Cahoon v. Simmons,* 29 N.C. 189; *Drake v. Howell,* 133 N.C. 163, 165, 166), and the legal title and constructive possession is sufficient for a recovery in ejectment against one who enters not having a better title. We will presently refer more fully to this principle as applied to the trust relation of mortgagee and mortgagor.

Third assignment: As we have already said, the mortgagee has been regarded as holding in trust for the mortgagor, but that does not alter his right to the possession of the land, as against the mortgagor, unless the latter has, by some special circumstance, shown his superior right to the same, which has not been done here.

Fourth assignment: This was a correct instruction, for, as we have intimated, it only states that, nothing else appearing, plaintiffs hold the equity of redemption by conveyance from the mortgagor and mesne conveyances to her, and defendants hold the legal title of the mortgage by deed from him and mesne conveyances to them, the latter have the better title and right to the possession, unless the plaintiffs have in some way shown a better title, which she has not done. The jury have even decided that she had no sufficient adverse possession, if any at all; and we are of the opinion that, upon her own showing, she did not have such adverse possession for the length of time required to ripen her title, even if she had color of title.

The fifth, sixth, seventh, eighth, and ninth assignments of error are fully covered by what we have already said. The jury have found correctly, as we are of the opinion that plaintiff's possession was not adverse under *Parker v. Banks, supra;* and if not adverse, what the judge said about the necessity of defendants having adverse possession to restore the title to themselves was immaterial as they had not lost the title by any adverse possession, and, therefore, they need not acquire what they had not lost. The plaintiffs being assignees of the mortgagor, their possession could not be considered as adverse to the defendants, who were assignees of the mortgagee. Plaintiffs have, in this case, claimed that the possession of the mortgagee, or his assignees,

(238) could not be adverse to her as they held in trust for her, and formerly for her assignors. And the converse, therefore, is equally true, that the mortgagor in possession holds under the mortgagee and not against him, unless some break in the trust relation, as, for instance, a hostile possession or repudiation of the trust is previously shown. Mere possession is not sufficient for this purpose.

The Court said in *Parker v. Banks,* 79 N.C., at p. 483: "The mortgagor in possession sold and conveyed to his tenant, also in possession, the mortgage having been duly registered prior to the sale by the mortgagor. It is insisted that the purchaser having continued in possession for seven years after his purchase before the beginning of this action is protected by the statute of limitations against this action by the assignee of the mortgagee. It is well settled that the mortgagor is the tenant of the mortgagee, and therefore that his possession is not hostile or adverse to the mortgagee; nor can the mortgagor make any lease or contract respecting the mortgaged premises effectual to bind the mortgagee or prejudicial to his title; neither can the assignee of the mortgagor hold possession adverse to the mortgagee unless the assignee has taken a conveyance without notice. But where a bona fide purchaser from the mortgagor entered without notice of the mortgage (which was not registered till after the commencement of the ejectment suit), and he and those claiming under him had been in the continual possession of the premises claiming under color of title for more than the time limited by statute, it was held in this State sufficient to bar the mortgagee or any claiming under him. *Baker v. Evans,* 4 N.C. 417. And such is the general doctrine. *Perkins v. Pitts,* 11 Mass. 125; *Newman v. Chapman,* 2 Rand. (Va.), 93; Angel on Limitations, 554; *Wellborn v. Finley,* 52 N.C. 228. Apply these principles to our case: It was virtually decided in *Fleming v. Burgin,* 37 N.C. 584, that a registered mortgage is notice to a subsequent purchaser from the mortgagor. This decision has been approved and affirmed in *Leggett v. Bullock,* 44 N.C. 283, and in *McLennan v. McLeod,* 70 N.C. 364, and such being the obvious policy and purpose of our registration laws, as well as the convenience and good sense of the thing, it may now be considered as settled in this State, that the purchaser from the mortgagor, or the mortgagee, after a mortgage duly registered, is a purchaser with notice. Adams Eq., 152; 2 Kent 172. The intestate of the defendant, then, purchased with notice of the mortgage and took only such title as the mortgagor had, and subject to all the stipulations contained in the mortgage deed. He simply took the place of the mortgagor and as the mortgagor cannot claim adversely to the mortgagee, neither can his assignee with notice. The right of the purchaser can in no case go beyond his own title, and whatever appears in the registered mort-

gage is as much an integral part of his title as if it had been in- (239)
serted in his deed from the mortgagor. Such notice therefore is of the most conclusive nature and is unsusceptible of being rebutted or explained away. 2 White & Tudor Eq. Cases, 21 LeNeve & LeNeve, and notes."

So far, *Justice Bynum* has shown what the relation of mortgagor and mortgagee is, and how it is affected by either of them having possession of the land. He then practically applies the principle in these words: "The defendant acquired by the purchase only that which the mortgagor could rightfully convey, to wit, the equity of redemption in the land; and nothing short of the payment and discharge of the mortgage debt will change his relations with the mortgagee. Adams Eq., 110. It follows that the deed from Pool to Banks, a purchaser with notice, conveyed the equity of redemption only, and that such title is not that *colorable title,* a possession under which for seven years will bar the martgagee's right of action. The only limitation upon the mortgagee's right of action in this case is contained in C. C. P., sec. 31 (3), which prescribes that where the mortgagor has been in possession, the action for foreclosure or sale shall be brought by the mortgagee within ten years after forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the debt. Such time has not elapsed in this case.

"Take another view of this action: Even assuming that Pool's deed to Banks was a colorable title, it has been long settled that the possession under it, to bar an action under the statute, must be an adverse possession. The constructive possession was in the mortgagee, and that continued until an adverse possession commenced, and that adverse possession must have continued seven years before the right of possession of the first grantee could be lost. *Slade v. Smith,* 2 N.C. 248. But the law never presumes a wrong; hence he who alleges an adverse possession against the better title must show it as well as allege it."

It would seem that this statement of the law answers conclusively the plaintiffs' objections. The charge of the judge, instead of being adverse to the plaintiff, went to the extreme verge of the law, if not beyond, in their favor, and they have no ground of complaint. This is not an action to redeem from the mortgagee, but a straight action of ejectment, with no equitable element pleaded. The statute of limitations is not, therefore, really involved (*Cone v. Hyatt,* 132 N.C. 810); and if it were, there has been no evidence to show that it applies beneficially to the plaintiffs. There is no proof here of actual payment of the indebtedness secured by the mortgage, and the fact is, so far as appears, that the trust relation is still open, and, therefore, *Parker v. Banks, supra,* applies.

(240) The case has been tried on its merits, with proper instructions to the jury, so far as the plaintiffs are concerned, and their exceptions therefore were not well taken, and must be overruled.

No error.

Cited: Bank v. Wysong & Miles Co., 177 N.C. 292; *Stevens v. Turlington,* 186 N.C. 194, 195; *Crews v. Crews,* 192 N.C. 682; *Bank v. Lumber Co.,* 193 N.C. 760; *Montague v. Thorpe,* 196 N.C. 164; *Alexander v. Bank,* 201 N.C. 452; *Bank v. Jones,* 211 N.C. 318, 319; *Mills v. Building & Loan Association* 216 N.C. 667, 668; *Ownbey v. Parkway Properties Co.,* 222 N.C. 56; *Cleve v. Adams,* 222 N.C. 214; *Anderson v. Moore,* 233 N.C. 301.

MARY IDA SWAIN ET AL. V. DAVIS CLEMMONS ET AL.

(Filed 27 March, 1918.)

1. Costs—Lands—Title—Disclaimer.

A defendant in an action concerning land should enter a disclaimer if he does not claim the land in controversy, or does not intend to litigate with the plaintiff, in order to escape the payment of costs.

2. Costs—Lands—Title—Part Recovery—Admissions on Trial.

Where the pleadings raise the issue of title or right of possession of the parties, and the plaintiff recovers a part of the land, he is entitled to his cost of the defendant; and this applies to the adjudication of the question of title alone (Revisal, sec. 1264); and where the plaintiff has been required to introduce evidence of his title to the whole of the *locus in quo,* and then defendant consents that the court charge the jury to find for the plaintiff if they believe the evidence as to a certain part, and the issue is found for the defendants as to the remaining land, the costs of the action are properly awarded against the defendant.

ALLEN J., dissents.

CIVIL ACTION, tried before *Bond, J.,* and a jury, at Spring Term, 1918, of BRUNSWICK.

This is an action for the recovery of land, and was before us at a former term, being reported in 172 N.C. 277, where the facts will be found, together with an explanation of the controversy.

The plaintiffs alleged in their complaint that they were owners of the Burns tract (described by metes and bounds) and entitled to the possession thereof. This was denied in the answer. Plaintiffs then al-

leged, in the second section, that defendants were in possession of a part of the said land known as the "Island Tract." This also was denied by defendants. The court, without objection, as appears from this record, submitted the following issues to the jury, which, with the answers of the jury thereto, are as follows:

1. Are the plaintiffs owners and entitled to the possession of the tract of land described in the complaint known as the Burns Tract? Answer: "Yes."

2. Is the island in controversy, shown on the map between North Run and South Run, a part of said Burns Tract described in the complaint? Answer: "No."

3. If said island is not a part of the Burns Tract described in (241) the complaint, have plaintiffs acquired title to said island by adverse possession? Answer: "No."

4. Did defendants authorize the removal of timber from said island by the Wacamaw Shingle Company? Answer: "Yes."

5. What damages, if any, are plaintiffs entitled to recover of defendants? Answer: "Not any."

And thereupon the court entered the following judgment:

"This cause coming on to be heard before Bond, judge presiding, and a jury, and it appearing that after the plaintiffs had introduced a number of witnesses tending to show possession under color of title for more than twenty-one years of the land described in the complaint, outside the piece called the island, the defendants then admitted to the court that they had no objection to the court charging the jury that if they believed the evidence in the case they should answer the first issue 'Yes,' which involved the title to all the land in controversy except the island, but which said issue did not include any part of the island, which was done, and the cause proceeded thereafter to its conclusion, the verdict being returned as appears of record. The court being of the opinion, considering the state of the pleadings and the time the admission was made, that as the result of the verdict the plaintiff would be entitled to a judgment that they recover the costs of this action. Upon consideration thereof, the court adjudged that the plaintiffs, Mrs. Ida Swain and others, according to their respective interests, together own in fee simple the tract of land described in the complaint, known as the Burns Tract, shown on the map used on trial of this case, a copy of which is to be attached to and filed as a part of this judgment.

"It is further adjudged that the plaintiffs own no interest in any of the lands called the island, being bounded by the North Run on one side and by the South Run on the other, and located in the northeastwardly part of the said plot; the northeastwardly boundary of the

lands which is adjudged to be the property of the plaintiffs is the southern one of the two runs, one marked on map North Run and the other marked the South Run.

"It is further adjudged that the plaintiffs recover of the defendants no damage.

"It is further adjudged that the plaintiffs recover of the defendants and sureties to the defense bond the costs of this action to be taxed by the clerk of the court."

To that part of the judgment which taxed the defendants with the costs of this action, or any part thereof, the defendants excepted and appealed.

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C. Ed Taylor and Robert Ruark for plaintiffs.
Crammer & Davis for defendants.

WALKER, J., after stating the case: The issues between parties to an action are raised by the pleadings. If a defendant is sued for the recovery of land, a part of which he does not claim or about which he does not intend to litigate with the plaintiff, he should enter what is known as a disclaimer; and when he does so, he cannot be taxed with any costs relating to that part of the land; but when, instead of doing so, he takes issue with the plaintiff as to all of the land, and plaintiff recovers any part of it, he is entitled to recover his costs, although he may have failed to recover the other tract. And this rule applies, even though only a question as to the title, and not as to the right of possession, is raised as to the part which the plaintiff recovers. Revisal, sec. 1264, provides: "Costs shall be allowed, of course, to the plaintiff upon a recovery 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."

It will be noted that this statute is not confined to a recovery of real property—that is, of the title and possession—but it is sufficient that the plaintiff has recovered only to the extent of having the title adjudged to be in him, for the language is that when a claim of title to real property is involved, or is certified by the court to have come in question and plaintiff has succeeded in having a favorable decision upon his claim, he shall have his costs, and so have we decided in several cases.

"The statute (The Code, sec. 525, now Revisal, sec. 1264) prescribes that costs shall be allowed, of course, in favor of the plaintiff upon a recovery in an action for the recovery of real property, or when a

claim to real property arises on the pleadings, or in an action to recover possession of personal property. But the defendant shall be allowed costs in such actions unless the plaintiff be entitled to costs therein. There is no provision that limits the allowance of costs in favor of the plaintiff in case of only a partial recovery in such action. The language of the statute as to them is comprehensive and without exceptive provision." *Wooten v. Walters,* 110 N.C. 251 (defendant's appeal, at p. 258).

"A case was within the meaning of section 525 of The Code, wherein 'a claim of title to real property arose in the pleadings,' and the plaintiff, if the issue based thereon was found in his favor, was entitled to judgment declaratory of his title, and for nominal damages, if none had been assessed, with costs. The statute in this respect is in affirmance of the principle established before its enactment." *Moore v. Angel,* 116 N.C. 843, 856. But the case of *Bryan* (243) *v. Hodges,* 151 N.C. 413, would seem to be directly applicable. There the issues were:

1. Are the plaintiffs, or either of them, the owners of and entitled to the possession of the land described in the complaint, or any part thereof? Answer: "Yes, the plainitffs are the owners and entitled to the possession of all the lands described in the complaint, except that 100-acre tract claimed by defendant, as shown on plat by red lines; and the lines of the plaintiffs should run with the lines of Hodges and Hartley, as shown on plat by purple line and dotted red lines."

2. What damages are the plaintiffs entitled to recover, if any? Answer: "None."

The plaintiffs' counsel, upon the rendition of the verdict, requested the court, in due form and apt time, to tax the defendant with the costs. This motion was denied, and the plaintiffs excepted.

This Court said on the appeal: "We are of opinion that the judge erred upon the question of costs. As the defendants denied the title of the plaintiffs and the right of possession of the plaintiffs to the *entire* tract, they were necessarily required to prove their title and incur the costs and expense of so doing, and under the able and clearly expressed opinion of *Justice Avery,* speaking for the Court in *Moore v. Angel,* 116 N.C. 843, the plaintiffs were entitled to a judgment for their costs. *Cowles v. Ferguson,* 90 N.C. 309; *Harris v. Sneeden,* 104 N.C. 369; *Murray v. Spencer,* 92 N.C. 264; Revisal, sec. 1264. In not ruling in favor of the plaintiff upon the question of costs, the court erred, and to this extent the judgment is modified." See, also, *Vanderbilt v. Johnson,* 141 N.C. 370.

In this case the plaintiffs were required to prove their title to the Burns Tract of land, or that part of it not embraced by the Island

Tract. It will be observed that the defendants denied both plaintiffs' title and right of possession to the Burns Tract, and plaintiffs recovered judgment as to a part of that tract. This entitled them to their costs. It makes no difference that defendants, after some of the evidence was introduced, admitted plaintiffs' title and right of possession to all of the Burns Tract outside of the Island Tract. The admission came too late for the purpose of saving the costs. The plaintiffs had already incurred expense, and it would be manifestly unjust under the circumstances to deprive them of reimbursement for their outlay, even if the statute was not so explicit in allowing them to plaintiffs.

No error.

Cited: Parker v. Parker, 176 N.C. 201; *In re Hurley,* 185 N.C. 423; *Cody v. England,* 221 N.C. 45, 46.

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E. B. ATKINSON v. J. H. DOWNING.

(Filed 27 March, 1918.)

1. Parent and Child—Custody of Child.

The *prima facie* right of parents to the care and custody of their infant children is a natural and substantive one which will not be interfered with by the courts unless the good of the child clearly requires it.

2. Same—Child's Welfare.

While this parental right is fully recognized in this State, it is further held that the welfare of the child is also entitled to full consideration and on especial facts may become controlling in the disposition of its custody.

3. Same—Habeas Corpus.

It appearing in the present case that a female child, now 11 years of age, has been in the care and custody of her grandparent since the death of her mother, four years ago and more; that said grandparent is amply able to take care of her, and that he has done so affectionately and properly; that she has a secure and comfortable home with desirable neighbors and associates; that the father, the petitioner, though spoken of as a man of good character, could not and was not circumstanced to give the child the same dependable advantages of education and religious training and environment necessary to the child's welfare, the judgment of the Superior Court awarding the child to the present custody of the grandparent will not be disturbed on appeal.

4. Appeal and Error—Parent and Child—Habeas Corpus—Review of Evidence.

Semble, on appeal in *habeas corpus* proceedings as to care and custody of children, the Supreme Court may not regard as final the findings of the Superior Court, but may consider and pass upon the whole record, including the testimony.

HABEAS CORPUS proceedings involving the right to present custody of an 11-year-old female child, heard before *Bond, J.*, at October Term, 1917, of BLADEN.

The petitioner being the father of the child and the respondent being the maternal grandfather.

The court heard the testimony and made findings of fact thereon, in part, as follows:

1. That petitioner is the father of the child, and the child is now about 11 years of age.

2. That the mother of the child died at the home of the mother's father seven or eight years ago. That several months prior to the death of his daughter, at her request, the respondent, her father, took her to his house, and at his expense took care of her, furnished medical attention, bore all the expenses of same and paid the costs of her funeral.

That the petitioner has never paid any part of the same to the respondent. (245)

3. That a very short time before the death of the mother of the said child, she, in the presence of her husband, she being sick at the time, stated that she expressly desired that the grandparents of the child should keep it to raise, and in the presence of the petitioner, his wife stated that her husband had not properly cared for and provided for her. That she had to die at 22 years of age, and that his neglect of her was the cause of it.

4. That respondent, Downing, has sufficient means to take good care of said child, is of good character, and is fond of said child and anxious to do all that is necessary to give said child proper attention. That he owns about 1,000 acres of land in Bladen County; that the father of said child, with the exception of a few small gifts, has done nothing to raise said child since her mother's death or to meet any of the expenses of the child's being raised to this time.

5. That the petitioner has married a second wife. He owns no home and has no property, real or personal; that he works for wages and did not properly provide for his first wife when she was living; that said child has first cousins of her age to associate with where she now lives at her grandfather's; that said girl has been sent to school by the grandfather and can now read and write fairly well for her age; that she goes to Sunday-school and is visited and attended to by her aunts;

that a schoolhouse is soon to be erected near enough to the home of the grandfather to furnish better educational facilities than heretofore; that there is no evidence tending to show that said wife wants the girl in her home.

6. That on this hearing, witnesses testified that the general character of the petitioner, father of the girl, is considered good, but by reputation he did not provide properly for his first wife, and the court finds the last of said facts to be true. As to his character, the court finds his general reputation is considered good. He behaves himself properly and is considered a well-behaved man as to truth and treatment of other people. No witness testified that his general character is bad, but the witnesses who testified as to his character stated that he had never been considered a thrifty man. The court further finds he neglected his first wife and has done practically nothing to help raise the child.

7. The court further finds from the evidence that the petitioner is now working in a knitting mill in the capacity of a machinist, and is getting $2.50 per day for the time he works. That he owns no property, either real or personal; that in the past he has worked at times and at other times has failed to be employed, and has frequently moved from place to place.

8. The court further finds that the interests of the said child will be best promoted by letting her live with her grandfather, where
(246) she has been since she was about three or four years of age, she being now about 11.

The subsequent findings do not materially affect the legal aspects of the controversy.

Upon his findings, the court entered judgment as follows:

"Upon the foregoing findings of fact, it is adjudged by the court that the best interests of the child require that she be allowed to stay at her grandfather's, and it is ordered and adjudged by the court that the writ be dismissed, and that said child remain in the custody of her grandfather; that her father be allowed to visit her, and that said father is hereby enjoined and restrained from removing or having said child removed from the custody of her grandfather. It is also adjudged by the court that the costs of this proceeding be paid by the petitioner, E. B. Atkinson."

From this judgment the petitioner appealed.

J. Alden Lyon, H. L. Lyon, and A. H. Pait for plaintiff.
MacLean, Varser & MacLean for defendant.

HOKE, J. It is fully recognized in this State that parents have prima

facie the right of the custody and control of their infant children, a natural and substantive right not to be lightly denied or interfered with except when the good of the child clearly requires it. *In re Mercer Fain*, 172 N.C. 790; *In re Mary J. Jones*, 153 N.C. 312; *Newsome v. Bunch*, 144 N.C. 15; *Latham v. Ellis*, 116 N.C. 30.

In the case of *Mary Jane Jones*, it is held that "this paternal right should prevail whenever, being of good character, they have the capacity and disposition to care for and rear their children properly in the walk of life in which they are placed, a right growing out of the parents' duty to provide for their helpless offspring, not only enforcible as a police regulation, but grounded in the strongest and most enduring affections of the human heart. A substantial right, therefore, not to be forfeited or ignored except in some way or for some reason established or recognized by the law of the land." It is also held with us in well-considered cases, and they are in accord with the rule now generally prevailing, that this right of the parents is not universal and absolute; but even as between individuals, the same may be modified and disregarded when it is made to appear that the welfare of the child clearly requires it. *In re Alderman*, 157 N.C. 507; *In re Turner*, 151 N.C. 474; *In re Samuel Parker*, 144 N.C. 170.

In *Alderman's* case, *supra*, it was held that on proceedings in *habeas corpus* by a father for the possession of his child in the custody of the mother, the mother's possession of the child will not be disturbed if it appears that therein the physical and moral and spiritual (247) welfare of the child will be the better preserved.

In *Turner's* case the opinion quotes with approval from Chancellor Kent, to the effect "That the father, and on his death the mother, is generally entitled to the custody of their infant children, inasmuch as they are their natural protectors for maintenance and education, but the courts of justice may, in their sound discretion and when the morals or safety or interests of the children strongly require it, withdraw the infants from the custody of the father or mother and place the care and custody of them elsewhere."

And in the case of *Samuel Parker*, it was said in the concurring opinion, that in this country the disposition of the child rests in the sound legal discretion of the court, and it will be exercised as the best interests of the child may require, citing *Newsome v. Bunch*, 142 N.C. 19; Tiffany on Persons and Domestic Relations, p. 308; Shouler on Domestic Relations, sec. 240.

And, further: "The best interest of the child is being given more and more prominence in cases of this character and on especial facts has been held the paramount and controlling feature in well-considered

decisions," citing *Bryan v. Lynn,* 104 Ind. 227; *In re Welsh,* 74 N.Y. 299; *Kelsey v. Greene,* 69 Cann. 291.

Considering the facts presented in the light of these principles, we concur in his Honor's view that, under present conditions, the child should be allowed to remain with the grandfather, who with the grandmother has had the care and maintenance of the child since its mother's death, seven or eight years ago; that it has a safe and pleasant home with desirable associates and neighbors, and where it is being well cared for and instructed, while the conduct of the father, though he is spoken of as a man of good character has not hitherto been such as to give assurance of that environment and watchful and intelligent care and attention that would justify the Court in removing the child from its present home and surroundings.

We were cited by appellee to several authorities to the effect that the findings of the court below were conclusive with us except on an entire lack of evidence to support them. These cases were principally in civil causes of an ordinary kind heard on report and findings of a referee and of a judge on exceptions noted in which the position is undoubted. In cases of the present kind, and as now advised, while there is seeming conflict of authority on the subject, we are inclined to the opinion that the entire case, including the findings of the court, is subject to review on appeal. The question is not presented, however, as, in the present instance, we see no reason for disturbing the conclusions of the court below, either of fact or law, and on the record the judgment must be

Affirmed.

Cited: In re Means, 176 N.C. 311; *In re Warren,* 178 N.C. 45; *Brickell v. Hines,* 179 N.C. 255; *State v. Burnette,* 179 N.C. 743; *In re Hamilton,* 183 N.C. 58; *Clegg v. Clegg,* 186 N.C. 37; *In re Caston,* 187 N.C. 514; *In re Shelton,* 203 N.C. 78; *In re Foster,* 209 N.C. 494; *Browning v. Humphrey,* 241 N.C. 287; *James v. Pretlow,* 242 N.C. 104; *S. v. Smith,* 243 N.C. 172; *Holmes v. Sanders,* 246 N.C. 201.

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GEORGE PENDLETON, KATE B. POOL, E. F. AYDLETT ET AL. *v.* MISSOURI WILLIAMS, MARION WILLIAMS ET AL.

(Filed 27 March, 1918.)

1. Judgment—Estoppel—Estates—Contingent Interests—Statutes.

A former action determined before the enactment on the subject by the Legislation, holding that contingent remainders in lands, etc., cannot be sold unless all persons who may by any possiblity be interested, united in such decree, cannot estop the parties to proceedings thereafter brought under the provisions of the Statute, Pell's Revisal, sec. 1590, authorizing the judicial sale of property, or portions thereof, when there is a vested interest with remainder over to persons not in being, or when the contingency has not yet happened, etc.

2. Estates—Contingent Interests—Judicial Sales — Statutes — Constitutional Law.

Pell's Revisal, sec. 1590, authorizing the sale of land affected with contingent interests, does not interfere with the essential rights of ownership but operating in addition to those already possessed, is constitutional and valid.

3. Estates—Contingent Interests—Judicial Sales—Statutes.

An estate to G. and K. in the event either die without issue then to the other, etc., and should both die without issue, then to R: *Held*, G. and K. took vested interest in the lands under the provisions of our statute, Pell's Revisal, sec. 1590, and it is subject to judicial sale under the terms and provisions of the statute. *Smith v. Witter*, 174 N.C. 616, and other like cases, cited and approved.

4. Estates—Contingent Interest—Qualified Fee—Vested Rights.

The owner of a base or qualified fee, determinable on a contingency, has a vested interest in the property while it endures, with a fixed right of present use and control, and may exercise over it all the acts or privileges of the owner in fee simple absolute, except that he cannot alien the property freed from the contingency by which it is determined.

5. Estates—Contingent Interests—Vendor and Purchaser—Fee-Simple Title—Application of Funds.

A purchaser at a sale of land with contingent interests allowed under the provisions of Revisal (Pell's), 1590, acquires a fee simple title, upon payment of purchase price to the court or person authorized to receive it, without being required to see to the application of the funds, and on such payment made is quit of all obligations concerning it.

6. Appeal and Error—Objections and Exceptions—Judgments—Estates—Betterments—Estoppel.

Where a preliminary judgment in proceedings to sell lands with contingent interests (Revisal, sec. 1590) provides for the payment of betterments to the life tenant, and in this respect the judgment is not excepted to or appealed from, it is conclusive upon the parties as an estoppel. As

to whether under the facts of this case such betterments are allowable, *Quaere?*

7. Estates—Contingent Interests—Judicial Sales—Funds—Court's Discretion—Life Tenant—Interest.

The preservation of the proceeds of the sale of lands, affected with contingent interests, under Pell's Revisal, sec. 1590, is referred to the sound discretion of the trial judge and in this case no error is found to the order requiring the funds to be paid into the office of the clerk of the Superior Court, to be loaned out by him or otherwise invested as required by law until the happening of the contingency, except that it should be so modified as to require that interest on these loans be allowed the owners of the particular estate, whether the estate, under correct interpretation of the deed, be one for life to be enlarged into a fee, or a fee simple, determinable on their death without issue, it appearing that they were given the usufruct of the land.

(249) CIVIL ACTION to sell land for partition and reinvestment, part of same being affected by contingent interests, instituted to November Term, 1916, of PASQUOTANK; *Justice, J.*

The rights of the parties and respective interests in the property are chiefly dependent on a certain deed bearing date March, 1883, in which A. L. Pendleton, the owner of the property, and Charles Guirkin, as trustee holding under a trust deed from said Pendleton, to secure two small claims due from him to his then wife, Jane Pendleton, conveyed the same to Jane R. Pendleton and others, habendum as follows:

"To have and to hold the above mentioned and described . . . property unto the said Jane R. Pendleton for and during the term of her natural life free from the control and incumbrances of any and all persons whatsoever.

"To have and to hold one-third of the remainder unto the said Robert D. Williams and his heirs forever. To have and to hold the other two-thirds of the said remainder in equal parts in severalty unto the said George W. Pendleton and Kate Pendleton, each for his or her natural life; but if the said George or the said Kate shall die, leaving issue of their body, or the body of either, or the issue of said issue, living at the time of his or her death, then to have and to hold the part of the one so dying and so leaving lineal heirs unto the said George W. or unto her, the said Kate, and his or her heirs in fee forever. But if the said George W. or the said Kate shall die without leaving issue, or the issue of such, at his or her death, then to have and to hold the remainder after their life estate unto the said Robert D. Williams and his heirs in fee. But if either the said George or the said Kate shall die, not leaving issue of the body of the one dying, but leaving the other surviving, then to have and to hold the part of one so dying, one moiety thereof unto the said Robert D. Williams

and his heirs, and one-half thereof unto the survivor for and during the term of their natural life, and if the survivor shall die, leaving issue living at his or her death, or the issue of such, then to have and to hold the part last mentioned unto the said survivor (250) and his or her heirs. But if the survivor shall die, not leaving issue at his or her death, or the issue of such, then the remainder of said life estate herein granted to have and to hold unto the said Robert D. Williams and his heirs. The object of thus limiting the estate herein granted being to secure the same to the blood of the said Jane R. Pendleton in exclusion of the relatives of the half-blood of the said George W. and Kate on side of their father and said Andrew L. Pendleton."

It appears that Jane R. Pendleton is dead; that Robert D. Williams, a child and one of her heirs at law and one of the grantees in said deed, is dead, having him surviving his widow and Missouri and four children and heirs at law who are parties defendant, and *sui juris* and duly served with process; that during the life of said R. D. Williams, on judgment duly docketed and execution against him, his one-third vested interest in the property was sold and same was purchased by E. F. Aydlett and T. B. Flora and the latter having since died, his children and heirs at law are among the petitioners; that said Flora and Aydlett, shortly after the purchase of R. B. Williams' interest, bought and received a deed for the life-interest in the property and made certain valuable improvements on the place, for which they were adjudged entited to receive out of the proceeds of present sale the sum of $300, in addition to their one-third interest in the estate of R. B. Williams, acquired by execution sale.

The parties plaintiff and copetitioners in the present action are George B. Pendleton and Kate Pendleton Pool, the children, two of the three children and heirs at law of Jane R. Pendleton, deceased; E. F. Aydlett and the children and heirs at law of J. B. Flora, copurchaser with Aydlett, at execution sale, of the vested interest of R. B. Williams, including S. H. Johnson, who married a daughter of J. B. Flora, deceased, and who is the purchaser in the present proceedings.

The defendants, as stated, are the widow and heirs at law of R. D. Williams, who have been duly made parties defendant and file no answer.

It also appeared by admissions made on the argument that heretofore, to wit, at Spring Term, 1892, on proceedings instituted before the clerk and duly transferred to civil issue docket, an application was made to sell this land, dependent on this very deed for partition and relief, and was denied on the ground that, under the facts and the law then existent, the courts were without power to make such a decision.

At February Term, 1917, before his Honor F. A. Daniels, Judge, a decree was entered for want of answer, declaring the rights of the parties in the property and ordering a sale and also an assessment to be allowed of $300, by reason of improvements, as heretofore stat-
(251) ed. Report was made of said sale to March Term, 1917, and, on an increased bid, another sale was ordered. On this sale, report was made to June Special Term, 1917, before his Honor M. H. Justice, Judge, S. H. Johnson being the purchaser, the report stating and it being admitted that the sale and purchase were on condition that a good title would be made. On notice duly served, it was adjudged that a deed be made and the purchaser pay the price of his said bid.

Decree was further made that one-third purchase money and the $300 assessment for improvements be paid to the owners of R. B. Williams' interest, Aydlett and the heirs at law of Flora and the remainder be paid to George B. Pendleton and Kate Pendleton Pool for their lives, they giving bond to account for same if the contingency arrived finally carrying their interests or any part thereof to the defendants, the widow and heirs at law of R. D. Williams; this last part of the decree being changed during the term so as to direct that the money representing this interest be paid into the clerk's office to be loaned out by him or otherwise invested as required by law until the happening of the contingency.

To this last judgment, for payment of purchase money and distribution of the proceeds, the purchaser, S. H. Johnston and George B. Pendleton and Kate Pendleton Pool, excepted and appealed.

W. A. Worth for Pendleton et al., appellants.
Ehringhaus & Small for Johnson.

HOKE, J. In a former proceeding concerning this property, *Aydlett v. Pendleton et al.*, 111 N.C. 28, it was adjudged that a sale for partition could not be had on account of contingent estates and interests therein, the recognized rule at that time being correctly stated in the headnotes as follows: "A sale for partition will not be decreed when there are contingent remainders or other conditional interests therein unless all the persons who may be by any possibility interested unite in asking such a decree."

A like decision was soon thereafter made in *Hodges v. Lipscombe*, 128 N.C. 57, and the position had long been the accepted law of the State.

Neither the position, however, nor its application to this property can be rightly considered an estoppel on the parties to this present proceeding, the only question there determined being whether, under the law

and the conditions then prevailing, the owners or any of them had the right of compulsory sale, and soon after these rulings were made, the Legislature, in 1903, chapter 99, amended in chapter 548, Laws 1905, and again in 1907, the law on the subject now appearing in 1 Pell's Revisal, sec. 1590, authorized the sale of property or the portions of it affected by interests of this character, by judicial de- (252) cree, wherever there was "a vested interest in real property with remainder over to persons not in being or when the contingency has not yet happened which will determine who the remaindermen are and, further, when it is made to appear that the interests of all parties require or would be materially enhanced by such sale." Provision is made for service of process on all persons in being having an interest and for the proper representation and protection of the interests of persons not in being and not ascertainable before the happening of the contingency, and further, for the proper care of the proceeds by reinvestment in other property, etc., or a loan of same under the court's approval till a satisfactory investment can be found. Under certain conditions, the statute also authorizes the sale of a part of such property looking to the improvement of the remainder when such a course is found to be for the advantage of all persons having an interest, actual or potential.

It is very generally recognized that statutes of this kind, being no interference with the essential rights of ownership, but operating rather in addition to those already possessed by the owners of such estates, are well within the Legislative powers. Lawson's Rights and Remedies, sec. 3867.

And the act we are presently considering has been repeatedly approved and applied by decisions of this Court, the law being construed to authorize a sale of the property or the portion of it affected by the contingent interest and not a sale of the contingent interest separately. *Smith v. Witter,* 174 N.C. 616; *Smith v. Miller,* 151 N.C. 620; *Anderson v. Wilkins,* 142 N.C. 154; *Hodges v. Lipscombe,* 133 N.C. 199; *Springs v. Scott,* 132 N.C. 548; where the subject of these sales is very fully discussed by our former Associate Justice Connor. And it may be well to note that this later decision of *Hodges v. Lipscombe* was in reversal of a previous decision in the same case, 128 N.C., *supra,* additional parties having been made in accord with the Court's suggestion, so as to bring the later case within the provisions of the statute referred to.

And the present case, too comes clearly within the statute, for whether the two-thirds interest held by George B. Pendleton and Kate Pendleton Pool is a life estate to be enlarged into a fee on the happening of the contingency, a position which has the support of authority in case of a will (*Shriver's Lessee v. Lynn et al.,* 43 U.S. 43—

Howard, 2 ed.), or whether, as intimated in the opinion in the former case, 111 N.C., *supra,* these parties had a determinable fee, this being the larger estate (Preston on Estates, 168), and the life estate being merged therein under the rule in *Shelley's* case, in either event these parties held a "vested interest in real property," within the meaning of the statute, and whether such an interest is owned in severalty
(253) or in cotenancy with other like or vested interest, the power of sale now exists under the law and according to the course and practice of the Court.

A base or qualified fee, while it may be determined on a contingency, is a vested interest in the property while it endures.

The owner of such an estate has the fixed right of present use and control of the property, holding the same unimpeachable for waste, assuredly by any of the ordinary actions, and may exercise over it all the acts and privileges of an owner in fee simple absolute except that he cannot by deed alien the property freed from the contingency by which it is to be determined. In Fearn on Contingent Remainders and 1 Washburn on Real Property, 5 ed., p. 38, a vested estate is said to exist when there is an immediate fixed right of present or future enjoyment, a definition that has been accepted and illustrated in many well considered cases, as in *L'Etournean v. Hinquenet,* 89 Mich. 310; *S. v. Brown,* 27 N.J. Laws 13; *Smith v. West,* 103 Ill. 332.

In the Michigan case it is said that "a vested estate, whether present or future, may be absolutely or defeasibly vested. In the latter case, it is said to be vested subject to being divested on the happening of the contingency."

The case, therefore, comes clearly within the purpose and terms of our statute and the desirability and even the necessity for a sale being properly made to appear, a very valuable lot in the business center of a thriving city, subject and liable to great and increasing taxation and assessments and inadequately improved, the decree for sale has been properly made and the same sets forth and declares the interests of the parties as follows: One-third interest in absolute ownership in E. F. Aydlett and the heirs of John B. Flora, deceased, purchasers, at execution sale, of one undivided third of the fee simple absolute, formerly owned by R. D. Williams and also an amount by way of betterments, consisting of a house built upon the property by said Aydlett and Flora while they occupied the same as purchasers of the life estate of Jane R. Pendleton. That George B. Pendleton and Kate P. Pool, coplaintiffs, were each the owners of a determinable fee in one undivided third of the property, with remainders over, as stated, in the deed and with the ultimate remainder in R. D. Williams and his heirs in case they both died without issue.

There was neither appeal nor exception noted by any of the parties. Pursuant to this decree, the amount for betterments to Aydlett and Flora having been assessed at $300, the property was sold, report made and an increased bid having been offered, a resale was ordered at which the property was bid off by S. H. Johnston at $5,126.

There was judgment confirming the sale and directing distribution of the proceeds to payment of costs, etc., to the $300 to Aydlett and Flora and one-sixth of the remainder paid each to (254) E. F. Aydlett and the heirs of John B. Flora; one-third of the remainder to be paid to George B. Pendleton, and one-third to Kate P. Pool, to be held by them subject to the contingencies of the deed, on their giving bond to properly secure the interest of the ultimate remaindermen.

At the same term when this decree was rendered, on notice duly issued, payment was resisted by the purchaser on the ground that, by agreement of all parties, his bid should be paid only on condition that the commissioners could and would make a good fee simple title.

The court gave judgment that the deed be delivered and payment by the purchaser for the amount of his bid, and modified the former decree as to the distribution of the fund by directing that the portion of the fund ordered paid to George B. Pendleton and Kate P. Pool be paid into the clerk's office to be lent out or lawfully invested until the happening of the contingency.

From this last judgment, the purchaser, S. H. Johnston, and the coplaintiffs, George B. Pendleton and Kate P. Pool, having duly excepted, appealed.

So far as the purchaser is concerned, the statute having given the power of sale and all the parties in interest being before the court, there is no reason why a good title cannot be conveyed to him and he is in no way charged with the duty of seeing that the purchase money is properly distributed. When a purchaser has paid his bid into court or to the officers duly authorized to receive it, he is quit of all further obligation concerning it, and as to him the judgment must be affirmed. *Wilkerson v. Brinn*, 124 N.C. 723; R.C.L., title, Judicial Sales, sec. 85.

As to the appellants, G. B. Pendleton and Kate Pendleton Pool, it is the rule that betterments in behalf of a life-tenant, by reason of improvements on the property when he occupied it as life-tenant, cannot be allowed as against a remainderman. *Northcott v. Northcott, ante*, 148; *Merritt v. Scott*, 81 N.C. 385; unless when they were made such life tenants held the property under the fair and reasonable belief that he owned the same in fee. *Faison v. Kelly*, 149 N.C. 282. On the record, however, we do not think this objection is open to appellants; in fact, we do not understand that they now make it, and this on the

ground that they joined in the complaint alleging that these betterments were justly due the claimants. Nor did they appeal or note an exception to the preliminary judgment in which the right thereto was determined. In such case, this judgment should conclude them as to this right, being under the circumstances a final judgment on that question. *Johnson v. Roberson,* 171 N.C. 194; *Davis v. Pierce,* 167 N.C. 135; *Williams v. McFayden,* 145 N.C. 156; *Bradburn v. Roberts,* 148 N.C. 214.

(255) In addition to this, we are not at all assured that, as cotenants in remainder, the facts, under certain conditions, would not call for some such allowance, the courts of equity leaning more and more to an accounting in these cases where the circumstances fairly demand it. R.C.L., Title Cotenancy, sec. 103, citing among other cases, *Brick v. Martin,* 21 S.C. 590; *Vaughn v. Langford,* 81 S.C. 282.

On the other exception, that the fund was ordered paid into court to be loaned or invested according to law, the statute directs that the proceeds from the sale of property or portions of it affected by contingent interests shall be sold for reinvestment, the property acquired to be held upon the same contingency and in like manner as the property ordered to be sold, and further, the court may authorize the loaning of the money, subject to its approval, until such time as it can be reinvested in real estate.

From a perusal of the statute, it clearly appears that the pending care of this fund, whether as to reinvestment or its loan, is referred to the sound discretion of the court, and to this extent, the judgment as to these appellants is also affirmed.

As we have endeavored to show, however, these parties are entitled to the usufruct of these interests, whether they have a life estate therein to be enlarged into a fee or a fee simple determinable on their death without issue.

This being true, the judgment will be so far modified that the interest on these loans or the use of property purchased for reinvestment be paid or allowed them for and during the term of their natural life or until their ownership is determined by the contingencies affecting it.

In this respect, therefore, the judgment as to these appellants is modified.

Modified and affirmed.

Cited: Dawson v. Wood, 177 N.C. 163; *McLean v. Caldwell,* 178 N.C. 426; *Bynum v. Bynum,* 179 N.C. 17; *Thompson v. Humphrey,* 179 N.C. 51; *Crawford v. Allen,* 180 N.C. 247; *Poole v. Thompson,* 183 N.C. 598; *Midyette v. Lumber Co.,* 185 N.C. 426; *Construction Co. v. Brockenbrough,* 187 N.C. 75; *Waddell v. Cigar Stores,* 195 N.C. 438;

DeLaney v. Clark, 196 N.C. 283; *Smith v. Smith,* 199 N.C. 8; *Stepp v. Stepp,* 200 N.C. 239; *Spencer v. McCleneghan,* 202 N.C. 671; *Perry v. Bassenger,* 219 N.C. 848; *Butler v. Winston,* 223 N.C. 426; *Beam v. Gilkey,* 225 N.C. 525; *Neill v. Bach,* 231 N.C. 395.

RALEIGH REAL ESTATE COMPANY v. MOSER.

(Filed 27 March, 1918.)

1. **Contracts—Options—Consideration — Withdrawal of Offer — Acceptance.**

An offer to sell upon commission certain lands to a proposed purchaser, so much in exchange and the balance in cash or on certain conditions of payment, is not a valid contract to convey the lands, but a mere option, or unilateral contract without consideration, which the owner could withdraw before acceptance.

2. **Contracts—Options—Acceptance—Evidence — Questions for Jury — Trials.**

Where the seller of lands upon commission under an option or unilateral contract containing certain conditions, and without consideration, telegraphs the proposed purchaser, who was absent, asking him when he could come and close the deal, and a date is set in reply, the telegraphic communication is not an acceptance of the proposal to sell, or to make it enforcible as a completed contract.

3. **Instructions—Trials—Requests—Contracts—Options — Acceptance — Evidence—Omissions.**

Where the evidence is conflicting as to whether the terms of an option without consideration to sell lands given to an agent for that purpose upon commission were withdrawn before acceptance, the question is one for the jury under proper instructions from the court; and where the court instructs the jury that it would be binding if the agent had procured a purchaser who was at all times ready, able and willing to purchase the property upon the stated terms, it is reversible error for him to omit or refuse to charge that the defendant would not be bound by his option if he had withdrawn it before its acceptance.

4. **Instructions—Trials—Evidence.**

A correct request for instruction which is not supported by the evidence is properly refused.

5. **Evidence—Principal Agent—Good Faith—Fraud.**

Evidence that an agent to sell land on commission was trying to get the best terms he could for a proposed purchaser is not alone, under the evidence in this case, sufficient of his bad faith or fraudulent purpose to obtain a greater price with the intention of appropriating the excess.

(256)

CIVIL ACTION, tried before *Devin, J.*, at June Term, 1917, of WAKE.

There was a verdict and judgment for plaintiff, and defendant appealed.

R. N. Simms for plaintiff.
Manning & Kitchin and J. C. Little for defendant.

BROWN, J. This action is brought to recover of defendant $150, commissioners alleged to be due plaintiff upon a real estate transaction. The evidence shows that the defendant owned a house and lot on Polk Street, in the city of Raleigh, and that T. W. Fenner owned lot No. 6 in Cameron Park, a suburb. The defendant had placed his house with plaintiff for sale at $3,500, the plaintiff to have 5 per cent commission for selling. The evidence shows that plaintiff had been negotiating with Fenner for a trade, and that Fenner had stated he would pay $1,350 "boot," together with $150, plaintiff's commission.

It appears that Fenner left the city without concluding the trade and before plaintiff had received specific authority to make it. Thereafter defendant signed and gave plaintiff the following paper-writing on Wednesday, 9 February 1916:

(257) RALEIGH REAL ESTATE AND TRUST COMPANY:

I agree to trade my house, No. 407 Polk Street, for lot No. 6 in Cameron Park, together with $1,350 difference coming to me. The $1,350 payable in cash, if you can get same; if not, one-half cash and the balance in one year's time, secured by a first mortgage on house and lot, No. 407 Polk Street.

After receiving such authority, the following telegraphic correspondence was had:

RALEIGH, N. C., 9 February 1916.

To T. W. FENNER,
Scotland Neck, N. C.

Wire when to expect you here. We can trade.

RALEIGH REAL ESTATE AND TRUST COMPANY.
SCOTLAND NECK, N. C., 9 February 1916.

RALEIGH REAL ESTATE AND TRUST COMPANY,
Raleigh, N. C.

Will come Sunday. Will that do? Not convenient sooner.

T. W. FENNER.
RALEIGH, N. C., 10 February 1916.

To T. W. FENNER,
Scotland Neck, N. C.

Be in Raleigh not later than Monday morning.
RALEIGH REAL ESTATE AND TRUST COMPANY.

We are unable to agree that this correspondence constitutes a valid and enforcible contract of exchange on the part of Fenner. It is true that before leaving Raleigh he had expressed a willingness to trade upon certain terms, but his proposition was not accepted and he did not confirm it by telegraph. He merely replied that he would be in Raleigh at a certain time.

Neither is the writing signed by defendant a valid contract to convey. It was a mere option, a unilateral contract without consideration, which could be withdrawn before acceptance. It was authority for the broker to sell on the terms specified. As is said in *Trust Co. v. Adams*, 145 N.C. 161: "The defendants having specified no definite time for the duration of the plaintiff's employment as their broker when they appointed and authorized it to sell the lots, had the right to terminate it at will before any contract was affected with a purchaser, subject, however, only to the requirement of good faith."

It is contended by defendant that he revoked this authority on Saturday, 12 February, before any trade was consummated and before Fenner arrived at Raleigh.

As to what took place on the 12th, there is a conflict of evi- (258) dence. The plaintiff's witness, Chamberlain, thus states his version: "The next conversation with Moser after 9th February was over the telephone Saturday, the 12th, and he said his wife would refuse to sign the deed, and said I need not go any further with it. I told him it was too late because we had a contract to the effect that he would accept the proposition that we had from Fenner. Mr. Moser said he would come down to see me; that was on Saturday, the 12th."

The defendant testified: "I do not know when the next conversation with them was, and it was a day or two later Mr. Chamberlain called me up and said he wanted to examine the title, and I told him that the title was all right, but that we need not go any further; that I had decided not to sell, and he said, 'What is the trouble?' and I said, 'I will come down and tell you what is the matter.' I went down to see him and told him that I had decided not to sell, and I told him that my wife had decided that she did not want to sell; and when that statement was made he had no information that Mr. Fenner had made any proposition."

The case appears to turn upon the disputed fact as to whether on Saturday the 12th the plaintiff had procured a bona fide purchaser who

was ready, able and willing to take the property upon the defendant's terms, as stated in the paper-writing of 9 February, and had so notified defendant at the time when defendant undertook to withdraw the property. If so, upon practically all the authorities, plaintiff is entitled to recover.

Upon this phase of the case the court charged the jury: "If the jury should find from the evidence and by the greater weight thereof that the defendant M. A. Moser placed the property referred to in the evidence with the plaintiff, that is, the Raleigh Real Estate and Trust Company, for sale as real estate broker on specific terms of $3,500, that is, $2,000 in exchange for a lot and $1,500 cash, and with an agreement that of that amount the plaintiff was to have $150 for his commission in the transaction, and you find that thereupon the Raleigh Real Estate and Trust Company procured one Fenner, who was at all times ready, able and willing to purchase this property on the identical terms proposed by the plaintiff, to wit, $3,500, $2,000 for the lot and $1,500 in cash, and the plaintiff so informed the defendant in the conversation in which the defendant attempted to withdraw the authority, and you find that no material fact in relation to the transaction was concealed from the defendant by the plaintiff, the court instructs you to answer the issue $150 and interest. Unless you find these facts to be true, you will answer it 'Nothing.'"

(259) The defendant requested this instruction: "Under the law the defendant had the right to withdraw his proposition at any time before the plaintiff produced a purchaser ready and willing to buy the property on the terms made by defendant, and if you find from the testimony that the defendant withdrew his proposition on Saturday, and that at that time the plaintiff had not effected a sale or trade, then you will answer the issue 'No,' or 'Nothing.'"

In failing to give this instruction, we think the court erred. The instruction given is correct as far as it goes, but the judge failed to state the defendant's contention and to instruct them that the defendant had a right to withdraw his proposition under certain conditions, and what those conditions were. Even without a specific instruction, it was incumbent upon the judge to do this, for when the judge assumes to charge and correctly charges the law upon one phase of the evidence, the charge is incomplete unless it embraces the law as applicable to the respective contentions of each party, and such failure is reversible error. *Jarrett v. Trunk Co.*, 144 N.C. 299. As is held in *Baker v. R.R.*, 144 N.C. 37: "It is the duty of the trial judge to give a requested prayer for special instruction, which is correct in itself, material to the case and based upon certain phases of fact reasonably assumed upon the evidence, and a general and abstract charge of the law applicable to the case is not sufficient."

The defendant requested the court to charge the jury: "The law requires the utmost good faith on the part of an agent toward his principal, and if you should find that while the plaintiff was acting as agent for the defendant it was endeavoring to obtain a greater price than that fixed by the defendant, with the intention of appropriating such excess and not accounting for same to the defendant, then the plaintiff would be entitled to recover nothing for any efforts it might have made in trying to sell the property."

The instruction embodies a correct and very wholesome rule of law, but we do not think there is any sufficient evidence to support it.

Plaintiff's witness and agent, Chamberlain, testified: "As to the terms, he said he had the money, if necessary, but he would rather have some time on part of it. He had told me that when I wrote the letter to Moser. I knew Fenner could pay cash, but said he would rather have a little more time. I do not recall that I told Moser that Fenner was ready to pay the difference in cash. I was trying to get the best terms I could for Fenner. He was buying from me and was a customer of mine."

This is the only evidence relied upon to support the instruction, and we think it fails to disclose any bad faith or fraudulent purpose upon the part of plaintiff. There is no evidence that plaintiff was Fenner's agent to make the trade, or that plaintiff was to re- (260) ceive a dollar more for their services than the $150 agreed to by defendant. It is true this was to be paid by Fenner, but it was in exoneration of defendant. All the evidence shows that if the trade had been fully consummated, defendant would have received every dollar the paper-writing called for, and that plaintiff would have received no more than the stipulated commission of $150.

The language of the witness Chamberlain is ambiguous and its purport not quite understood by us, but it is probable that he was referring to the terms of payment. Certainly, nothing else appearing, it is not sufficient to brand plaintiff with bad faith and fraudulent conduct in its dealings with defendant.

For the error pointed out in the charge, there must be a

New trial.

Cited: Butler v. Manufacturing Co., 182 N.C. 552; *S. v. O'Neal*, 187 N.C. 25; *S. v. Melton* 187 N.C. 482; *S. v. Bost*, 189 N.C. 643; *Richardson v. Cotton Mills*, 189 N.C. 655; *Milling Co. v. Highway Commission*, 190 N.C. 699; *Mehaffey, Admx. v. Construction Co.*, 194 N.C. 719; *S. v. Bryant*, 213 N.C. 757; *Switzerland Co. v. Highway Commission*, 216 N.C. 460; *Johnson v. Insurance Co.*, 221 N.C. 445; *S. v. Alston*, 228 N.C. 558.

E. S. FORD v. DEWITT MOORE.

(Filed 27 March, 1918.)

Statute of Frauds—Debt of Another—Promise—Consideration.

Where money and crop supplies are advanced to a father and son upon the promise of the father alone to pay for them, and accordingly the credit is extended at the time or thereafter, the transaction does not fall within the meaning of the statute of frauds requiring a writing, etc., for one to become bound for the debt, etc., of another; and when there is evidence of such transaction, a motion as of nonsuit should be denied.

CIVIL ACTION to recover a debt, tried before *Lyon, J.*, at November Term, 1917, of FRANKLIN.

From a judgment of nonsuit plaintiff appealed.

W. H. Yarborough and Ben T. Holden for plaintiff.

W. H. Ruffin, Thomas W. Ruffin, and W. M. Person for defendant.

BROWN, J. This action is brought to recover $592.99 for money, supplies, and a horse alleged to have been furnished to defendant and his son, John D. Moore. At the close of the evidence, the court, being of opinion that there is no evidence that the credit was extended to defendant, or that he was the original promissor, and the contract not being in writing, sustained a motion to nonsuit.

There is evidence that in the beginning of the year 1914 this defendant went to plaintiff, a merchant engaged in the mercantile and live-
stock business, and made a contract with plaintiff for advances
(261) for himself and his son, John Moore; that defendant obtained
$34 in cash at once to pay his son's account at McKennis'; that he purchased a horse for him, and that plaintiff advanced during the year to the son feed supplies and some money with which to make a crop.

There is evidence that at the time of the arrangement defendant told plaintiff that he did not wish his son to know that he was helping him. For the protection of defendant, the plaintiff caused the son to execute a crop lien and chattel mortgage. The advances were charged on the books to the defendant, DeWitt Moore and John D. Moore.

We are of opinion that the court erred in sustaining the motion to nonsuit.

There is abundant evidence to go to the jury that the promise of defendant was made before the debt was created; that the credit was extended solely to him, and that if any credit was extended to the son it was in the capacity of a joint principal with his father. *Morrison v. Baker,* 81 N.C. 81; *Sheppard v. Newton,* 139 N.C. 536.

It is immaterial that the account was charged on the books against both father and son, if the credit was extended to the former. The obligation of the promissor is binding if made at the time or before the debt is contracted when the credit is extended to him or to both him and his codebtor. *Peele v. Powell,* 156 N.C. 553; *Worthington v. Frizelle & Joly,* 93 S.E. 776.

Reversed.

Cited: Balentine v. Gill, 218 N.C. 499; *Rubber Corporation v. Bowen,* 237 N.C. 427.

BENNIE ROE, BY NEXT FRIEND, v. JAMES JOURNEGAN.

(Filed 27 March, 1918.)

1. Deeds and Conveyances—Grantees Not in Esse—Statutes.

A deed executed and delivered in 1881, or prior to the Acts of 1893, ch. 498 (now Revisal, sec. 1045), conveying lands, etc., to persons not then *in esse* may not be revoked by the grantor.

2. Evidence—Declarations—Against Interest.

Where the grantor conveys land by gift to his son and later to another person under a registered deed, the declarations of the son made shortly prior to the later deed, that his father had offered to give him the place, but he would not accept it, do not, of themselves, show that the declarations were against the son's interest, and they are incompetent evidence in favor of the son's title to the lands.

3. Evidence—Admissions—Lands—Title.

Admissions as to title must be made by the adverse party or one under whom he claims to be admissible against him in an action to recover lands.

4. Evidence—Title—Lands—Declarations—Interest — Remainderman.

Declarations of a deceased person affecting title to lands should be most closely scrutinized and admitted as evidence with great caution; and when they are admitted, it is upon the ground that, being against declarant's interest, they are as efficacious of the truth of the matter as the oath and cross-examination; and when admissible, the declarations of a life tenant may be competent against the remainderman. The distinction between admissions and declarations discussed by ALLEN, J.

5. Evidence—Title—Lands—Declarations—Burden of Proof.

One relying on declarations of a deceased person as affecting his title and made against his interest must show that the declarant was aware of their effect at the time; and where the facts and circumstances tend

to disprove this, and only the mere fact of the declaration is testified to, such declarations are inadmissible.

6. Evidence—Lands—Title—Ante Litem Motam.

The doctrine of *ante litem motam*, in its relation to the admissibility of declarations affecting title to lands, applies to the beginning of the controversy and not the action.

7. Deeds and Conveyances—Delivery—Presumptions—Evidence.

The registration of a deed presumes delivery and places the burden of proof on the one who controverts its delivery.

8. Pleadings—Admissions—Delivery—Evidence.

Where declarations are relied on in an action to recover lands to show that a deed to lands had not been delivered, and the pleadings and admissions show that the deed was delivered: *Semble*, it is not open to a party on the trial to deny its delivery.

(262) APPEAL by plaintiff from *Lyon, J.*, at the August Term, 1917, of FRANKLIN.

This is an action for the recovery of land. Plaintiffs claim under the deed of their grandfather, William Roe, dated 26 August 1881, and recorded 27 May 1882, made to plaintiff's father, Winfield Scott Roe.

Defendant claims under a deed made by William Roe to Winfield Scott Roe dated 2 January 1886, and recorded 25 January 1886, for the same land, and subsequent deed of W. S. Roe and wife to defendant, also duly recorded.

The deed of 26 August 1881, contained *habendum* as follows: "To have and to hold to him, the said W. S. Roe, during his natural life; and if he should have any living child or children, then to them; or if his wife, Mary Roe, should survive him, then to her during her lifetime. The said W. S. Roe having no children, then the said land is to revert back as a part of my estate."

The second deed was in fee simple; was made after the death of Mary Roe; the second taker for life under the first deed had died without issue, and the deed contained the following reference to the first named deed: "It being the tract of land deeded by the said William Roe and wife to W. S. Roe during his lifetime, and containing 50 acres, more or less."

(263) W. S. Roe married a second time and died in July, 1915, leaving issue surviving, Elijah Roe and Bennie Roe, plaintiffs.

The real controversy on the trial was as to the delivery of the deed of 1881, and on this question the defendant was permitted to prove by a witness that he went to see W. S. Roe a short time before the deed of 1886 was executed for the purpose of buying the land, and that he, W. S. Roe, said "he didn't have any land to sell; said his father had offered to give him a place, but he wouldn't accept it."

The plaintiffs excepted.

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

William H. Ruffin, Thomas W. Ruffin, and William W. Boddie for plaintiffs.

Yarborough & Beam and A. J. Harris for defendant.

ALLEN, J. The plaintiffs are the owners of the land in controversy if the deed of 1881 was delivered, although not then *in esse*, because of the conveyance by the deed of a life estate to W. S. Roe (*Powell v. Powell*, 168 N.C. 561), and the deed of 1886 could not affect their title as it was executed prior to the enactment of the statute conferring the power to revoke a deed when made to persons not then in being (Acts 1893, ch. 498, now Revisal, sec. 1045), and the title having passed from the grantor by the first deed, if delivered, it could not be recalled. *Buchanan v. Clarke*, 164 N.C. 58.

These positions, practically conceded by the parties, show the importance and materially of the declaration of W. S. Roe, which is the only evidence offered by the defendant to rebut the presumption of delivery arising from the registration of the deed, and the question presented is as to the admissibility of this declaration.

It was not competent as an admission because not made by a party, or by one under whom the plaintiffs claim, as they derive their title from the deed of William Roe and not from W. S. Roe, and if admissible at all it must be as a declaration against interest, which is a recognized exception to the rule excluding hearsay evidence.

Declarations against interest are admitted from necessity, as otherwise, the declarant being dead, a party might be deprived of the opportunity to establish a just cause, and because self interest is supposed to supply a test of truth as efficacious as the oath and cross-examination; and it has been held, in the application of the rule, that the declaration of a life tenant may be competent against a remainderman. *Smith v. Moore*, 142 N.C. 287.

The courts, however, while receiving evidence of this character, say that "the testimony of witnesses based merely upon memory as to oral statements made by persons since deceased should be (264) received with great caution, and if a long time has elapsed since the alleged statements (in this case more than thirty years), such testimony is held to be most unsatisfactory and inconclusive." *Dixon v. Dixon*, Ann. Cas., 1915 D, 622.

"Words are harder to observe than physical things." Minto Logic., 290. "The narration of conversations correctly is the most difficult fact

of memory and expression." Piffett's Succession, 37; Lee Ann., 871, "Conversations are always but partially recollected, never truly stated." Note to *Wilbur v. Toothaker,* 18 Ann. Cas., 1191.

"This character of evidence is the weakest and least satisfactory of any in persuasive character. It may be observed that they ought to be received with great caution. 'The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake, the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party did say.' 1 Green on Ev., 16th, 2d sec. 200.

"Though the witness who testifies to the oral statement may be honest, his memory may be at fault, or he may have failed to comprehend and interpret the statement as it was intended to be understood by the speaker. . . . Moreover, so easy is it to fabricate such evidence that there is strong temptation to a dishonest or interested witness to do so. (17 Cyc. 806.) After enumerating these elements of weakness, the author of the article in Cyc. on this subject, at page 808, remarks: 'Exposed to all the infirmities just mentioned is the testimony to oral statements of dead men, which is invariably subjected to the closest scrutiny in view of the impossibility in most cases of convicting the witness of perjury if his testimony is willfully false.' " *Escollier v. R.R.,* Ann. Cases, 1914 B., 470-1.

In furtherance of this policy of caution and scrutiny, the line has been marked between the declarations of deceased persons and the admissions of parties, which are subject to some but not to all the infirmities of evidence of declarations, and rules have been formulated prescribing tests for their admissibility. The distinction between admissions and declaration against interest is very clearly stated by Mr. Chamberlayne in his work on Evidence, Vol. 2, sec. 1235, as follows:

"(*a*) The admission is the statement of a party; the declaration against interest is made by a third person. (*b*) To be admissible at all, the declaration against interest must contravene, to the knowledge of the declarant, his pecuniary or proprietary interest. In case (265) of an admission, such a state of affairs would enhance the probative weight; it would not, however, be essential to admissibility. To secure that, it is sufficient that the statement should be the voluntary act of the party and cover a probative or *res gestae* fact. (*c*) The declaration against interest is secondary evidence and is incompetent unless the declarant is shown to be dead, absent from the jurisdiction,

or unavailable for some other sufficient cause. The admission, on the contrary, is primary evidence and is competent though the declarant be present in court and ready to testify. (*d*) An admission may be made at any time. The declaration against interest is incompetent if made *post litem motam*. (*e*) The admissibility of a declaration against interest is governed by the rules of sound reason. That of an admission is determined largely by procedure."

The same author says, Vol. 4, sec. 2770, that the declarant must have been distinctly conscious at the time of making his assertion that it was directly opposed to his pecuniary or proprietary interests, that there was "an absence of controlling motive to misrepresent" (sec. 2772); that "The burden of proving that the declaration was against the interest of the deceased declarant lies upon the proponent of the evidence" (sec. 2773); that "To establish the degree of relevancy or probative force upon which this exception to the hearsay rule rests, it is essential that the speaker should possess a present, rather than be expecting to acquire a future interest. He must not only possess this interest in point of fact, but be aware that he does so. The willingness of the declarant to minimize his apparent interest must not spring from a desire that a still greater gain will result by his making an apparently trifling sacrifice, so that he may be really the victim of a controlling motive to misrepresent while seemingly forced to speak the truth, though highly injurious to himself. In other words, it is required that the interest in derogation of which the declarant speaks should be shown by the proponent to be (1) actual, (2) known to the declarant, (3) the substantial interest involved in the matter" (sec. 2781); that "should the interest of the declarant be erroneously supposed by him to be served by the statement which he is making, the latter is devoid of probative force, although as the situation actually exists it is very much against his pecuniary or proprietary interest" (sec. 2782); and "it should be made to appear by the proponent that the declarant is not, as it were, making a jettison, throwing over a small portion of his cargo for the sake of saving the rest. Should the court come to entertain a suspicion that it is dealing with an attempt to prejudice a small interest for the purpose or with the result of saving a large one, the evidence will be rejected" (sec. 2784).

The other text-writers lay down the same general principles, (266) although not usually with the same elaboration, and applying them to the evidence before us, the declaration of W. S. Roe is incompetent.

We will not put our decision on the ground that the declaration was not made *ante litem motam*, which means the beginning of a controversy, and not of an action (*Westfeldt v. Adams*, 131 N.C. 385), be-

cause there is a conflict of authority as to the necessity for this requirement; but if we did so, it appears that the controversy as to the delivery of the deed had already arisen, as the registration of the deed presumed delivery and the declarant was denying it.

We prefer to deal with the question as to whether the defendant has sustained the burden of showing that the declaration was against the interest of the declarant, that "he had no probable motive to falsify the fact declared" (*Smith v. Moore, supra*), and that there was "a total absence of interest to pervert the fact." *Smith v. Moore,* quoting from Lord Ellenborough.

Whatever else may be in doubt, it is clear that the declarant did not believe it was against his interest to say that the deed of 1881 had not been delivered, and there was therefore absent the consciousness of self-interest, which takes the place of the oath and cross-examination, and without which the declaration is not admissible.

So far from thinking such a declaration against his interest, he evidently thought the deed of 1881 conveying to him a life estate was injurious to him, because he says he would not accept it. Nor is the declaration shown to be free from a probable motive to pervert the truth. If the deed of 1881 could be shown to be inoperative, the title to the fee would be in his father, to which he might reasonably hope to succeed as heir if he could not procure another deed, and there is no suggestion in the record of any influence which could by any possibility frustrate his expectation of owning the whole estate one way or the other. The declaration was also made but a short time before the execution of the deed of 1886 conveying to him the fee, the nearness in point of time permitting an influence of one being a preparation for the other.

We therefore conclude that the evidence ought not to have been admitted; but it is doubtful if the question of delivery is open to the defendant.

The deed of 1886 is not set out in full, but the recital, "it being the tract of land deeded by the said William Roe and wife to W. S. Roe during his lifetime," would seem to be an acknowledgment of the delivery of the deed of 1881, but if this is not binding on the defendant, the delivery of the deed of 1881 is not only not put in issue by the pleadings, but it is substantially admitted.

It is alleged in the complaint:

(267) "1. That on 26 August 1881, William Roe and wife, Elizabeth Roe, grandparents of the said Bennie Roe and Elijah Roe, conveyed to their son, Winfield Scott Roe, father of the plaintiffs, by a deed which is recorded in the registry of Franklin County in Book 60, at page 225, a tract of land in said county of Franklin, which is bounded and described as follows:" (Description omitted.)

The habendum of said deed being as follows: "To have and to hold to him, the said W. S. Roe, during his natural life; and if he should have any living child or children, then to them; or if his wife, Mary Roe, should survive him, then to her during her lifetime; and after the death of the said W. S. Roe and his wife, Mary Roe, the said W. S. Roe having no children, then said land is to revert back as a part of my estate."

"2. That on 2 January 1886, after the deed described in paragraph 1 hereof had been delivered and put to record, the said William Roe and wife executed and delivered to said W. S. Roe a deed conveying said 50 acres of land to him in fee simple, which deed is recorded in said registry in Book 71, page 269. The record of both of said deeds will be offered in evidence when in the course of the trial of this cause the same becomes necessary."

The answer to these paragraphs is as follows:

"1. It is admitted that the deed referred to in paragraph 1 of the complaint appears of record in the office of the register of deeds of Franklin County in Book 60, page 225, but in connection therewith, this defendant says that on the date the said deed purports to have been dated, to wit, 26 August 1881, and the date when the same appears to have been recorded, to wit ....., the said plaintiffs, Bennie Roe and Elijah Roe, had neither of them been born, and the said W. S. Roe had never had any children. Mary Roe, wife of W. S. Roe, was living, but died prior to 2 January 1886, without ever having had any children. And this defendant further says that no consideration passed, or could have passed, from the said plaintiffs to the said William Roe and Elizabeth Roe, grantors in said deed, the sole consideration cited therein being natural love and affection for the said W. S. Roe. This defendant, therefore, insists that said plaintiffs not being in existence on said 26 August 1881, and no consideration having passed from them or from any one in their behalf, they did not take, and could not have taken, any estate or interest in the lands described in said deed. Except as herein admitted, paragraph 1 of the complaint is denied.

"2. The execution and delivery of the deed referred to in paragraph 2 of the complaint, whereby William Roe and wife conveyed the said lands to W. S. Roe in fee simple, is admitted, and it is further true that on said 2 January 1886, the said W. S. Roe had no children or wife, Mary Roe, his former wife, having died some time prior (268) to said date without ever having had any children."

It thus appears from the first paragraph of the answer that the only attacks made by the defendant on the deed of 1881 are that it was executed when the plaintiffs were not *in esse*, and that it was without

consideration, and from the second that the allegation in the second paragraph of the complaint, that the deed of 1886 was executed after the deed of 1881 "had been *delivered* and put to record," is not denied.

We are therefore of opinion, on the whole record, that the plaintiffs are entitled to a

New trial.

Cited: S.c., 179 N.C. 686; *S.c.,* 181 N.C. 181, 183; *Nobles v. Davenport,* 183 N.C. 210; *Best v. Utley,* 189 N.C. 365; *Carr v. Bizzell,* 192 N.C. 213; *S. v. Blakeney,* 194 N.C. 652; *Insurance Co. v. R.R.,* 195 N.C. 696; *Stanback v. Bank,* 197 N.C. 295; *Thompson v. Buchanan,* 198 N.C. 281; *Hager v. Whitener* 204 N.C. 751; *Jefferson v. Jefferson,* 219 N.C. 339; *Mackie v. Mackie,* 230 N.C. 154.

JOHN R. HAWES ET AL. v. COMMISSIONERS OF PENDER COUNTY.

(Filed 27 March, 1918.)

Stock Law—Taxes—Assessments—Real Property—Statutes—Injunction.

Revisal, sec. 1675, authorizes, upon certain conditions, "a tax upon the property holders within the district," when withdrawing "from a stock-law district"; and section 1685 authorizes an "assessment" upon all real property, etc., for the purpose "of building stock-law fences" within counties "which may adopt the stock laws"; but an assessment by a county upon the real estate to build a fence for the purpose of keeping the stock in antistock-law territory from trespassing is unauthorized by law; and a restraining order should be continued and, under the facts of this case, made perpetual at the final hearing.

APPEAL by defendants from *Devin, J.,* at chambers in Wilmington on 12 December 1917, continuing a restraining order to the final hearing.

C. D. Weeks and C. E. McCullen for plaintiffs.
J. H. Burnett and John D. Bellamy & Son for defendants.

CLARK, C.J. This is an action by sundry citizens and taxpayers of Pender County and owners of real estate therein, alleging that the Board of Commissioners of Pender had levied an assessment upon all real estate within the boundaries of the county, excepting a part of Rocky Point Township, for the purpose of raising funds to construct a fence around the outer boundaries of said district, and would order the sheriff to collect the said assessment out of the real estate of said county.

The Court finds as a fact that the defendants have been restrained in another action pending in the Superior Court of Pender from levying a tax upon all the property, real and personal, located in the said district under authority of Revisal, 1675, as amended by chapter 99, Public Local Laws 1917. The validity of such "tax" is (269) not before us in this proceeding.

The court properly held as a conclusion of law that "the Board of County Commissioners of Pender have no lawful authority to levy such assessment upon the real estate of said district."

There are only two statutes under which the commissioners of Pender could claim authority to levy this assessment, *i.e.*, Revisal, 1675 and 1685. Revisal, 1675, provides that upon the conditions therein prescribed under which territory may be allowed to "withdraw from a stock-law district," the expense incurred in changing the fence in such territory shall be provided for by "a tax upon the property holders within said district." That section certainly does not authorize the levy of an *assessment* which must be laid solely upon the real estate of the district benefited. The order herein enjoined does not levy a "tax" upon all "property holders."

Revisal, 1685, does authorize the county commissioners to levy an assessment, but only for the purpose therein stated "of building stocklaw fences," for which purpose "the board of commissioners of the county may levy and collect a special assessment upon all real property taxable by the State and county, within the county, township, or district *which may adopt the stock law.*" This is an assessment, but it is not for such purpose, and is, therefore, unauthorized. This has been expressly held. *Harper v. Comrs.*, 133 N.C. 114.

The restraining order was properly continued to the final hearing, at which time, upon the admissions in the defendants' answer, the injunction should be made perpetual.

Upon the merits of the stock-law and antistock-law controversy in the county of Pender, the Court has no authority nor desire to pass. The sole question presented to us is whether there is any authority conferred by law upon the commissioners of said county to pass the resolution levying an assessment upon real estate to build this fence for the purpose set out in the resolution of keeping the stock in an antistock-law territory from trespassing upon people in the adjoining counties of Duplin, Sampson, Bladen, Columbus, Brunswick and New Hanover and Rocky Point Township in Pender, in which the stock law prevails, and it is very clear that such authority is not conferred by any statute, and the judgment of his Honor is

Affirmed.

Cited: Marshburn v. Jones, 176 N.C. 519.

(270)

IN RE LYON SWAMP DRAINAGE DISTRICT.

(Filed 27 March, 1918.)

1. Drainage Districts — Judgments — Modifications — Changes — Courts.

The judgments rendered upon the organization of a drainage district does not conclude the filing of supplementary petitions, for such proceedings are subject to modification from time to time by the landowners in the district or by the supervisory orders of the court, with the restriction that no radical change will be made or any change that would throw additional costs upon the landowners therein without benefit to them.

2. Same—Supplementary Petition—Procedure.

Where it is made to appear that the stopping of a main canal within a drainage district short of the distance originally planned is a detriment, and causes damage to the health of those living therein, and is also insufficient, it is proper, upon the petition of some of the landowners in the district to extend the canal at their own cost, for the court to appoint "viewers" with direction to report their action, subject to the approval of the court.

APPEAL by Drainage Commissioners from *Devin, J.*, at chambers, 25 January 1918; from PENDER.

This is a petition by certain members of the Lyon Swamp Drainage District. They do not attack the formation of the original district nor the bond issues on account thereof, nor are they seeking to enjoin the collection of taxes, or in any way to change the boundaries of the district, or the decrees already made. The petitioners have paid all their assessments for the expenses in forming the district and its maintenance and the taxes levied for the payment of the bonds.

This is a supplementary petition, after due notice given to the drainage commissioners, filed before the clerk, who held that the landowners within said district above the Vollers line should be permitted, without cost to the landowners below that line, to extend through their lands a canal sufficient in size and depth to drain and carry off the waters from said lands and to discharge the same into the main canal already constructed.

The clerk before whom the petition was filed finds as facts that the main canal extending up Lyons Swamp to the Vollers line is amply sufficient to accommodate and carry off the water from the lands in said district above that line, and it would be beneficial to said canal to have this additional water turned through it, which will tend to keep it open and clear of trash and vegetable matter; that said lands above the Vollers line owned by the petitioners are a part of said

drainage district and have been paying assessments regularly, though their lands have received no actual benefit from the drainage, and that the Worth and Vollers farms in said district below the (271) Vollers line are not now sufficiently drained, but if the said canal should be extended as desired by the petitioners of sufficient size and depth to drain the lands above the Vollers line, it would benefit the Worth and Vollers farms below that line by giving them sufficient drainage, and that the canal below is amply sufficient to take care of the water coming down from above if the canal is extended. The clerk held that the landowners above the Vollers line should be allowed to drain the waters from their lands into the said main canal without being required to pay anything for the privilege, but that the extension of the canal through the lands of the petitioners should be provided at their own expense without any cost to the landowners below said line. The clerk directed that the line of the extension of the canal from its present head through the lands of the petitioners should be selected, marked and designated by the board of viewers, whom he named, and who should lay out the routine and report their action for approval by the court, together with the cost of digging and constructing such canal.

From this order the drainage commissioners appealed to *Devin, J.*, who found substantially the same facts, and, further, that the extension of the canal now prayed for was part of the original plan of the district, and that by stopping the canal at the Vollers line the bottom of the canal had silted up a foot above the depth called for in the original plan for a distance of 2,000 yards, with the result that it had retarded the flow of water down the said canal, and that by extending the canal through the property of the petitioners to conform to the original plan, it would have the effect to deepen the present canal for the distance of 2,000 yards, and that the natural drainage of the water from the land of the petitioners is through said main canal, the extension of which will benefit said land, which is very fertile, and will produce abundant crops if such adequate drainage is provided, but that now the lands of the petitioners above the Vollers line are too wet for cultivation for lack of the drainage which the petitioners are asking to make at their own cost, and that the stagnation of water in this territory is such as to threaten the health of the community, including the village of Centerville, which will be much improved by this drainage.

All the petitioners were parties to the original proceeding, and their lands are already within the district. They have paid all assessments without deriving any adequate benefit from said district in consequence of the amendment of the original plan which stopped the main canal

at the Vollers line, instead of carrying it through the lands of the petitioners as originally provided.

The judge affirmed the action of the clerk, and the commissioners appealed.

(272) *Bayard Clark for petitioners.*
C. D. Weeks for Drainage Commissioners.

CLARK, C.J. In *Adams v. Joyner*, 147 N.C. 77, almost the identical question was presented and decided. The defendant there contended that the formation of the district had been settled in a drainage proceeding in 1891, and pleaded estoppel and *res judicata*. The Court, however, held against this contention and the point came fairly before the Court in *Staton v. Staton*, 148 N.C. 490. The Court held that the judgment which had been entered in 1886 was "not a final judgment conclusive of the rights of the parties for all time, as in a litigated matter, but it is a proceeding *in rem* which can be brought forward from time to time, upon notice to all the parties affected, for orders in the cause, dividing (as here sought) the amount to be paid by each of the new tracts into which a former tract has been divided by partition or by sale; to amend the assessments when for any cause the amount previously assessed should be increased or diminished; for repairs; for enlarging and deepening the canal, or for other purposes, or to *extend the canal* and bring in other parties. It is a flexible proceeding, and to be modified and molded by decrees from time to time to promote the objects of the proceeding. The whole matter remains in control of the court."

We think this expresses the intention of the statute. Subsequent events, such as the silting up of a canal, or washouts by reason of torrential rains, or other causes, may cause a necessity for some changes in the plans originally adopted, or experience may point out unforeseen defects, and for this and other causes the corporate body itself can make proper changes in its plans, or they can be ordered upon supplementary petition before the clerk, subject, however, in both cases to the rule that there can be no radical change made in the plan marked out in the original proceedings, or any that will be a dertiment to the rights of the bondholders or to the other proprietors within said district. In *Gibbs v. Drainage Comrs., ante,* 5, this Court approved the action of the drainage commissioners in raising the assessment for maintenance which was made necessary by changed conditions.

In this case it has been proven by experience that the dropping off from the original plan of the extension of the canal as now proposed has made the drainage district an injury, not a benefit, to the petition-

ers, and has caused stagnant water to be ponded upon their lands to the detriment of cultivation and the impairment of the health of the community, and the board of viewers were directed to lay out and report the location and cost of the proposed extention, which, if approved by the court, shall be made at the sole cost of the petitioners. (273)

In *Adams v. Joyner,* 147 N.C. 83, the Court, discussing the right of the court to make orders from time to time in the regulation of drainage matters by reason of changed conditions, says: "The purpose of the statutes is the promotion of agriculture, the increase of food for the people. They should be so construed and so administered that this purpose be accomplished."

In *Staton v. Staton, supra,* the Court, after holding that it is not necessary to keep such cases on the docket, says: "The proceedings are not highly technical, but are intended to be inexpensive and to be molded from time to time *by the orders of the court* as may best promote the beneficial results contemplated by the statute."

The cases cited by the counsel for the appellants are all where an attack was made upon the formation of the district, or to enjoin the collection of taxes, or to withdraw lands from the district. In *Griffin v. Comrs.,* 169 N.C. 643, relied on by appellants, the Court declined to enjoin the collection of taxes because the right to object not having been taken at the proper time, it had been waived, but says that the plaintiffs might proceed against the drainage commissioners as to other matters.

It was intended that these proceedings should be flexible and subject to modification from time to time by the action of the landowners in the district or by the supervisory orders of the courts, subject, however, to the restriction that there should be no material change or any change that would throw additional costs upon the other landowners except to the exent of benefit to them.

In this case, it was found as a fact by the clerk, and the finding was approved by the judge, that the extension asked for will be a benefit to the canal already dug, and will benefit some of the owners of the lands below the Vollers line as well as those above that line while the expense shall be borne entirely by the petitioners above that line.

Upon the findings of fact, we think that the order appointing "viewers" and directing them to make a report of their action, subject to the approval of the court, was properly granted.

Affirmed.

Cited: Oden v. Bell, 185 N.C. 404; *Drainage District v. Cahoon,* 193 N.C. 330; *Drainage District v. Bordeaux,* 193 N.C. 628; *In re Drainage District,* 228 N.C. 249.

GEORGE L. FARMER ET AL v. J. FULTON HEAD, ASSIGNEE OF MATTHEWS ET AL.

(Filed 3 April, 1918.)

Partnership — Individual Liability — Insolvency—Exemptions — Consent—Creditors—Exoneration.

Each member of a partnership is individually liable for partnership debts, with the right to have the firm's assets applied thereto in exoneration; and, in case of insolvency, neither member of the firm may claim his personal property exemption therefrom, without the consent of the other; and this principle applies in exoneration of the retiring partner, and for the benefit of the firm's creditors, when the continuing partner has bought out the other upon condition that he shall assume the indebtedness and pay them out of the assets of the partnership.

(274) CONTROVERSY WITHOUT ACTION heard by *Stacy, J.*, 5 January 1918 from NEW HANOVER.

This is an action to determine the right of the defendant L. P. Matthews to a personal property exemption in certain property which formerly belonged to the partnership known as the Frost Ice Cream Company, which partnership was composed of the defendant L. P. Matthews and the plaintiff George L. Farmer.

On 2 April 1917, the plaintiff Farmer sold his interest in the business and property of the partnership to the defendant Matthews, who, as a part of the contract of sale, assumed the payment of all the debts of the partnership and agreed to pay the same out of the said business.

After said sale, the said Matthews continued the business until 30 June 1917, when he executed a deed of assignment to the defendant Head conveying to him the entire property, which was the same property owned by the partnership on 2 April 1917, and reserving therein his personal property exemption.

All of the property and business has been sold by the assignee and the assests in his hand are insufficient to pay the debts of the partnership in existence on 2 April 1917, and which are now due and owing.

The plaintiffs in the action are creditors of the old partnership, and Farmer a member of the old firm, and they contend that the defendant Matthews cannot have his personal property exemption until the debts of the old partnership are paid, without the consent of his former partner Farmer, who objects to the defendant having his exemption.

His Honor rendered judgment in favor of the plaintiff, denying the right of the defendant to his exemption, and the defendant excepted and appealed.

Kenan & Wright for plaintiffs.
J. A. McNorton for defendants.

ALLEN, J. Prior to 2 April 1917, the plaintiff Farmer and the defendant Matthews were partners, and as such each was liable for the debts of the firm.

Growing out of this liability, the Court says in *Allen v. Grissom,* 90 N.C. 92: "Each member of a partnership has a right to require the application of the joint effects to the joint debts, before any portion of them can be diverted to the individual debts of the separate partners, and this is a means of personal exoneration. It is an (275) equity possessed by each and grows out of their relations as partners, and the implied limitation upon the power of each to dispose of the common property in furtherance of the object of their association. But this equity does not extend to the creditors, as such, so as to create a lien, but they receive the benefits of the exercise of the right of the separate partners to require the appropriation and the exoneration is worked out in the payment of their debts." And in *Stout v. McNeill,* 98 N.C. 4: "It is plain that partnership effects ought to be first applied to partnership debts, and each partner has a right to require this to be done in his own exoneration, the separate interest of each being in the surplus left after the partnership liabilities have been discharged."

It is upon the same principle it has been held that one of several partners cannot have his property exemption out of the partnership assets without the consent of the other partners. *Burns v. Harris,* 67 N.C. 140; *Scott v. Kenan,* 94 N.C. 296.

This relationship and these rights of the parties existed on 2 April 1917, when the plaintiff Farmer sold his interest in the partnership and in its property to the defendant Matthews, and as the right to have the partnership assets applied to the partnership debts rests on the common liability for the payment of the debts, and it is upon this ground that the right to invoke the equitable doctrine of exoneration depends, the right ought to continue as long as the liability exists unless the retiring partner has waived or abandoned his right.

It needs no citation of authority to show that the retiring partner continued liable to the creditors, and that there has been no abandonment of the right to exoneration clearly appears from the agreement, which was a part of the contract of the sale, to pay the debts of the old partnership, and out of the firm business.

"A partner who retires from a firm without selling his interest therein is entitled to his share of the firm's assets, including the profits realized from the business after the firm's dissolution. After an abolute sale of his interest, he becomes, as we have seen, a creditor of the purchaser, and the assets are available to the purchaser's creditors, the selling-out partner having no lien on the old firm assets. But if the

sale is made subject to the partnership indebtedness, or upon terms from which the court can imply an understanding that the purchaser took the assets subject to a trust for the benefit of the retiring partner and the firm creditors, it is generally held that the retiring partner retains a lien by which the property can be secured for himself or unpaid firm creditors." 30 Cyc. 610.

It also appears, by fair intendment, that the partnership was insolvent on 2 April 1917, because it is agreed that the assets in
(276) hand are the proceeds of the firm property in existence on 2 April, and that they are insufficient to pay the debts of the old firm now due and owing, and when this condition of insolvency exists and one partner sells to another under an agreement to pay the debts, the retiring partner does not lose his right to have the partnership assets applied to the payment of the debts.

In *Darby v. Gilligan*, 33 W. Va. 246, it is held that where a firm is insolvent, if a partner sells out to his copartner, and the purchaser agrees to pay the firm debts, the sale cannot be considered bona fide, so as to cut off the equity of the firm creditors to be preferred; and to the same effect is *Oslon v. Morrison*, 29 Mich. 395, In the latter case Oslon and Jones were partners. Oslon sold out to Morrison, the consideration being that the vendee should pay the debts of the firm. It sufficiently appears that the firm was insolvent. The vendee neglected to comply with this agreement, and the creditors, joining with the vendor, brought suit to compel performance of the agreement and to subject the property to the payment of the partnership debts. *Held,* that the agreement to pay the debts as consideration for the transfer was a sufficient recognition of the equitable lien of the partnership creditors, tracing the same through the equity of the vendor, to enable them, joining with him, to enforce such equity.

The question is considered and discussed at length with numerous citations of authority in *Thayer v. Humphrey*, 51 A.S.R. 888 *et seq.*, and the Court sums up its conclusions on page 905 as follows, omitting those not applicable here:

"2. Partnership creditors have no lien, strictly so called, on partnership assets, but must work out their preferences over the creditors of the individual members of the partnership through the equities of such members.

"4. The word 'assets,' used in No. 1, is not confined to assets at law, but includes all assets applicable to the payment of the partnership debts, under the well defined principles for the administration of the affairs of insolvent partnerships under the direction of a court of equity.

"6. If a member of an insolvent firm sells out with the understand-

ing that the business is to be continued with the same assets, and the purchaser or purchasers, as consideration for the sale, are to assume and pay the old debts, and the circumstances are such as to evidence the fact that the purpose of the transaction is to pay the old firm debts, and to wind up the old partnership concern by the payment of the debts of such concern out of the partnership assets and a continuation of the business, the court is warranted in concluding that the equity of the outgoing partner to have the assets of the firm applied to the payment of the firm debts is not changed, and that the right of the creditor to enforce it continues."

The facts in the record before us brings this case within these (277) principles, as the partnership was insolvent at the time of the sale on 2 April 1917, and there was an agreement on the part of the defendant Matthews to pay the partnership debts and out of the partnership business.

The case of *Richardson v. Redd*, 118 N.C. 677, is also almost directly in point, in which it was held that after the death of one partner, which had the effect of dissolving the partnership, that the surviving partner could not claim his personal property exemption without the consent of the administrator of the deceased partner, which could only be upon the ground that the liability of the estate of the deceased partner to pay the debts continued, and that the right to have the firm assets applied to the payment of the firm creditors and thereby exonerate the estate was coextensive with the liability.

We are therefore of opinion that the defendant is not entitled to his personal property exemption.

Affirmed.

Cited: Oakley v. Marrow, 176 N.C. 135; *Bank v. Odom*, 188 N.C. 681.

ACME MANUFACTURING COMPANY v. MARTIN J. McCORMICK.

(Filed 3 April, 1918.)

1. Contracts—Statute of Frauds—Parol Agreement—Contemporaneous—Bills and Notes.

A parol contemporaneous agreement that a promissory note was not to be paid at its stated due date is contradictory of the written instrument and is incompetent evidence.

2. Contracts—Statute of Frauds — Parol Agreement — Subsequent—Bills and Notes—Maturity—Notice.

The rule excluding parol evidence contradictory of a written instrument does not apply to an agreement thereafter made upon a sufficient consideration, and evidence thereof is admissible as between the original parties to a promissory note, or its endorsee taking after maturity.

3. Contracts—Statute of Frauds—Parol Agreement—New Promise—Consideration—Insurance, Life.

An agreement subsequently made by the maker of a promissory note and the payee that the latter take out at his own expense insurance on the maker's life requires the consent of the maker, and is a sufficient consideration for the new promise, being an act which he was not required to do and conferring a substantial benefit on the payee.

APPEAL by defendant from *Connor, J.*, at February Term, 1918 of ROBESON.

This is an action on a note executed by the defendant to John W. Ward for $2,500, dated 19 April 1915, and payable 15 October 1915.

(278) The defendant admitted that the plaintiff was the equitable owner of the note, but denied that it was transferred to the plaintiff before maturity.

The defendant alleged in his answer as a defense:

1. That it was agreed between the defendant and the said Ward, at the time of the execution of the note, that he, the said Ward, would hold the note and accept the interest on the same annually until the defendant could pay the whole of the note.

2. That after the execution of the note the said Ward agreed with the defendant that if he would allow the said Ward to take out insurance on his life in the sum of $5,000, payable to the said Ward, as security for the said note, that he, the said Ward, would pay the premiums on the policy and hold the same to secure the payment of the said note, in the event of the death of the defendant, and that in consideration of the defendant allowing the said Ward to take out said insurance on his life that he would hold the note and accept the interest on the same each year until the defendant could pay the same.

The plaintiff moved for judgment upon the pleadings upon the

ground that the answer admitted the execution of the note and that the plaintiff was the equitable owner thereof, and that the answer did not set up a defense available to the defendant.

The motion of the plaintiff was allowed, judgment was rendered accordingly, and the defendant excepted and appealed.

MacLean, Varser & MacLean and McIntyre, Lawrence & Proctor for plaintiff.

W. E. Lynch and T. A. McNeill, Jr., for defendant.

ALLEN, J. The first defense relied on, that there was a contemporaneous agreement that the defendant would not be required to pay the note according to its terms and that the time to pay the principal would be extended upon the payment of interest, cannot be allowed because in direct contradiction of the written promise to pay.

In *Hilliard v. Newberry,* 153 N.C. 109, defendant relied upon an alleged oral contemporaneous agreement extending the time of payment beyond that shown by the face of the note sued on, and the Court said:

"As heretofore stated, the obligation sued upon, in addition, contains a positive promise to pay a definite sum at a specified time, and entitled the plaintiff to judgment according to the tenor of the bond. The claim that there was a cotemporaneous oral agreement to the effect that the time could be further extended is in direct contradiction of the written stipulation of the agreement and under several recent decisions of the Court such a position was not open to defendant. *Woodson v. Beck,* 151 N.C. 145; *Walker v. Cooper,* 150 (279) N.C. 129; *Walker v. Venters,* 148 N.C. 388; *Mudge v. Varner,* 146 N.C. 147; *Bank v. Moore,* 138 N.C. 529." And in *Bank v. Moore,* 138 N.C. 532:

"The only defense attempted amounts in substance to this: That although the defendant executed his note and received a valuable consideration for same, there was an understanding and agreement at the time that payment should never be enforced or demanded. All the authorities are agreed that such a defense is not open to defendant."

See, also, to the same effect, *Rousseau v. Call,* 139 N.C. 177, and *Boushall v. Stronach,* 172 N.C. 274.

These authorities are not in conflict with *Evans v. Freeman,* 142 N.C. 61, and *Kernodle v. Williams,* 153 N.C. 475, which permit the proof of a cotemporaneous agreement as to the mode of payment, or with many other cases in our Reports in which the cotemporaneous agreement did not contradict the writing.

This rule, excluding evidence of a parol agreement, has no appli-

cation to an agreement made after the execution of the writing, changing, or modifying the written agreement (*Brown v. Mitchell*, 168 N.C. 313), and the subsequent agreement to extend the time of the payment of the principal upon the payment of the interest upon the debt, in consideration of the defendant giving his consent for the payee to take out insurance on his life as security for the debt, is therefore a defense if based on a valuable consideration.

The question of what constitutes a valuable consideration was considered in *Institute v. Mebane*, 165 N.C. 644, where the Court says: "In 9 Cyc. 312, the author cites many authorities to support the position that 'There is a consideration if the promisee, in return for the promise, does anything legal which he is not bound to do, or refrains from doing anything which he has the right to do, whether there is actual loss or detriment to him, or actual benefit to the promisor or not.' . . .

"The Exchequer Chamber, in 1875, defined consideration as follows: 'A valuable consideration in the sense of the law may consist either in some right, interest, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.' Courts 'will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made, as consideration for the promise made to him.' Anson on Contracts, 63. 'In general, a waiver of any legal right at the request of another party is a sufficient consideration for a promise.' Parsons on Contracts, 444. 'Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise.' 2 Kent's Com. (12 Ed.), 465."

(280) If the consent of the defendant was necessary to the issuing of the policy of insurance, the agreement alleged in the answer comes within the principle laid down, as he has done an act which he was not required to do and has also conferred a substantial benefit on the creditor, the payee in the note.

Was the consent of the defendant necessary to a valid policy of insurance?

The question has not been presented in this Court before this, and it will be of rare occurrence because usually the insured must submit to a physical examination, but the authorities generally agree that the consent of the insured is necessary.

"It is held to be contrary to public policy to insure the life of a person who has not consented to the issuance of a policy." 14 Mod. Am. Law, 145. "Except perhaps in the case of an infant, it is a general rule that a policy of life insurance taken out without the knowledge or con-

sent of the insured person is unenforceable, though it is frequently the case that such a policy is enforced, no question being raised." 14 R.C. Law 889.

"It is against policy to allow one person to have insurance on the life of another without the knowledge of the latter. Indeed, it is sometimes made a felony to take out insurance on the life of another without his knowledge." 25 Cyc. 732.

See, also, to the same effect, Vance on Insurance, 145; *Rombach v. Piedmont Ins. Co.*, 35 La. Ann., 233.

The principle has been adopted to prevent speculation in human life, the consent of the insured being regarded as a safeguard against excessive insurance on the life of the debtor, which might cause the creditor to be more interested in his death than in the continuance of his life.

We therefore conclude that there was error in rendering judgment upon the pleadings in favor of the plaintiff.

Reversed.

Cited: Mills v. Walker, 179 N.C. 484; *Thomas v. Carteret*, 182 N.C. 379; *Slayton v. Commissioners*, 186 N.C. 695; *Hooper v. Trust Co.*, 190 N.C. 427; *Roebuck v. Carson*, 196 N.C. 674; *Warren v. Bottling Co.*, 204 N.C. 125; *Trust Co. v. Wilder*, 206 N.C. 125; *Coral Gables, Inc. v. Ayres*, 208 N.C. 426; *Coleman v. Whisnant*, 226 N.C. 259.

J. A. CLARK v. JOHN SWEANEY.

(Filed 3 April, 1918.)

Automobiles—Negligence—Principal and Agent — Evidence — Nonsuit —Trials.

Where the plaintiff sues the owner of an automobile for injuries received while his son was driving it, evidence that the son was driving his mother at the time, and that after the injury the defendant ordered his son to take the plaintiff home, is sufficient to take the case to the jury upon a motion to nonsuit, upon the question of whether the son was acting in the service of the defendant when the injury was inflicted.

ALLEN, J. dissenting; WALKER, J., concurring in the dissenting opinion.

APPEAL from *Connor, J.*, at November Term, 1917, of DUR- (281) HAM.

Scarlett & Scarlett and Brawley & Gantt for plaintiff.

Fuller, Reade & Fuller for defendant.

CLARK *v.* SWEANEY.

CLARK, C.J. This was an action for damages for personal injury sustained by being struck and seriously injured by defendant's automobile, which was being driven by his son at 45 to 50 miles an hour, according to plaintiff's testimony, as with due care plaintiff was attempting to cross Main Street near the center of the business district of Durham. That the plaintiff was run over and injured and that the defendant was the owner of the automobile, that it was being driven by his son, and that the defendant's wife was in the automobile at the time, also that the defendant immediately came up and ordered his son to carry the plaintiff home in his automobile, are admitted or not controverted. Indeed, the defendant put on no evidence.

The plaintiff did not contend that there was any liability on the part of the defendant merely because the chauffeur was his son, but contended that all the circumstances taken together were sufficient evidence to be submitted to the jury upon the question whether the driver, Fred Sweaney, was acting as the servant of his father in the operation of said automobile at the time said injury occurred. That the automobile was owned by the defendant, that the defendant's wife was being conveyed in the machine at the time of the injury, and that the defendant directed his son to take the plaintiff home was evidence "taken in the light most favorable to the plaintiff, with the most favorable inferences which the jury could draw from it," sufficient to submit the case to the jury for the natural presumption is that one who is employed in operating an automobile is doing so in the service of the owner, especially when the passenger in the machine is the owner's wife. *Long v. Neut,* 123 Mo. 204, citing *Moon v. Matthews,* 29 L.R.A. (N.S.), 586.

It will be difficult for the plaintiff in such cases to show that the automobile was being driven and operated under the direct instruction of the owner, which was a matter peculiarly in the owner's knowledge. We think it was error to nonsuit the plaintiff. The facts testified to raised a presumption that the machine was being operated in the scope of the defendant's ownership, and it was incumbent upon the defendant who put on no evidence to rebut the presumption.

Linville v. Nissen, 162 N.C. 95, relied on by the defendant, is
(282) not in point. In that case, there was evidence that though the owner's son was operating the machine, he was not doing so with the knowledge or at the instance of the owner, but in violation of the owner's orders and without his knowledge. That was not a nonsuit, and the Court held that the evidence for the defendant should have been submitted to the jury with an instruction that the owner would not be responsible for the tort of the chauffeur, even though he was

the owner's son and a minor, if acting without the owner's authority and wholly for the servant's own purposes and in pursuit of his private or personal ends.

The judgment of nonsuit is

Reversed.

ALLEN, J., dissenting: I think *Linville v. Nissen*, 162 N.C. 96, is a controlling authority in favor of the defendant, and that the judgment of nonsuit ought to be sustained.

In the *Linville* case it was held:

1. That the owner of an automobile is not liable for personal injuries caused by it, merely because of his ownership.

2. That the father is not liable for the acts of a minor son (much less reason for liability for the acts of an adult) unless he has approved the acts, or it is shown that the son is his agent or servant.

3. That if the minor son is shown to be the agent or servant of the father, the latter is not liable unless the son was acting at the time in the scope of his employment and in regard to his father's business.

A nonsuit as to the father was held to be proper, although it was in evidence that the father had bought the machine for the use of himself and family; that the son, a minor, had driven the machine frequently, sometimes with his father present; that the son was a reckless driver; that he had injured two buggies and his father had paid the damages; that on one occasion the father had taken off a wheel to prevent the use of a machine by his son; that he had left the garage unlocked, and his son could get the machine as he wished, and the ground of the ruling was that the father had forbidden the use of the machine on the day of the injury, which does no more than negative the idea of his consent, which was essential to plaintiff's case.

In this case the son is an adult, there is no evidence that the machine was bought for the use of the family, or that the son was reckless, or had ever driven the machine before, or that the father knew that he was using the machine at the time of the injury. The only circumstances claimed to have a tendency to prove agency on the part of the son are that his mother was in the machine, and that the father, as soon as he heard of the accident, went to the scene and directed his son to take the plaintiff, who had been injured, in his automobile to a hospital.

The first is a circumstance which would be present with any (283) son, although acting against his father's will, if asked by his mother to take her; and the second is an act of humanity which any man, whether responsible for the injury or not, ought to do, and which

ought to be encouraged instead of imputing it to the defendant as evidence of a wrongful act.

There is to my mind a total absence of evidence of agency, or that the son, if an agent, was acting within the scope of his employment, or was about his father's business.

I think the *Linville case* is stronger for the plaintiff than this, and that unless it is overruled, which the Court is not inclined to do, this judgment of nonsuit ought to be affirmed.

Cited: Tyree v. Tudor, 181 N.C. 216; *Tyree v. Tudor,* 183 N.C. 346, 348; *Robertson v. Aldridge,* 185 N.C. 295; *Williams v. R. R.,* 187 N.C. 352; *Allen v. Garibaldi,* 187 N.C. 799; *Watts v. Lefler,* 190 N.C. 724; *Ewing v. Kates,* 196 N.C. 355; *Vaughn v. Booker,* 217 N.C. 481; *Carter v. Motor Lines,* 227 N.C. 195; *Ewing v. Thompson,* 233 N.C. 570.

H. J. STOCKARD ET AL. V. WARREN AND WIFE.

(Filed 3 April, 1918.)

1. Contracts—Writing—Letters—Statute of Frauds.

The owner of farming lands made an offer by letter that if the addressee would take charge of his farm and stock, at the death of the owner and his wife he should have a certain portion thereof in fee simple; and wrote later reiterating the terms of the offer, evidencing the receipt of the letter of acceptance, agreeing upon a later time when the adressee should move there, which was accordingly done. *Held,* the contract is valid within the meaning of the statute of frauds.

2. Contracts—Lands—Descriptions—Evidence — Identification — Deeds and Conveyances.

A proposition, upon consideration by letter and acceptance, to give 200 acres of land on the home place of a larger tract of land, is not too vague as to description to admit of parol evidence of identification and evidence when theretofore the owner had caused the tract to be cut up in several tracts, leaving a well defined 200-acre tract attached to the home place.

3. Contracts—Lands—Acceptance—Consideration—Trusts and Trustees —Courts — Equity—Decrees.

Where the owner of lands, by letter, makes a proposition, upon lawful consideration, to give a certain part thereof after his own death and that of his wife, which has been accepted in writing and complied with, the court will decree, at the death of the owner and his wife, a trust in favor of the acceptor and enforce it.

STOCKARD *v.* WARREN.

APPEAL by defendants from *Connor, J.*, at September Term, (284) 1917, of ALAMANCE.

Long & Long and Manning & Kitchin for plaintiffs.
W. P. Bynum and Parker & Long for defendants.

CLARK, C.J. This was a proceeding by the heirs at law of Y. B. Warren to sell the tract of land set out in the petition for partition, making R. E. Warren and wife defendants, who allege that he was sole owner because the intestate had entered into a contract in writing with him to move upon his land and take charge of the farming operations upon an agreement that Y. B. Warren would devise absolutely to the defendant R. E. Warren the tract of land described in the petition. Said Y. B. Warren died intestate after his wife and the defendant R. E. Warren averred that the plaintiffs held the land as trustees for himself, and asked that they be declared equitable owners only of said real estate and be required to convey said legal title to him. On this plea the cause was transferred to term for trial. The court held that the agreement could not be executed because the description of the property was too indefinite, and sustained the plaintiffs' motion to nonsuit the defendants.

The writings offered by defendants are two letters from Y. B. Warren to the defendant R. E. Warren as follows:

BURLINGTON, N. C.
R. F. D. No. 3, Box No. 21,
February 12, 1906.

DEAR ED:—If you will come and take charge of my farm and stock of all kinds and run the farm, I will give you all the tobacco you can make and at mine and my wife's death all the stock and 200 acres of land on home place shall be yours to have and hold forever in fee-simple. Ed, I make this offer to you because I am worn-out and want my people to have my property at my death. Your Uncle,

Y. B. WARREN.

(On opposite side of sheet:) Confidential to you, Ed.

Y. B. WARREN.

The second letter was as follows:

BURLINGTON, N. C., R. F. D. No. 3, Box No. 21.

DEAR EDGAR:—Yours to hand and contents noted.

I made the proposition in good faith to you, intending to take you

as one of my family and hand over to you at my death about $5,000 in property. Edgar, you spoke of a notion to get married. That will suit me, as I have five different residences good enough for anybody to live in. Edgar, I have made arrangements for this year now, but if you will come to me next fall I will do just what I said. Now go to work and hunt you up a good, domestic wife and come to my house next fall and go to business where your Uncle can start you in life. All is well.

Y.B. WARREN.

(285) It was in proof that both these letters were received by defendant in spring of 1906 by mail and were in the handwriting of Y. B. Warren.

It was in evidence that the defendant R. E. Warren moved to Y. B. Warren's in the following fall of 1906, took charge of his farm and managed it till his death; looked after the rents of the other tenants and took the business in hand entirely. At first he lived in the house with Y. B. Warren, but after his marriage he moved into a house on the edge of the yard 20 or 30 steps from Y. B. Warren and is still living there.

The only question presented is the nonsuit entered by the judge on the ground that the description of the property was not sufficiently definite to make this a valid contract to devise the property. There was evidence that the tract of land on which the intestate lived originally contained several hundred acres, but that several years before Warren moved on the place the intestate had caused the tract to be cut up into several, leaving 200 acres with well defined bounds attached to the place where he lived, which was known as the intestate's home place, in the neighborhood and generally.

The offer to the defendant in the letter of 12 February, 1906, to give him at death of the intestate and his wife's death "all the stock and 200 acres of land on the home place to have and to hold forever in fee simple," in the light of the above testimony was sufficient to be submitted to the jury for the identification of the property.

"There can be no question that a contract upon a sufficient consideration to devise lands is valid and may be enforced in a court of equity, the decree being so drawn as to declare the parties to whom the land is devised, or, in the event of a failure to devise, the heirs at law to hold such lands in trust for the persons to whom the testator had contracted to devise them." *Price v. Price*, 133 N.C. 503. To same purport *East v. Dolohite*, 77 N.C. 566; *Earnhardt v. Clement*, 137 N.C. 94.

"It is settled by a line of authorities which are practically uniform, that while a court of chancery is without power to compel the execution of a will, and therefore the specific execution of an agreement to

make a will can not be enforced, yet if the contract is sufficiently proved and appears to have been binding on the decedent, and the usual conditions relating to specific performance have been compiled with, then equity will specifically enforce it by seizing the property which is the subject matter of the agreement, and fastening a trust on it in favor of the person to whom the decedent agreed to give it by his will." *Naylor v. Shelton*, Am. Ann. Cases, 1914, A, 394.

The defendant R. E. Warren testified that he received both these letters, with the envelopes in which they are contained, by mail in the spring of 1906. The signature and handwriting of the intestate were proven. The contract is made up of the two letters, the latter showing that the defendant had received from the intestate the (286) first letter, that he had replied thereto and then the intestate wrote reiterating the contract and consenting to postpone the time for the defendant to move upon his place till the fall, at which time it is in proof that the defendant did move upon the place and took charge according to the terms of the letter.

"A valid contract within the Statute of Frauds may be of one or many pieces of paper, provided the several pieces are so connected physically or by internal references that there can be no uncertainty as to their meaning and effect when taken together." *Mfg. Co. v. Hendricks*, 106 N.C. 492.

Upon the evidence, it was for the jury to decide whether the property was sufficiently identified, for the description upon the face of the contract is not so palpably defective as to be incurable by any evidence. *Farmer v. Batts*, 93 N.C. 390-391.

In *Boddie v. Bond*, 158 N.C. 205, it is said that a devise "I give my wife, Cornelia, the house where we now live, with all the outhouses and premises, embracing the peach and apple orchard," is a sufficient description to pass the title and permit parol testimony to fit the description to the land intended.

In *Fulwood v. Fulwood*, 161 N.C. 601, where the devise of a tract of land describes it simply as the "homestead tract," the Court said: "The description of the land devised to the defendant as 'the homestead tract' presented the case of a latent ambiguity, as it was uncertain what land was intended to be included under that designation, after it appeared that the 200-acre tract and the first, second, and third tracts described in the petition were adjoining tracts, and that the lands were acquired under different descriptions and at different times. It was then permissible to introduce extrinsic evidence to fit the description, and for the purpose the declarations of the testator at the time of making the will, and at other times, and his manner of dealing with

the land, as by listing for taxation as one tract, were competent evidence."

In *Johnson v. Mfg. Co.*, 165 N.C. 105, where the description was "50 acres adjoining P. R., bounded on White Oak Road and adjoining A. S. R. and P. S.," the Court said: "We think his Honor erred in excluding parol testimony to identify this tract of land. It was a latent and not a patent ambiguity. It may be that the defendant could have shown that *the boundaries had been actually run and marked.*" In the present case there was evidence by the surveyor and others that when the rest of the tract was surveyed and cut off, the 200 acres around the homestead of the intestate was surveyed, the boundaries run and corners marked.

(287) "Parol evidence of surrounding circumstances is competent in the interpretation of a deed or will to enable the court to ascertain the intention of the parties." *Caudle v. Caudle,* 159 N.C. 55.

It is open to the plaintiffs to put on testimony, if they can, to contradict any part of the evidence as to the identity of the land, but it was error to direct a nonsuit.

Reversed.

Cited: Freeman v. Ramsey, 189 N.C. 790; *Fawcett v. Fawcett,* 191 N.C. 682; *Grantham v. Grantham,* 205 N.C. 366; *Chambers v. Byers,* 214 N.C. 377; *Clark v. Butts,* 240 N.C. 714.

JOHN W. WARD v. R. F. MARTIN.

(Filed 3 April, 1918.)

1. Evidence—Examination of Party—Incrimination—Refusal to Answer —Statutes.

Where no statutory immunity is given, a party to an action cannot be compelled to testify to matters that manifestly tend to convict him of a crime, whether the examination takes place at or before the trial.

2. Evidence—Examination of Party—Statutes—Affidavits.

Upon application to examine a defendant before the clerk of the Superior Court, prior to trial (Revisal, secs. 865, 866) and to aid in preparing the complaint, such facts as will entitle the movant to the order must be made to appear by affidavit; but after filing a verified complaint setting out a cause of action, the plaintiff has a right to the order for examination, and the leave of the court is unnecessary.

3. Same—Incrimination—Refusal to Answer.

An order to examine a defendant under Revisal, secs. 865, 866, will not be denied on the ground that the answers of the defendant will tend to incriminate him, in an action wherein the complaint has been filed alleging that the defendant had misappropriated the plaintiff's money while acting as his bookkeeper and accountant, the answers of defendant not necessarily having to show a criminal intent, etc., and the time for his refusal to answer being when such incriminating questions are asked on the examination.

4. Evidence—Incrimination—Oath of Party—Attorney and Client.

The privilege to refuse to answer questions tending to incriminate a party must be claimed by the party under oath, and not by his attorney, and an order to examine the party to an action under Revisal, secs. 865, 866, may not be revoked on motion made on written notice of his attorney, stating that the answers sought to be elicited will tend to incriminate him.

5. Appeal and Error—Examination of Party—Premature Appeal — Supreme Court's Discretion.

While ordinarily an appeal from an order of the clerk of the court for examination of a party under oath is premature, the Supreme Court, in this case, in its discretion, considered the appeal on its merits.

WALKER, J., dissents.

CIVIL ACTION pending in Superior Court of ROBESON County. (288) The plaintiff having filed his verified complaint, moved in the cause for an order to examine defendant before the clerk prior to trial under Revisal, secs. 865, 866. The clerk made the order and the defendant moved to vacate the same. The motion was denied and defendant appealed to the Superior Court. His Honor *Judge Bond* affirmed the order of the clerk, October Term, 1917, and defendant appealed.

MacLean, Varser & MacLean, McIntyre, Lawrence & Proctor for plaintiff.

H. E. Stacy, T. A. McNeill, Jr., Johnson & Johnson, W. E. Lynch, Manning & Kitchin for defendant.

BROWN, J. The grounds upon which the motion to vacate the order is based are: (1) That the order would allow plaintiff to examine defendant as to his private affairs immarterial to the matters in controversy. (2) That the complaint and affidavit indicate the purpose of plaintiff to secure from defendant evidence of an incriminating character tending to convict him of a crime, in violation of his constitutional rights.

We recognize the general principal that where no statutory immunity

is given, a party to an action cannot be compelled to testify to matters that manifestly tend to convict him of a crime, whether the examination take place at or before the trial. Where no complaint has been filed and the purpose of the examination is to aid in preparing the complaint, the mover must show by affidavit such facts as will entitle him to the order. In this case the complaint has been filed and sets out a cause of action against defendant. The plaintiff then has a right under the statute to examine the defendant. No leave of court is necessary, as was the case under the old bill of discovery. That requirement is omitted from our statute. *Vann v. Lawrence*, 111 N.C. 34. The cause of action set out in the complaint is based upon an alleged misappropriation of money by defendant while acting as bookkeeper and accountant for plaintiff.

It is contended that the order for examination should be vested because any answers that defendant should make to questions asked him would necessarily tend to convict defendant of a crime.

While all courts hold that a party cannot be forced to answer questions which tend to criminate him or subject him to a statutory penalty, yet they are divided somewhat as to when he may assert his privilege when the attempt to examine him is made before trial. Some courts hold that the party cannot resist an order for his examination upon such ground, but that he must avail himself of his privilege
(289) at the time the objectionable questions are propounded to him, while others declare that if the *only material* evidence is sought is *necessarily* incriminating, the examination will not be allowed, otherwise the party will be left to assert his privilege at the examination. The author of Ency. of Pleading and Practice arrays all the cases *pro* and *con*, and says the latter seems to be general rule.

In order to vacate an order for examination, all those authorities hold that it must be plainly apparent that the evidence sought must *necessarily* tend to convict the party to be examined of a crime or to subject him to a penalty or forfeiture. 14 Cyc., 363. We are inclined to the view that the plaintiff should not be denied a plain statutory right to examine his adversary before trial solely because the latter claims that any answer he may make will tend to convict him of a crime. This rests the matter upon the *ipse dixit* of the defendant, and not upon the judgment of the court.

It is true the complaint charges the defendant with misappropriating funds belonging to plaintiff. This may or may not constitute an indictable offense according to circumstances, one of which is the criminal intent. The evidence of defendant, instead of convicting him of a crime, may tend to exculpate him and by satisfactory explanation induce plaintiff to cease the prosecution of his action. Proceeding with

the examination does not deny defendant any constitutional right. If he cannot answer the questions propounded without incriminating himself, he can then avail himself of his privilege. To proceed with the examination cannot deprive defendant of any protection thrown around him by the law, while to stop it would deprive plaintiff of a right conferred by the statute. The defendant cannot be hurt while the plaintiff may.

There is another reason why the order of examination should not be vacated. The claim for privilege must be made by the *party,* and cannot be made for him by an attorney, and it must be made under oath. 14 Cyc., 363-364 and cases cited. When it is made during examination, it is necessarily made after the party being examined has been sworn. In this case the claim for privilege is asserted by counsel for defendant in a written notice of a motion to revoke the order of examination. It is not based upon any affidavit of defendant and does not appear to be his personal act, but that of his attorneys acting for him.

A motion was made to dismiss this appeal on the ground that it is premature. There are decisions of this Court holding that a party cannot appeal from an order to appear before the clerk to be examined under oath concerning the matters set out in the pleadings. *Pender v. Mallett,* 122 N.C. 163; *Holt v. Warehouse Co.,* 116 N.C. 480; *Vann v. Lawrence,* 111 N.C. 32.

In the exercise of our discretion, as the point presented is of (290) first importance here, we have concluded to deny the motion and to consider the appeal on its merits.

The order of the Superior Court directing the examination of defendant under the statute is

Affirmed.

Cited: Monroe v. Holder, 182 N.C. 79; *Johnson v. Mills Co.,* 196 N.C. 94; *Buchholz v. Furguson,* 198 N.C. 700; *Bohannon v. Trust Co.,* 210 N.C. 683, 686; *Douglas v. Buchanan,* 211 N.C. 667, 668; *Knight v. Little,* 217 N.C. 682; *Washington v. Bus, Inc.,* 219 N.C. 859, 860; *Suddeth v. Simpson,* 224 N.C. 183; *Fox v. Yarborough,* 225 N.C. 608.

A. RAY v. C. G. RAY.

(Filed 3 April, 1918.)

Appeal and Error—Evidence—Transactions with Deceased — Statutes—Verdict—Harmless Error.

The erroneous admission of evidence of transactions with deceased persons, prohibited by Revisal, sec. 1631, becomes immaterial when from the answers by the jury to the issues it appears that this evidence was disregarded by them.

CIVIL ACTION, tried before *Bond, J.*, at October Term, 1917, of BLADEN, upon these issues:

1. Was the execution of the deed referred to in the complaint procured by assurances of said C. G. Ray that he would provide and take care of his father and mother so long as they lived, as alleged in the complaint? Answer: "Yes."

2. Did the defendant, C. G. Ray, make assurances for the purpose of getting said deed and with the intention of not providing for and caring for his father and mother as he agreed to do? Answer: "No."

3. Has defendant, C. G. Ray, made provision for and cared for his father and mother as he promised and agreed to do? Answer: "Yes."

From the judgment rendered, plaintiff appealed.

E. J. McCulloch, Jr., for plaintiff.
Bayard Clark for defendant.

BROWN, J. On 5 July, 1913, the plaintiff, A. Ray and wife, P. A. Ray, conveyed a certain tract of land in Bladen County to their son, C. G. Ray, the defendant. This deed was made on the special trust that C. G. Ray should provide and take care of his father and mother as long as they lived.

This action is brought to the deed set aside because of the failure of defendant to carry out the agreement. The only exceptions considered in appellant's brief relate to a conversation between the deceased wife of plaintiff and the defendant testified to by defendant. The (291) objection was made in apt time and is based on section 1631, Revisal. The evidence tended to contradict the contention of plaintiff that the defendant agreed to support his father and mother (the plaintiff and his wife) as a consideration for the execution of the deed.

As the jury found with the plaintiff on first issue, thereby establishing the trust, the exception is irrelevant. It is manifest that the jury disregarded defendant's evidence upon that issue.

The jury have found that the defendant accepted the deed upon the alleged trust, and that he has fully performed so far the agreement upon his part.

In view of the findings of the jury, the assignments of error are irrelevant.

H. A. McLAURIN v. T. F. WILLIAMS.

(Filed 3 April, 1918.)

1. Landlord and Tenant—Leases—Fraud—Title.

Where the plaintiff has been in possession of the lands in dispute for twenty-three years and continues therein, and has executed a lease thereof to the defendant, it may be shown in evidence that the defendant induced the lease by fraud and misrepresentation, and upon establishing this as a fact, the relation of landlord and tenant is unavailable as a defense.

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

Evidence that the defendant has induced the plaintiff, an ignorant colored man, to accept a lease of his own land upon defendant's representation that it was necessary to get a paper title to the lands after it had been sold for taxes, is sufficient upon the question of defendant's fraud and misrepresentation to take the issue to the jury.

3. Instructions—Contentions—Tax Deeds—Deeds and Conveyances—Appeal and Error.

Where the plaintiff has permitted the lands in controversy to be sold for taxes, and the defendant claims under the tax deed, it is not error for the court to forbid the defendant's counsel to argue to the jury that neither the plaintiff nor his ancestor had paid anything for the land.

4. Instructions — Contentions — Appeal and Error—Objections and Exceptions.

A statement by the court of the contention of a party properly arising in the controversy is not error and will not be considered on appeal when not excepted to at the time.

5. Instructions—Colored Persons—Fair Trials—Appeal and Error.

A charge to the jury, where one of the parties is a white and the other a colored man, that they should give the litigants a fair and impartial trial regardless of color is not erroneous.

6. Tax Deeds—Deeds and Conveyances—Liens—Instructions—Appeal and Error.

Where the controversy over lands depends upon the validity of defendant's tax deed, it is not error for the court to charge the jury that if plain-

tiff recovered in the action he would have to repay the defendant the moneys he has expended; and where the verdict is in plaintiff's favor, a judgment is proper making the amount a lien upon the lands.

(292) APPEAL by defendant from *Bond, J.*, at September Term, 1917, of CUMBERLAND.

Cook & Cook and J. M. Williford for plaintiff.
Bullard & Stringfield for defendant.

CLARK, C.J. The complaint alleges that the plaintiff is the owner of the tract of land described, containing 148 acres, and has been in the peaceable, quiet and adverse possession of said land, claiming it as his own, for more than twenty-three years, exercising all the rights of ownership, but that the defendant has trespassed upon said land, interfering with his farming thereon, and has threatened the plaintiff to put him on the county roads, and otherwise sought to intimidate the plaintiff, who is an ignorant colored man; and being fearful to proceed with the cultivation of said land, he brought this action to restrain the defendant from interfering with the possession of the land and asked a restraining order. The defendant answered that the plaintiff had rented the land in 1916 from him and was estopped to deny defendant's title.

The plaintiff in his reply averred that the defendant bought the land at a sale for taxes due by the plaintiff for the year 1914; that at such sale by the sheriff on 3 May, 1915, the defendant bought the land and in January, 1916, notified the plaintiff that he would ask a deed from the sheriff on 3 May, 1916; that the defendant had bought the land at the tax sale for $14.55 taxes, but that the land is worth at least $1,000. The complaint alleged, and the plaintiff testified, that when this notice was given he told the defendant that he would get the money and pay defendant, but that the defendant told him he need not do that, that he wanted to help him get a paper title for the land, and to wait till after 3 May 1916, when he (defendant) would get a sheriff's deed for it, and that thereafter the defendant told the plaintiff that it was necessary for him to sign a lease in order to help him strengthen his chances to get a good title. It is alleged and in evidence that plaintiff, relying upon these representations of the defendant, did not get the money to pay the taxes before 3 May, 1916, and signed the lease in August of that year, as the defendant had told him it was necessary to do so in order to perfect his title.

(293) There was evidence to the contrary from the defendant, but the jury found, in response to the issues, that the defendant

agreed to get the title from the sheriff for the land in order to make the plaintiff's title good, and Williams had expended altogether in getting deed for the land from the sheriff $63.50, to which the defendant is entitled to add any taxes paid since that time, and that the plaintiff executed the lease to the defendant on the understanding with him that it was made in order to use to make McLaurin's title good.

The court properly refused to grant the motion to dismiss. If, as the jury find, the lease was secured by the defendant for the purpose of perpetrating a fraud on the defendant, the plaintiff could have the same declared void without surrendering possession, and besides, the plaintiff, according to the evidence, has never been out of possession. A lease obtained by fraud and misrepresentation, as found by the jury, did not create the relation of landlord and tenant, and there was no agreement, according to these findings, for an option.

While the counsel for the defendant was addressing the jury, urging that the grandfather of the plaintiff had never paid for the land, and that the plaintiff did not have a good title for it, the court interrupted the counsel by saying that he could not permit that argument as the defendant was claiming under a tax deed, the land having been sold for the plaintiff's taxes. We do not see any error in this, nor in the court refusing to permit the case to turn upon the question whether the plaintiff's ancestor had paid for the land. There was neither allegation nor issue presenting such proposition. It was in evidence that the plaintiff had been in uninterrupted possession 23 years. Nor was there any error in stating the contentions of the plaintff that the defendant had misled him in order to prevent his redeeming the land and that the plaintiff contended that the land—148 acres—was worth $1,000 to $1,400, and that he would not have let the defendant get the tax title if he had not been misled by the defendant's promises to buy the land for his benefit at the sheriff's sale. This was merely a statement of the plaintiff's contention in the complaint and in the argument and, besides, was not excepted to at the time.

Neither was there any error in the judge charging the jury that in a trial where one party is white and the other is colored the jury should be fair and just and give them a fair and impartial hearing, regardless of the color of the litigants. Nor was there any error in the court instructing the jury that if the plaintiff recovered the land he would have to pay Williams the taxes, costs, and interests as provided by law.

The result of the trial depended almost exclusively upon the controverted issues of fact as presented by the pleadings and submitted to the jury. The verdict as to the second issue was set aside, and at the next term of the court it was found by the jury that the (294) amount due the defendant for taxes and the interest allowed by

law and cost attendant amounted to $39.84, for which sum judgment was rendered in favor of the defendant and the same declared to be a lien upon the land, but that subject to such lien, the defendant held the naked legal title to the lands in trust for the plaintiff, to whom he should convey in fee simple all interest and title therein upon payment of the aforesaid lien, and the defendant was perpetually enjoined from trespassing upon said land or in any way interfering with the possession thereof by the plaintiff. And judgment was rendered in favor of the plaintiff for the costs of the action.

No error.

Cited: Headman v. Commissioners, 177 N.C. 264; *Wilson v. Sewing Machine Co.,* 184 N.C. 43; *Lamborn v. Hollingsworth,* 195 N.C. 353.

J. A. ELY v. ISAAC NORMAN.

(Filed 3 April, 1918.)

1. Mortgages, Chattel—Real Estate.

A written instrument creating a lien on crops to be raised on adequately described lands, to secure advancements made, with provision that should the crops be insufficient, "said paper is to be considered a mortgage on his land"; *Held,* the writing creates a lien on the land itself for the amount found to be due and unpaid, after the application of the proceeds of sale of the crops, and enforcible by judgment of foreclosure. As to whether the writings is an equitable or legal mortgage, *Quaere? Semble,* the latter.

2. Mortgages—Original Parties—Registration—Junior Mortgages—Priorities—Distribution.

Where a paper-writing has the effect of a mortgage on lands, the question of proper registration as between the original parties is immaterial; but becomes necessary for consideration when a junior mortgagee under a registered mortgage is made a party to the action, and the question of priorities has arisen in the distribution of the proceeds of the sale.

3. Deeds and Conveyances—Registration—Indexing—Duty by Grantee.

Where the general index in the office of the register of deeds correctly refers to the book and page where a chattel mortgage, or agricultural lien, combined with a real estate mortgage of the same land for the same purpose is to be found, it is sufficient for all purposes; and the fact that the instrument was only recorded in a book set apart for chattel mortgages and crop liens will not effect the rights of the mortgagee to the prior security of his lien on the land as against that of a junior mortgage. The duty of a grantee to see to the proper registration and indexing of his deed, and as to whether the indexing is a part of registration, discussed by HOKE, J.

ELY *v.* NORMAN.

4. Deeds and Conveyances—Registration—Indexing.

Held, by BROWN, J., WALKER and ALLEN, JJ., concurring, that the indexing of deeds is an essential part of their registration, overruling *Davis v. Whitaker*, 114 N.C., 279.

BROWN J., concurring; WALKER and ALLEN, JJ., concurring in opinion of BROWN, J.

CIVIL ACTION tried before *Whedbee, J.*, and a jury at October (295) Term, 1917, of HERTFORD.

The purpose of the action was to declare a certain paper-writing, hereinafter set forth, a mortgage on the lands of defendant described therein, to secure a debt of $75, with interest due from defendant to plaintiff and for the further purpose of foreclosing the same under the decrees of the court. It was admitted that on 23 April, 1914, to secure advances to enable him to cultivate his crop for said year, to the amount of $75, defendant executed a lien on certain crops for said year therein described and contained also the following provision:

"It is further agreed that in case said I. Norman does not make sufficient crops to pay this amount of $75, that said paper is to be considered a mortgage on Isaac Norman lands in Winton Township, Hertford County, and bounded as follows: On north by the main road from Cofield to Harrellsville; on east by George Keen tract; on west by I. Jernigan; on south by Lilly Hicks and Mac Hall. And if by the first of November, 1914, said Isaac Norman should fail to pay said indebtedness, then said J. A. Ely may foreclose this lien as provided in section 2054, Revisal 1905, or otherwise, and may sell said crops and other property after ten days notice, posted at the courthouse door and three other public places in said county, and apply the proceeds to the payment of said indebtedness and all costs and expenses of executing this conveyance and to pay the surplus to said .....

"And the said Isaac Norman hereby represents that said crops and other property are the absolute property of Isaac Norman and free from encumbrance with the exception of $100 lien held by S. E. Harrell & Co., of Cofield, N. C.

"Witness my hand and seal, this the 23rd day of April, 1914.

(Signed) Isaac Norman"

It was admitted further that the crops referred to in said instrument were all required to pay S. E. Harrell & Co., whose claim was constituted a preferred debt therein, and plaintiff alleged further that said paper-writing was duly proved and registered and the amount advanced, no part of which had been paid. Defendant denied that the paper-writing was in any sense a mortgage on realty, or that he owed

for advancements to the amount claimed, and by way of further
(296) defense alleged that there had been a breach of warranty by plaintiff in the sale of a horse advanced under the contract and to defendants' damage. Defendant claimed further that there had been no proper registration of plaintiff's paper, or that same had been recorded only in the book used and labeled for liens and chattel mortgages. It was urged by defendant, appellant, that this became material in view of the fact that a subsequent mortgagee had been made party defendant by order of court.

There was verdict for plaintiff, that there had been no warranty of a horse or breach thereof on plaintiff's part; that the amount of advancements due and unpaid was $75. Upon the verdict, the court, being of opinion that the paper-writing constituted a valid mortgage on defendant's realty described therein, and that same was properly registered, gave judgment of foreclosure and distribution of proceeds according to the liens presented and established in the suit, and defendant excepted and appealed.

W. D. Boone for plaintiff.
R. C. Bridger and S. Brown Shepherd for defendant.

HOKE, J. Under our decisions, the instrument in question contains a sufficient description of the property (*Patton v. Sluder*, 167 N.C. 500), and on the facts presented, the same creates a lien thereon in plaintiff's favor for the amount found to be due and unpaid, enforcible by judgment of foreclosure, the relief awarded to plaintiff on the record. Whether the paper-writing is an equitable or legal mortgage is not now of the substance, though under many recent cases with us upholding the principle that a deed should, as a general rule, be interpreted so as to affect the clear intent of the parties as expressed in the entire instrument, this would seem to constitute a regular legal mortgage, as it is declared to be in his Honor's judgment. *Jones & Philips v. McCormick*, 174 N.C. 82; *Williamson v. Bitting*, 159 N.C. 321; *Triplett v. Williams*, 149 N.C. 394; *Harris v. Jones*, 83 N.C. 318.

It is chiefly objected for appellant that, although the instrument should be properly considered as a mortgage on realty, there is a defect of registration in that the same is recorded in the book labeled and used for agricultural liens and chattel mortgages. Inasmuch as the only litigated questions thus far presented in the record or in the case on appeal are between the alleged mortgagee, plaintiff, and mortgagor, the original defendant, the case might very well be disposed of by the position that, as between these parties, the matter of a correct registration is

not essential, this being now required only in reference to the rights and claims of creditors and subsequent purchasers. Re- (297) visal, secs. 980-81-82. But as a subsequent mortgagee, admitted by defendant to hold a valid claim and lien on the property, has been made party defendant, it is well, and perhaps required, that the exception be directly disposed of that a proper distribution of the fund may be had.

An examination of this question will disclose that there are few subjects presented for consideration about which there is greater contrariety of decision than in the construction and application of the registration laws as affecting the validity of deeds and written instruments. In some of the States it is held that when the holder of the title presents the instrument to the recording officer, properly proven, and the same is received by him pursuant to the statute, the holder has done all that the law requires and his title is unaffected by mistake, etc., on the part of the officials in recording the paper. In others, the authorities are to the effect that the holder of such a paper so presenting it is charged with the duty of seeing that the same is recorded on the proper books with substantial accuracy in essentials, *i.e.,* the names of the parties, the property embraced in the instrument, and if a mortgage, the true amount of the debt—a view that seems to have been approved by our own decisions on the subject. *Smith v. Lumber Co.,* 144 N.C. 47; *Royster v. Lane,* 118 N.C. 156.

Again, there is pronounced conflict on the question whether, under statutes requiring an index and cross-index of registered instruments by the officer, this index should be considered and construed as an essential part of a completed registration. On this question much the larger number of cases hold that such an index as ordinarily expressed in the laws on the subject form no part of a valid and completed registration, but are only intended as an aid to facilitate investigation on inquiry for the true title. Our own Court so holds in *Davis v. Whitaker,* 114 N.C. 279, a case that has since been unquestioned in our decisions and which seems to be in accord with the weight of authority in other jurisdictions. *Green v. Garrington,* 16 Ohio, 548, reported also in 91 American Decisions, p. 103, with an informing note on the questions presented here.

On the other hand, there are strong and well-reasoned opinions in authoritative courts to the effect that such an index constitutes an essential part of a completed and valid registration, and basing their decisions on the language of their registration laws and also on the reasoning that these indexes are commonly resorted to for the ascertainment of titles, and that a different ruling with the large number

of books and more accumulating, would render a satisfactory examination well-nigh impossible and practically render valueless our
(298) registration laws in their primary purpose of protecting creditors and subsequent purchasers for value. *Kock v. West,* 118 Iowa 468; *Barney v. McCarty,* 15 Iowa 110; *Ritchie v. Griffiths,* 1 Wash. 429, and the construction of our statute that the indexing and cross-indexing is a necessary part of a docketed judgment tends to support this position. *Dewey v. Sugg,* 109 N.C. 328.

In cases upholding this view, it is held, "That an index will hold a subsequent purchaser to notice thereof if enough is disclosed by the index to put a careful or prudent examiner upon inquiry, and if, upon such inquiry, the instrument would have been found. *Jones v. Berkshire,* 15 Iowa, 248, syllabus quoted from report of case in 83 Amer. Rep., p. 412.

Whatever may be the ultimate and correct view on these much disputed questions, we have no hesitation in holding that the instrument before us has had valid registration and will bind subsequent purchasers in the distribution of the fund. The only objection urged against it being that it is registered in a book commonly known and used for recording chattel mortgages and agricultural liens, and so labeled. It was no doubt put in that book because it also contained an agricultural lien, but, so far as we have examined, there is nothing in our legislation applicable either in case of deeds, agricultural liens, chattel mortgages or other instruments which requires that they, or any of them, should be put in any special book or one of any particular kind of description. Undoubtedly they should be put in a book recognized and used in the office for recording instruments, but there is no suggestion in this case that the instrument was not accurately recorded The index and cross-index, properly kept, points clearly and correctly to its placing, and, to our minds, the official data are a full and sufficient compliance with our statutory requirements and serve every purpose that our laws on this subject were designed to promote. While there is diversity of ruling on this subject also, the position accords with the reasonable and correct interpretation of the statute and has the support of well-considered authority in other jurisdictions. *Fairabee v. McKerrehan,* 172 Pa. St., 234; *Swepson v. Bank,* 77 *Tenn.,* 713; *Armstrong v. Austin,* 45 S.C. 69.

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

No error.

BROWN, J., concurring: I concur in the disposition made of this case,

but I am of opinion that the case of *Davis v. Whitaker,* 114 N.C. 279, should be overruled. While it may not be absolutely necessary to overrule it on this occasion, I think it is well within our province to do so, and that the value of our registration laws, the stability of titles, and the best interests of the State demand it. I think that the (299) indexing of deeds is an essential part of their registration, just as much so as the indexing of judgments is an essential part of their docketing, as is held in *Dewey v. Sugg,* 109 N.C. 328. The great increase in the number of record books in the register's office (in Wake County there are over 300) renders it practically impossible for a title searcher to examine the pages of every book. Unless the index is held to be a part of the registration, then mortgagees and purchasers of land can have no positively certain assurance that they are acquiring a good title.

I do not care to discuss the matter at length, but I am convinced that the best interest of the State require that we should declare at once that the indexing of a deed is a part of its registration.

I am authorized to say that Justices WALKER and ALLEN concur in this opinion.

Cited: Fowle v. Ham, 176 N.C. 13; *Manufacturing Co. v. Hester,* 177 N.C. 611; *Hooper v. Power Co.,* 180 N.C. 653; *Wilkerson v. Wallace,* 192 N.C. 157; *Bank v. Harrington,* 193 N.C. 627; *Clement v. Harrison,* 193 N.C. 828; *Whitehurst v. Garrett,* 196 N.C. 159; *West v. Jackson,* 198 N.C. 694; *Story v. Slade,* 199 N.C. 597; *Watkins v. Simonds,* 202 N.C. 750; *Tocci v. Nowfall,* 220 N.C. 557, 559; *Cotton Company v. Hobgood,* 243 N.C. 229, 230; *Saunders v. Woodhouse,* 243 N.C. 611, 613.

JAMES W. COX ET AL. v. KINSTON CAROLINA RAILROAD AND LUMBER COMPANY ET AL.

(Filed 3 April, 1918.)

1. Trusts—Trustees—Duration of Trusts—Leases.

Where the donor of lands in an agricultural section of country has lived thereon and farmed the same and conveyed it to his son in trust for the children of the latter until the trustee's death, or the youngest child shall have become 21 years of age, with power to sell, reinvest, etc., and hold for the purposes of the trust, and to use the same "as he may deem best for the interest of the said children, either renting it out or using and cultivating it himself, and using the rents and profits to support his family and to educate his children": *Held,* a lease by the trustee, with the right

of the lessee to renew within five-year periods, extending the lessee's right for twenty years, is inoperative beyond the death of the trustee, or at least beyond the current year in which he died, the youngest child having reached maturity and the children then being entitled to the distribution of the estate under the provisions of the deed.

2. Same—Deeds and Conveyances—Registration—Notice.

A lessee of lands held in trust takes with notice of the authority conferred upon the trustee, under a recorded deed, to lease the premises, and where, thereunder, such authority ceases upon the death of the trustee, and a long-term lease has been made by him, in this case for five years, with renewal privileges extending it to twenty years, it is not required that the *cestuis que trust*, entitled to the distribution of the estate, at the death of the trustee, notify the lessee of their right, and the question of the reasonableness of the lease is immaterial.

3. Trusts and Trustees — Duration of Trusts — Courts — Extension of Time.

Where exigencies have arisen which makes it desirable and for the benefit of the *cestuis que trust* for a trustee to exceed the authority given him in making a lease of the trust estate beyond the time fixed in the deed for its termination, he may apply to the equity jurisdiction of the court for the authority to make it before executing the lease, which may be granted in proper instances.

4. Trusts and Trustees—Termination of Trusts—Leases—Improvements—Estoppel—Equity.

Where the lessee of a trust estate has put improvements on the leased premises, with notice that the lease would terminate upon the death of the trustee, the doctrine of equitable estoppel will not apply to the *cestuis que trust* upon the termination of the trust, especially when the lessee is permitted by the lease to remove the improvements from the land.

5. Trusts and Trustees—Termination of Trusts—Leases—Accepting Rent—Ratification—Knowledge—Trials—Evidence — Questions for Jury.

Where the trust estate, by the terms of a recorded deed, expires at the death of the trustee, and he has leased the premises for a term of years, which extends beyond the time permitted, in order for the *cestuis que trust* to ratify the act by accepting the rent for the current year it must be made to appear that they did so with knowledge of the facts necessary for them to understand the effect of receiving the rents from the lessor; and in this case, the evidence thereof being conflicting, it was properly left to the determination of the jury under a correct charge from the court.

6. Trusts and Trustees—Dower—Leases—Wife's Signature—Termination of Lease.

Where a trustee holds an estate for the benefit of his children, with right of dower in his wife, and he has leased the premises for a term extending after his death, when the trust was to terminate, the fact that his widow has signed the lease and released her dower does not give the lessor the right to hold the lands against the children for the lifetime of the widow.

COX *v.* LUMBER CO.

CIVIL ACTION, tried before *Stacy, J.*, and a jury, at November Term, 1917, of LENOIR.

On 1 March, 1883, James W. Cox, being the owner in fee of a tract of 70 acres of land, lying partly in the present corporate limits of Kinston and on the banks of the Neuse River, made, executed, and delivered to J. G. Cox, his son, a deed in fee upon the following trusts therein declared, the deed being recorded in Book 7, page 595, in the office of the register of deeds of Lenoir County:

"But upon this special trust and confidence, nevertheless, that the said J. G. Cox is to hold and shall hold the above-described premises for the use and benefit of Fleta Cox, J. W. Cox, Jr., and J. P. Cox and J. G. Cox, Jr., children of the said J. G. Cox, by his wife, J. O. Cox, and for the use and benefit of any other child or children which shall hereafter be born to the said J. G. Cox by his present or any other future wife; and in the event any of his children shall die without leaving issue, the share of one or more so dying to be held for the use of those surviving and for the use of the issue of any having died leaving issue, the issue to represent and to take such share as the (301) parent would have if living. The said J. G. Cox shall have the power to use said land in whatever manner he may deem best for the interest of his said children, either by renting it out or using and cultivating it himself and using the rents and profits to support his family and to educate his children. The Said J. G. Cox shall have power to sell said land in fee simple whenever he shall deem it to be the interest of his said children to do so and invest the purchase money in other real estate to be held upon the same conditions and for the same uses and trusts as these premises are held; and in case the said J. G. Cox shall die leaving a wife surviving, then she is to have dower in said land the same as she would be entitled to if the said J. G. Cox died seized of the same in fee simple. The said J. G. Cox shall not be held by the said children accountable for the rents and profits of said land during their minority or the minority of any of them, nor shall they be entitled to a division of said premises until the youngest child becomes of age, or the death of the said J. G. Cox before that period. The said J. G. Cox may allot to any of his said children on arriving of age or marrying such portion of said land as he deems an equal and just share, or to make such advances to any on arriving at age or marrying as he may deem proper and just advancement, to be accounted for in the final division of said land."

J. G. Cox, the trustee, did not sell and convey any part of the trust estate, nor did he allot to any one of his children on arriving at age or marrying his or her part of said land, or make any advancements to any one, but the entire 70 acres conveyed to him remained unsold upon

his death. J. G. Cox died 23 October, 1914, leaving surviving him his wife, J. O. Cox, mentioned in the trust deed, and the following children mentioned by name in said deed: (*a*) Fleta Cox, who married J. B. Cummings and died many years prior to her father, leaving several children, named in the complaint; (*b*) J. W. Cox, Jr., one of the plaintiffs, the other two children, J. P. Cox and J. G. Cox, Jr., named in the trust deed, died in infancy before their father and without issue. There were other children born to J. G. Cox and his wife, J. O. Cox, after the execution of the trust deed, to wit, John G. Cox, R. A. Cox, and Mozelle Cox, who has intermarried with George F. Suggs. All the children of J. G. Cox who survived him were at his death more than 21 years of age, the youngest, Mrs. Suggs, having been born 17 March, 1886, and therefore being at the death of her father 27 years and 7 month old. Mrs. J. O. Cox, the wife of J. G. Cox, survived her husband and was living at the time of the trial. All of the living children and the issue of the deceased child, Mrs. Cummings, are parties to this action.

(302) J. G. Cox was 73 years of age at the time of his death and his wife 67. The oldest living child is 49. Mrs. Suggs was married before her father's death and was 21 years old prior to 1 July 1907. On 1 July 1907, J. G. Cox and wife, V. O. Cox (called in the deed J. O. Cox), executed a lease to the Kinston Lumber Company of a part of the land conveyed in the trust deed and described in Exhibit B attached to the answer for a period of five years, with renewable terms of five at the option of the lessee or its assigns for the full period of twenty years; also, on 1 May 1911, they executed another lease for an additional part of the land described in the trust deed to the Kinston Manufacturing Company for a period of fifteen years, Exhibit C of the answer. The Kinston Manufacturing Company is the assignee of the Kinston Lumber Company by mesne conveyance and holds the leases dated 1 July 1907, and 1 May 1911.

At the date of the lease of 1 July 1907, J. G. Cox was 66 years of age and his wife 60. All his children at that time were of age and all but two married, and all had finished school. The probability of further issue by his then wife, 60 years of age, was remote if not, under the laws of nature, impossible.

The defendants contend (1) that the trustee had the power to make leases extending beyond the duration of the trust estate; (2) that the leases were reasonable; (3) that as Mrs. V. O. Cox joined in the execution of the two leases, whatever right she had under the trust deed passed to the lessees, and they have the right to hold such interest as against the children, the widow of J. G. Cox still living; (4) that after the death of J. G. Cox some rent was paid and received by J. W. Cox,

one of the plaintiffs, on 1 January 1915, and 1 April 1915, and the plaintiffs are estopped by such conduct to deny the validity of the leases for the unexpired terms; (5) that the defendants had put valuable improvements on the leased premises.

The leases were duly recorded. The right to remove the buildings, fixtures and property put by the lessee on the leased premises is conferred in express terms in the lease of 1 July 1917, and reserved to the defendants in the judgment of the court. At the time of the execution of the trust deed by J. W. Cox and wife, the land was used for agricultural purposes. The family residence was situated on it and was used as such for many years. The lease of 1 July 1907, stipulated that the rental should be paid in equal quarterly amounts, and the lease of 1911 provided that the rental should be paid annually on 1 May. No rental under the lease of 1911 was paid to any one of the plaintiffs after the death of the trustee, J. G. Cox, and only two installments of the rent for the property covered by the lease of 1 July, 1907, that accrued during the year current of the trustee's death. In April, 1915, the plaintiffs made demand on the defendants for the (303) possession of the leased premises.

The plaintiffs insisted that the trustee was without power under the trust deed to make a lease that would extend beyond the duration of the trust; that such lease would be good only until the trust terminated, and that the ultimate limit of the duration of the trust was the life of the trustee, J. G. Cox. His Honor, yielding to the contention of the defendants, decided to permit evidence to be offered as to the reasonableness of the leases made by the trustee, and much of the evidence was addressed to this phase of the case.

The jury returned the following verdict:

1. Are the plaintiffs entitled to the immediate possession of the lands described in the complaint, or any part thereof? Answer: "Yes; all."

2. What is the fair annual rental value of said land? Answer: "$550."

There is a provision in the lease that before the expiration of each term of five years the lessee should give notice of its intention to continue the lease for another term of five years. The court charged the jury that if this notice was not given, and there was no agreement to the contrary, the law presumed that the lessee holds thereafter as a tenant from year to year, and that if plaintiffs more than 30 days before 1 July 1915, it being the end of the year in which the trustee died, notified the defendants to vacate the premises, it would terminate the lease, and plaintiffs would be entitled to possession of the premises, and the jury were left free to find the facts as to whether the notice

had been given or waived by the trustor, or whether there was any understanding or agreement, express or implied, which prevented plaintiffs from taking advantage of the want of notice, if the notice was not given; the defendants contending that there was evidence, even from the notice served by plaintiffs in April, 1915, after the death of the trustee, that the notices either had been regularly given before each time expired, as required by the provisions of the lease, or had been waived. The court also left to the jury the question whether the leases, one for twenty years, composed of the four terms of five years each and the other for fifteen years, constituted a reasonable exercise of the trustee's power as given by the deed. Other matters will be noticed in the opinion of the Court.

Judgment was entered upon the verdict, and defendants appealed.

W. D. Pollock, Dawson & Manning, and Manning & Kitchin for plaintiffs.

W. B. Rodman, Cowper & Whitaker, and Rouse & Rouse for defendants.

WALKER, J., after stating the case: Upon the questions submitted to the jury, the charge of the court was full and explicit. The con-
(304) tentions were stated and proper instructions given in regard to them, and the jury have found the facts against the defendant's contention. But we need not longer dwell upon this feature of the case, for we are of opinion that the lease, under the admitted circumstances, could not continue beyond the death of the trustee, or, at least, beyond the end of the current year in which he died. The principal if not the pivotal question presented by the record is: Did the trustee J. G. Cox have the power to make leases extending beyond the duration of the trust?

We understand the plaintiffs' contention to be that he had no such power. Plaintiffs say it is manifest from reading the trust deed that the power given to the trustee to lease was to rent for agricultural purposes, the language of the deed being: "The said J. G. Cox shall have the power to use said land in whatsoever manner he may deem best for the interest of his said children, either by renting it out or using and cultivating it himself, and using the rents and profits to support his family and to educate his children." This language, coupled with the fact that the only use to which the land had been subjected up to that and at that time, and for some years thereafter, was agricultural, would seem to indicate that the words "to rent" as used *(noscitur a sociis)* was intended as a renting for agricultural purposes. But if the power to rent as conferred in the deed is to be given a broader and more

comprehensive construction, and means to rent for such purposes, agricultural or industrial, as will yield the largest revenue for the support of the family or the trustee and educate his children, then this power cannot be so used as to extend beyond the duration of the trust, and thus bind the *cestui que trusts*—those who are the manifest objects of the bounty of the trustor—for an indefinite period, and exclude them from the possession of the property clearly intended for their benefit. All of the children at that time—1 July 1907—were 21 and over; all had finished school; all except possibly Mrs. Suggs were self-supporting or cared for by their husbands. Mrs. Cox, the wife of the trustee, was then 60 years of age—beyond, according to the law of nature, the child-bearing age. There was the possibility that she might die, that Mr. Cox might marry a woman within the child-bearing age, and that from such union other children might be born to him, upon which event the trust would open for their benefit on equal terms with the children then living.

The defendant's reply that the very terms of the deed by which the trust was created and the condition of the donor's family show that the lease was a reasonable one, and that the power was rightly exercised; and they rely upon other facts; but all these matters were submitted to the jury, as we think after a careful review of the charge, and found against the defendants. We will, therefore, consider the case in another view of it, and one that we deem to be controlling. As a general rule, the power must be commensurate with the act done (305) under it and claimed to be authorized, or, at least, justified by it. The trustee cannot exercise more power than he has acquired, nor act beyond the limit of his power. There may be cases where the court will, under peculiar circumstances, extend the operation of the trustee's act beyond the time when his trust, by the limitation of the instrument creating it, is at an end, and this is done sometimes, but generally in advance of the exercise of the power, as will appear hereafter.

The general doctrine is thus stated in 39 Cyc., 387-388: "Trustees possess general power to lease trust property on such terms, conditions, and rentals as are reasonable and customary for that class of property in the particular vicinity; provided the interests of remaindermen and those entitled to the property after the termination of the trust are not injured thereby, and provided ordinarily that the lease is not made after the termination of the trust, or made to continue after the termination of the trust, either directly or by means of renewals."

It was held in *Matter of McCaffrey,* 50 Hun (N.Y.), 371, that "upon the termination of the trust, the power of the trustees is at an end; and they have no power to renew leases or in the lease executed by them to

provide for the renewal of leases." In the *McCaffrey* case, *supra,* the property was conveyed to a trustee to rent or lease and pay one-third of the net rentals to one daughter, another to a second daughter and one-third to a third daughter, during their natural lives, then upon the death of any one of them to convey to her descendants in fee. One of the daughters died leaving issue, and the lessee contended for a renewal of the term. The Court held that "so far as Mrs. McCaffrey's one-third was concerned the lease ceased to be valid."

The case of *Hutchinson v. Hodnett,* 115 Ga. 990, holds that while under a trust of real property for the purpose of raising income for the support, maintenance, and education of the beneficiaries, the trustee could, by implication of such a power, lease the premises, the power was not an unlimited one. The Court said as to the extent of such a power: "The lease cannot extend beyond the time the trusteeship is to last, and cannot in all cases extend even to the end of the trusteeship, the term of the lease being dependent upon the character of the property, the purposes of the trust, the custom of the place in reference to the management of like property and the conditions surrounding and the emergencies confronting the trustee in reference to the management of the property at the time the lease is extended."

Another case of similar import is *Bergengren v. Aldrich,* 139 Mass. 259, where the Court said: "An undivided third of a parcel of land was devised to a trustee to hold during the life of A, and at A's death to convey the same to the children of A. The will also empowered
(306) the trustee to sell and convey in fee simple, or for any less estate, any part or the whole of the land. During the life of A the trustee and the owners of the undivided third joined in a lease of a portion of the land for a term of nine years, and agreed that at the expiration of the term the lease might be extended for a further term of ten years. At the expiration of the first term A was living, and the lessee demanded a renewal of the lease; *Held,* on a bill in equity for specific performance of the agreement to renew the lease, brought after the death of A, that the trustee had no authority to bind the remaindermen, and the Court would not decree specific performance as to them." It was agreed in that case that "the lease may be extended, or renewed, for a further term of ten years," as a certain specified rent.

It was held generally in the case of *In re Armory Board,* 60 N.Y. 882, that trustees under a will have no authority to lease the property for a period which extends beyond the term of their trusts, and it seems that the following cases support that view: *In re Opening of One Hundred and Tenth Street,* 81 N.Y. 32; *In re McCaffrey, supra; Gomez v. Gomez,* 147 N.Y. 195; *Newcomb v. Kittelas,* 19 Barb. 608; *Greason v.*

Kittelas, 17 N.Y. 491; *In re Hubbell Trust* (Iowa), 113 N.W. 512, 135 Iowa 637; 14 Anno. Cases 640; *Ohio Oil Co. v. Daughetee,* 240 Ill. 361; 88 N.E. 818.

In the *Gomez* case the Court said: "The trust created by the deed, being for the life of Mrs. Gomez, terminated with her death, and with her death the powers of the trustees were, as we have seen, at an end, except to turn over and convey the trust property as directed in the deed. They, therefore, had no power under the deed to thereafter renew leases, or in the leases executed by them to provide for the renewal of leases after her decease."

In another case a trust was created by will to N. P. Daughetee and his successors forever, upon the following terms: To pay the expenses of the trust and necessary repairs and taxes and to pay over the annual proceeds to the nephew of the testator for his life and remainder over to the heirs of his body, share and share alike, forever. The trustee made oil leases for five years and as much longer as gas and oil were found in paying quantities, and the Court held he had no such power. *Ohio Oil Co. v. Daughetee,* 240 Ill. 361. The Court, in the case of *South End Warehouse Co. v. Lavery,* 107 Pac. (Calif.) 1008, considered a lease by the trustee under the following declaration of trusts, "to apply as much of the principal and interest of such property as may be necessary or proper to the support, maintenance, and education of the daughter of the testator, suitable to her condition in life, until she shall have attained the age of twenty-one years, and thereafter to pay to her two-thirds of the net income of said trust quarterly only, as long as she shall live, and upon her death to pay over and de- (307) liver the whole of said property to her descendants in accordance with the provisions of the statute of descents and distributions of the State of California." The lease was executed on 2 February 1904, for a term of five years from 1 June 1904, with privilege of extension for three years at the same rental and with the privilege of a further extension for two years at a rent to be agreed on. On 11 February 1904, the daughter died, leaving a will. The Court held that such trustees may not make a lease that will have force and effect after the termination of the trust, and consequently that the lease which they did make could not extend beyond the life of the daughter, although it was, of course, uncertain when she would die. It is also said in this case that in some of the cases which are apparently, but not really, to the contrary, it did not appear that the life beneficiaries had died, or that, in other words, the trust estate had terminated. In others of these cases, the opinions upon the question were *obiter* and not well considered, and in still others it was said that a lease by the trustees for a fixed time was not void *ab initio,* but would not extend beyond the life of the

trust, as specified in the instrument creating it. In those cases where the question was directly involved and decisions given upon it, it would appear that the courts have not disagreed as to the rule which should govern.

The Court in the case of *South End Warehouse Co. v. Lavery, supra,* (citing *Wier v. Barker,* 104 App. Div. (N.Y.) 112) held it to be settled law that leases made by trustees were valid only for a period ending with the trust term, and added: "The argument so earnestly urged, that such a rule will greatly hamper trustees holding property for a term of uncertain duration in making advantageous leases of property, is more properly addressed to the wisdom of creating such trusts without expressly authorizing leases for such terms as may be deemed prudent by the creator of the trust. That such power may be expressly given is not denied." See *Tredwell v. Tredwell,* 148 N.Y. Supp., 391.

In *Cram v. Dietrich (In re Opening One Hundred and Tenth Street),* 81 N.Y. Supp. 27, decided in 1903, the trust was for the life of the trustor's widow and upon her death the trustees were required to convey the property to her children with authority to the trustees to lease other premises from year to year or for a term of years, and they leased for twenty years the property in question, which was vacant and which the lessee improved. The Court said: "While we reach the conclusion that the trustee had no power to lease beyond the term of the trust estate for the widow, we are of opinion that such leases are valid while such trust estate endures. . . . Beyond such period the leases are void for the reason that they would cut down the estate devised, but for the duration of the life estate there was ample power to lease, and
(308) equity requires that the lessee should be protected in the enjoyment of the property during that period."

The case of *Hubbell v. Hubbell,* 154 N.W. 867, decided in 1915, and reaffirmed *In re Hubbell's Trust,* 135 Iowa 637, was an application for the approval by the Court of a lease proposed to be made by a trustee.

The courts are not prone to moderate the rule we have stated, as it is so easy and feasible for trustees to apply to the court and obtain its consent to the execution of a proposed lease of questionable validity, or when he entertains any doubt as to the extent of his power under the trust. It was said in *Upham v. Plankinton,* 152 Wis. 272; 140 N.W. 5: "If a trustee is given free control of real property to produce revenue therefrom, *and is not empowered to sell the property,* he may execute the trust by creating leasehold estates therein of any reasonable duration which the testator might fairly have had in contemplation; and in such circumstances, *with judicial advice,* to wit, advice of the court, may create a leasehold estate extending beyond the termination of the trust." There the trust was to extend, in all probability, over a long

but uncertain period of time. The jurisdiction of a court of equity to pass upon leases of trustees in advance of their execution and approve or disapprove them, was asserted in *Marsh v. Reed,* 184 Ill. 263, where the Court said: "A court of equity may enlarge the powers of a trustee under a will by extending the time limited by the testator for making leases of the property where exigencies have arisen which make an extension of time necessary to the carrying out of the testator's wish that the income should provide support for his wife and children." 28 A. & E. Enc., 1006, 1008; 2 Beach Trusts and Trustees, 1897 Ed. sec. 446; I Washb. Real Property (4 Ed.), sec. 307; *Upham v. Plankinton, supra.*

It will be seen from the foregoing examination of the cases that they may be divided into two classes: (1) Those where the trustee has attempted to execute the power of leasing without consulting the courts having jurisdiction; and (2) those cases where he has asked for the advice of the court, with all the beneficiaries and parties interested in the trust before it, upon the execution of the lease. The cases falling under the first class have, we think, uniformly held that a trustee has no power to execute a lease extending beyond the duration of the trust, and the reason given is that he has no power to prevent the beneficiaries of the trust from enjoying the estate as contemplated in the deed when the trust has terminated. In the second class of cases, it has been held the courts of equity have the power to enlarge the powers of the trustee as to the matter of leasing property embraced with the trust estate.

The present case is one of the exercise of power by the trustee himself without seeking the advice of the court or the approval of the beneficiaries of the trust, and these leases were accepted by (309) the lessees without requiring the children of J. G. Cox, the beneficiaries of the trust, to execute them, or consent to them, although the deed of trust was of record and all the children of J. G. Cox then living were more than twenty-one years of age, and had finished their education. It is clear and settled by the authorities that a person dealing with a trustee must take notice of the terms of the trust, is duration, and the ultimate remaindermen. It appears by the terms of this trust that leases should not endure beyond the life of the trustee, as it is provided in the instrument creating the power that there might be a division of the property when the youngest child was of age or at the death of the trustee, if that was the earlier event. It is even more favorable to the plaintiffs than that, as the trustee could allot just and equal portions to his children severally as they arrived at full age or married; he might "use the land in any manner deemed best for the interest of his children, either by renting it out or using and cultivating it himself, and with the rents and profits support his family and edu-

cate his children." He is also given a power of sale and reinvestment. Whether we should hold as a matter of law that this language confined his power to ordinary agricultural leases or not, it was evidently contemplated that he should not make leases for such long terms as might afterwards and at the close of the trust by his death, hamper or embarrass the remaindermen in the free use and enjoyment of the trustor's bounty.

As long as the trustee lived, he was willing to confide in his judgment and leave the interests of his family in his keeping, but at his death, there being no substitution of a trustee and no prolongation of the trust, he plainly intended that the property should pass unencumbered to those who had been designated to take it, when that time had arrived, and whose judgment, discretion and management was substituted for that of the trustee. The lease made by the trustee must be considered as one for the full period of twenty years, as by its terms it could last for so long a time, if proper notices were given before the expiration of each of the four periods of five years. He was without power to revoke or annul it within twenty years, if the other parties complied with its terms and conditions. The defendants took the lease with notice, in law, that it would end when the trustee died.

It is not necessary to discuss the question whether it was a reasonable lease in itself, and without regard to the fact whether or not his death would terminate it. The learned judge submitted that question to the jury upon the evidence and a proper charge, and it was answered against the defendants. But it was immaterial, as we have only held, and are only required to hold in this case, that the lease ended when the trustee died, and the plaintiffs have not asked for any rents (310) or damages except those accruing since said event. This also disposes of the first eighteen exceptions, which are germane only to the reasonableness of the leases. We may add, in this connection, that in view of the admitted facts and circumstances in the case, the law would, perhaps, regard this as an unreasonable lease, though we are not called upon to decide as to the ground. We do not think the judge expressed any opinion on the matters embraced within the first seventeen exceptions, as he merely endeavored to place before the jury the relevant evidence upon which their opinion as to the reasonableness of the lease was asked.

The mere fact that defendants improved the property for their own benefit and to promote the better enjoyment of it for their contemplated purposes created no estoppel, as the defendants have reaped all the benefit resulting from the improvements, and when they are removed under the terms of the lease and the order of the court permitting the removal, there will be no enhancement of the value of the

property, and the plaintiffs will not have gained any inequitable advantage even if the contention of the defendants be correct that plaintiffs should have given notice of the intention to end the lease at the death of the trustee. Why should plaintiffs give notice that the lease would be terminated by the death of the trustee when, under the law, it is presumed that the defendants were as well advised of it as the plaintiffs? But it is sufficient to say that the doctrine of equitable estoppel does not apply, as no material harm will result to the defendants and, besides, there has been no misconduct on the part of the plaintiffs and no misleading of the defendants to their prejudice. *Boddie v. Bond*, 154 N.C. 359; *S. c.*, 158 N.C. 204; *Patterson v. Franklin*, 168 N.C. 75, 78. The plaintiffs have simply availed themselves of their legal right; they could not foresee that the trustee would die before the twenty years had passed.

Nor do we think that the receipt of rent by the plaintiffs, or one of them, for the remainder of the current year in which the trustee died, estopped them or amounted to a ratification of the unauthorized act of the trust, in making the lease to continue after the termination of the trust, either directly or by means of renewals. It is not a question of estoppel but of ratification, and the latter does not take place without a knowledge of the facts.

We have held in *Wise v. Texas Co.*, 166 N.C. 610, that a ratification of an unauthorized act or transaction is not valid and binding unless it proceeds upon a full knowledge of the material facts relative thereto. "We, therefore, find it," said the Court, "to be of the very essence of ratification, as of an election, that it be done advisedly, with full knowledge of the party's rights," citing, among other authorities, *Baldwin v. Burrows.*, 47 N.J. 199, 211, and also *Thorndike v. Godfrey*, 3 Me., at p. 432, where it is said: "We can never consider consent and ratification as implied in those cases where there is no (311) knowledge of the facts to which it is said consent and ratification extend. This would be an effect without a cause." And 1 Clark and Skyles on Agency (1905), sec. 106, says: "No doctrine is better settled, both upon principle and authority, than this: that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded on mistake or fraud." See, also, *Owings v. Hull*, 9 Peters (U.S.), 607 (9 L. Ed. 246); Mechem on Agency (1889), sec. 129; Reinhardt on Agency (1902), sec. 340; *Town of Ansonia v. Cooper*, 64 Conn. 536, 544; 23 Am. & Eng. Enc. (2 Ed.), 889; *Marsh v. Fulton County*, 10 Wall. (U.S.) 676; *Norton v. Shelby County*, 118 U.S. 451.

In this case, it was proper for the judge, if the unauthorized act of the trustee could be ratified—which may be admitted for the sake of the argument—to submit the question to the jury, as he did, whether there was a ratification—that is, an adoption of the act of the trustee with knowledge of the facts—so that an intention to ratify it could be reasonably inferred from the facts; and on this question there was at least evidence to support the verdict against ratification, as there was some which tended strongly to show that the rent was received by only one of the defendants to the end of the current year, and that the intention was to apportion the rent for that year between the trustee and the defendants according to the time which elapsed before the trustee's death and that which remained after his death, the rent being payable quarterly during each year of the lease, which division of the rents would seem to have been made in accordance with Revisal, sec. 1988, which provides: "In all cases where rents, rent charges, annuities, pensions, dividends, or any other payments of any description are made payable at fixed periods to successive owners under any instrument or by any will, and where the right of any owner to receive payment is terminable by a death or other uncertain event, and where such right shall so terminate during a period in which a payment is growing due, the payment becoming due next after such terminating event, shall be apportioned among the successive owners according to the parts of such periods elapsing before and after the terminating event."

Whether the case falls strictly within the terms of that statute we need not say, as it is clear that the parties acted upon the same principle of apportionment, not intending the act of one of them to have any greater effect. Such an apportionment has been held to be proper under statutes of a like kind when the trust is for the life of one person with remainder to another and the life tenant dies. 2 Perry on Trusts (5 Ed.), sec. 556; *Price v. Pickett,* 21 Ala. 741.

(312) There is a class of cases where it seems to be held that the mere receipt of rent upon a lease originally void is not a ratification or continuance of the lease, as in *James v. Jenkins,* Butler's Nisi Prius, p. 96, where it was said that acceptance of rent by a tenant in tail on coming into possession is not a confirmation of the lease made by a tenant for life, which is absolutely void at his death.

And in *Robson v. Flight,* 6 De Gex J. and Smith (1865), 608 (46 Eng. Reprint, 1054), it was held: "Whether a trust may be performed or a trust power exercised by the heirs at law, which is obligatory on the trustees of the will, depends on the question whether in the exercise any thing has to be supplied by the judgment, knowledge, and discretion of the person acting in the exercise of such trust or power. A power to lease may be a trust power in the sense of its being the duty

of the trustee to avail himself of it under proper circumstances; but it is to be exercised by a person selected for the purpose, and not by the individual on whom, by reason of intestacy, the law casts the estate. Acceptance by an adult beneficiary after attaining majority of rent accruing under an invalid lease is not a confirmation of the lease or a bar to relief by having the lease set aside."

The case of *Doe v. Butcher, Douglas* (5 Ed.), 50 (99 Eng. Reprint, 36.) held that a lease void against a remainderman cannot be set up by his acceptance of rent after his interest vests in possession. *Lord Mansfield,* after taking the case under an advisari, stated that "there did not appear to have been any intention either to confirm the old lease or to grant a new one. Both the lessor of the plaintiff and the defendant had proceeded under a mistake, and had supposed the original lease to be good." *Doe v. Archer,* 1 B. & P. 531, was decided the same way, and also *Goodright, Lessee, v. Humphreys,* cited in the valuable note to *Doe v. Butcher,* in 99 Eng. Reprint 36, where other like cases will be found. *Lord Mansfield* also said, in *Jenkins on the demise of Yate v. Church,* 2 Cowper's Reports, 482, where a tenant for life made a lease for twenty-one years and died before the expiration of the term, and the remaindermen permitted the lessee to keep the possession for five years, receiving rent regularly during that time: "This is a *void* lease and not voidable only. But if it were *merely voidable,* the acceptance of rent alone, unaccompanied with any other circumstances, is not a sufficient confirmation. It cannot be a confirmation unless done with a kowledge of the title at the time; or unless the remainderman lies by and suffers the tenant to lay out his money in improvements, in confidence of continuing tenant. But here it is a void lease; and in general a void lease is incapable of confirmation." We do not cite these cases for the purpose of deciding the question raised in them, but to show that the mere acceptance of rent, nothing else appearing, is not always sufficient to show ratification.

It was held in *Galewski v. Appelbaum,* 65 N.Y. Supp. 694: (313)

"The lease purporting to be made by the landlord's grantor to the tenant was clearly invalid, in that it was not subscribed by the lessor, nor was there any evidence that the person who signed it in her behalf was her lawfully authorized agent. Nor is there any evidence that she ever ratified it. She certainly did not expressly ratify it, and there is no evidence that she ever saw it or knew of its terms. The fact that it was recorded and that she accepted rent under it raises no implication of ratification. It does not appear that she knew of its recording or knew that it purported to lease the premises for more than a year. At the time the landloard acquired the property, therefore, the

tenant was holding under an invalid lease." See 24 Cyc. 912, and notes; *Carlton v. Williams,* 77 Cal. 89.

The case of *Tyson v. Chestnut,* 118 Ala. 387, is more like ours, and at p. 403, the Court said: "It is manifest upon these facts that they did not intend by receiving the note about to mature and accepting payment of it from the plaintiff to ratify the lease to him and to accept attornment by him under its terms; and this is further shown by the fact that they proceeded promptly to notify him that his possessory right had terminated, to demand possession of him, and he failing to yield upon such demand, to bring their action of unlawful detainer against him. We are not at all inclined to hold them to a ratification and adoption of the lease upon the fact of their receiving and collecting the note for the rent of the year which was about spent at the time, and in the face of their obvious intention to the contrary."

These cases all show that there was sufficient reason for leaving this case with the jury to decide the question of fact whether there was a ratification, or whether the defendants acted under a misapprehension of the facts, or at least, without full knowledge of them, and the rent was received only to the end of the current year. The discussion as to the payment of rent and ratification applies to the lease of 1907, and not to the lease of 1911 for fifteen years, as nothing was paid under the lease after the trustee's death. This but shows, though, that the rent was intended to be paid only to the end of the current year, 1 July 1914, to 1 July 1915.

As to the dower interest, it may be said that this being a lease by a trustee under a power, it was not necessary for the widow to have executed the lease with her husband, as it could not endure beyond his life, as we have held, and she had no interest which vested in possession until his death. It was evidently intended that she should join in the lease for the purpose of removing any cloud from it and to release any possible interest or claim she might have during its continuance, if the dower happened to be assigned out of this land; or to protect
(314) defendants against the dower, if by any means the lease was validly extended beyond the testator's death. Besides, it does not appear that the dower interest to which she is entitled and which should be allotted, of course, according to Revisal, sec. 3084, would cover any part of the land in dispute, but on the contrary, it rather appears that the dwelling and its appurtenances are not on any part of said land. We know of no law which would compel her, in defendants' favor, to have her dower allotted in this land instead of that which is described in the statute. The widow and defendants, it may be added, certainly did not intend that the latter should have the dower in the land after the expiration of the lease, though they may

have mistakenly supposed that it would extend beyond the trustee's death. We should not allow so uncertain and remote an interest, if a real interest at all, to defeat the plaintiffs' clear, substantial, and indisputable right. This contention, therefore, cannot be sustained.

It would serve no good purpose to consider all of the exceptions in detail. We believe that what we have already said embraces all of them, as those specially treated are the prominent and controlling ones, and, as we find that they cannot be sustained, the fate of the others must be the same.

We have carefully examined the case in all its phases, and have discovered no error which should induce us to change the result.

No error.

Cited: Waddell v. Cigar Stores, 195 N.C. 437.

J. EDWARD SMITH ET AL. V. NATIONAL FIRE INSURANCE COMPANY OF HARTFORD, CONN.

(Filed 10 April, 1918.)

1. **Insurance, Fire—Policies—Contracts—*Stipulations.***

The rule that contracts of fire insurance are construed against the insurer in favor of the insured is not changed by the adoption of the standard statutory form, and ambiguous terms and phrases therein are resolved in favor of the latter; and where two interpretations are permissible, the one which without violence to the terms employed will sanction the claim and cover the loss will be adopted.

2. **Insurance, Fire—Policies—Contracts—Forfeitures.**

The courts look with disfavor upon interpretating a contract of fire insurance to effect a forfeiture, and a provision in such policy which might avoid it cannot have this effect if its violation has in no way contributed to a loss thereunder, the subject of the action.

3. **Same—Lumber—Clear Space Clause—Damages—Woodworking Enterprise—Sawmills.**

Where the policy of insurance on lumber against fire provides that the policy would be void unless a continuous clear space of 200 feet shall be maintained between it and "any woodworking establishment or drykiln," excepting tramways and the transportation of lumber across such space; and in an action to recover damages for the loss of the lumber it is shown that the required space was not kept between it and a sawmill operated by steam, but that the plant had been shut down for several days in anticipation of moving it elsewhere, and the fire causing the damages had originated elsewhere without negligence on the part of the insured: *Held,* the

clause referred to does not invalidate the policy or prohibit recovery thereunder. *Semble*, a sawmill is not a woodworking establishment in contemplation of the policy.

(315) APPEAL by plaintiffs from *Connor, J.*, at the February Term, 1918, of CUMBERLAND.

This is an action on a fire insurance policy issued by the defendant company on 24 April 1917, and insuring certain lumber in the sum of $1,500 from twelve months from that date.

The policy contained the following stipulation: "It is a condition of this contract that a continuous clear space of 200 feet shall be maintained by the assured between the property hereby insured and any woodworking establishment or any drykiln (except tramways upon which lumber is not piled), and such space shall not be used for the poling of lumber or timber products, but this shall not be construed to prohibit loading or unloading within, or the transportation of lumber and timber products across, such clear space; otherwise this policy shall be void."

The material facts bearing on the liability of the defendant are as follows:

4. That the lumber of the plaintiffs for which the present claim is presented was destroyed by fire on 10 August 1917, said lumber being located on the premises known as the D. R. Graham land, Rennert Township, Robeson County, North Carolina.

5. That at the time of said fire the lumber so destroyed was piled within less than 200 feet of an open-shed sawmill.

6. That from the issuance of said policy until within about three or four days of the fire above mentioned, said sawmill was in continuous operation, said operation consisting in the sawing of logs into lumber and cutting the lumber into sizes of varying length and width. That such operations were carried on by means of machinery, and in this connection the said sawmill was equipped with a steam engine, boiler, furnace, smokestack, shafts, belts and pulleys, and other equipment in general use in such plants.

(316) 7. That the lumber above described was at the time of its destruction piled in the same place where lumber had been piled at the time said policy of insurance was issued, and between the issuance of the policy and the time of the fire there was no communication between the parties in reference to the location of said lumber.

8. That the policy of insurance referred to was applied for by the plaintiffs in Philadelphia, Pa., was sent to Charlotte, N. C., and there made out upon the form approved by the State of North Carolina, and was then delivered to the plaintiffs in Philadelphia; that prior to

the issuance of said policy there was no inspection by the defendant, either of the lumber or the premises upon which it was piled, and no agent, officer, or employee of the defendant had knowledge or notice of the location of said lumber in reference to said sawmill, either at the time said policy was issued or at any time between the issuance and the date of the said fire; and there was abundant space on said premises, more than 200 feet from said sawmill, upon which said lumber could have been piled.

9. That the rate of insurance, or premium, at which the said policy was issued and the acceptance of said risk were controlled or influenced by the condition in said policy, "that a continuous clear space of 200 feet should be maintained by the assured between the property hereby insured and any wood-working establishment," etc.

10. That the plaintiffs had purchased the lumber insured from one E. J. Graham, and immediately after said fire insurance policy was issued plaintiffs informed the said E. J. Graham that they had taken out insurance upon the lumber covered by said policy of insurance and directed him to pile said lumber not less than 200 feet from said sawmill, and the plaintiffs supposed that said direction had been complied with and at no time did the plaintiffs or any agent of the plaintiffs know that any portion of said lumber was within less than 200 feet of said sawmill.

11. That at the time when the fire originated and for some days prior thereto said E. J. Graham's timber supply for that plant had been exhausted, and he was about to remove the sawmill to another location, though said sawmill was started up a few days after the fire for the purpose of sawing a few logs on the yard, in which lumber the plaintiffs had no interest, and the lumber of plaintiffs which they had purchased from said E. J. Graham was being loaded and hauled as rapidly as possible, though the amount of said lumber specified in the proof made by plaintiffs to defendant was consumed by said fire, the lumber so consumed not having been thus located or hauled, and there was other lumber owned by plaintiffs at said plant which was not consumed.

12. That the value of the lumber consumed by fire and cov- (317) ered by the policy attached hereto was upwards of $1,500, and if the defendant is liable on said policy it is liable for the sum of $1,500 and interest on same from 10 October 1917.

13. That the fire which destroyed the said lumber did not originate from said sawmill, but burned towards the mill building, and was extinguished within about 62 or more feet of the mill, and neither the mill building nor any part of the machinery connected therewith caught on fire.

14. That said fire did not originate from any act of negligence on the part of the plaintiffs or their agents or servants.

15. That the plaintiffs have duly submitted to the defendant a proof of loss on the above claim and the defendant has refused to pay same.

His Honor rendered judgment in favor of the defendant and the plaintiff excepted and appealed.

H. McD. Robinson for plaintiffs.
John M. Robinson for defendant.

ALLEN, J. The lumber of the plaintiffs was insured by the defendant upon condition that a space of 200 feet should be kept clear between the lumber and any wood-working establishment or drykiln, with provision that this stipulation should not be construed to prohibit loading or unloading within such space.

The lumber destroyed was within 200 feet of a sawmill, which had been used to manufacture lumber but was not in operation at the time of the fire and had been for several days, being stopped in contemplation of a removal of the mill to another location.

The lumber of the plaintiffs was being loaded as rapidly as possible at the time of the fire, which did not originate in or about the sawmill but at a distant point, nor was its origin due to the negligence of the plaintiffs or their agents.

Does the fact that the lumber was within 200 feet of the sawmill, under these circumstances, relieve the defendant from liability? We think not.

"The rule of construction prevails almost universally that contracts of insurance are construed against the insurer and in favor of the insured, and this has not been changed by the adoption of standard form of insurance. *Wood v. Insurance Co.*, 149 N.C. 385; *Gazzam v. Insurance Co.*, 155 N.C. 338; *Cottingham v. Insurance Co.*, 168 N.C. 265." *Johnson v. Insurance Co.*, 172 N.C. 146.

Doubts as to the meaning of ambiguous terms and phrases are resolved against the insurer, and Mr. Vance says in his work on
(318) Insurance, quoted in *Jones v. Casualty Co.*, 140 N.C. 264:
"Probably the most important general rule guiding the courts in the construction of insurance policies is that all doubt or uncertainty, as to the meaning of the contract shall be resolved in favor of the insured."

Again, the Court says in *R. R. v. Casualty Co.*, 145 N.C. 116: "When doubt arises by reason of the language employed to express the agreement, so that it admits of two interpretations, the courts, as a general rule, adopt that one which, without any violence to the words selected

by the parties, will sanction the claim and cover the loss. *Goodwin v. Assurance Society,* 97 Iowa 226; *Kendrick v. Insurance Co.,* 124 N.C. 315," and in *Johnson v. Insurance Co., supra,* "The courts look with disfavor upon forfeitures," *Skinner v. Thomas,* 171 N.C. 98, and the trend of modern authority is that a stipulation in a policy which might avoid it does not have this effect if it in no way contributes to the loss. *Cottingham v. Insurance Co.,* 168 N.C. 264.

Applying these principles, the defendant cannot be relieved from liability.

The language used, "a wood-working establishment," while perhaps comprehensive enough to include a sawmill, which merely cuts the logs into rough lumber, is not usually so applied, but to plants with more complicated machinery.

"Woodwork" is defined in the Century Dictionary as "objects or parts of objects made of wood, that which is produced by the carpenter's or joiner's art," and "woodworker" as "a worker in wood, as a carpenter, joiner, or cabinet maker," and those employed to operate a sawmill are generally referred to as a sawyer and the hands, and are not carpenters, joiners, or cabinet makers.

The term is at least ambiguous, and might be held not to include a sawmill, but conceding that it does so, when considered in connection with the nature of the contract and the danger sought to be provided against, it reasonably means an establishment working wood at the time of the injury complained of.

The purpose of the condition, requiring a clear space of 200 feet, was to decrease the risk and the danger apprehended was the escape of fire from the wood-working establishment. The parties had in mind a live plant and not a dead mill, and the contract should be given a reasonable construction to conform to its spirit.

Suppose the mill had been located and abandoned without being operated a day, would it not be "sticking in the bark" to say there could be no recovery because the lumber was within 200 feet of a mill which had never had fire in it, and when there was no accumulation of sawdust or any other inflammable matter, and if so why should not the same rule prevail when the mill had not been operated for several days in contemplation of a removal, and when there is no (319) evidence of an accumulation of combustible matter about the mill or that the fire originated near the mill.

The stipulation in regard to the drykiln also throws light upon the meaning of the contract because there is no accumulation of combustible matter of any kind about a drykiln, and the only danger of fire on account of nearness to one is while it is in operation.

Again, the proximity of the mill did not in any decree contribute to

the loss as the fire did not originate in or about the mill and reached the lumber of the plaintiffs from a point more than 200 feet from the mill.

Again, this stipulation, on which the defendant relies, expressly provides that it shall not be construed to prohibit the loading and unloading of lumber within 200 feet of the wood-working establishment, and the parties have agreed that the plaintiffs had bought the lumber a few days before the fire, and at that time they were loading and hauling the lumber as rapidly as possible.

In our opinion, the defendant is liable under the contract of insurance and judgment should be entered in favor of the plaintiffs upon the agreed statement of facts.

Reversed.

Cited: McCain v. Insurance Co., 190 N.C. 552; *Womack v. Insurance Co.*, 206 N.C. 447; *Insurance Co. v. Harrison-Wright Co.*, 207 N.C. 668; *Cab Co. v. Casualty Co.*, 219 N.C. 793.

J. A. PRITCHARD ET AL. V. D. E. WILLIAMS.

(Filed 10 April, 1918.)

1. Trusts, Parol—Registration—Purchasers with Notice—Statutes.

Our registration laws as to notice has no application to a parol trust engrafted on a conveyance of land where those claiming its benefits are found by the verdict of the jury, interpreted in the light of the charge, not to have been purchasers for value.

2. Trusts, Parol—Remaindermen—Right of Action—Equity.

Beneficiaries having vested or contingent interests in remainder under a parol trust engrafted upon a conveyance of lands, may maintain a suit to have such interest declared and established in the lifetime of the first taker, in the nature of a bill in equity to perpetuate testimony with the additional element of declaring the trusts, but no decree or order may be entered to disturb the possession of those entitled to it.

3. Same—Election—Conflicting Rights—Limitation of Actions.

The right of the holder of an interest under a parol trust in remainder to maintain his suit to have the trust declared in the lifetime of the first taker, is not inconsistent with his right to have the trust declared and for possession after the particular estate has fallen in, for the one includes the other; and his failure to have exercised the one does not bar his cause of action as to the other.

4. Same—Adverse Possession.

Where under the terms of a parol trust engrafted upon a deed the

grantee should hold the legal title to the use of his wife for her life, then to himself; then to H. for life with remainder over to the plaintiffs, etc., who bring their suit to declare the trust and for possession soon after the death of H., and it appears that the defendants claim under *mesne* conveyances from the trustee, but are not purchasers for value; defendants do not hold adversely to plaintiff during the continuance of the particular estates, and the suit is not barred by lapse of time.

5. Trusts, Parol—Deed of Trustee—Title—Original Uses.

Where a trustee under a parol trust engrafted on his title holds to the use of his wife for her life and then affected by certain contingent uses, conveys the lands to his wife absolutely, his deed is a renunciation of the trust and his relation is adversary, but his wife, taking the title with notice, holds it subject to the trusts originally declared.

6. Appeal and Error—Evidence—Harmless Error.

The exclusion of evidence on the trial will not be considered reversible error on appeal where it appears that the witness had substantially given such evidence elsewhere in his testimony, and that it conformed with the contention of the appellee.

HOKE, J., concurring; CLARK, C. J., dissenting.

APPEAL by defendant from *Kerr, J.*, at the Fall Term, 1917, (320) of CAMDEN.

This is an action instituted by the plaintiffs, the children of D. T. Pritchard and grandnephew and nieces of D. L. Pritchard, to establish a parol trust and to recover possession of land.

The defendant relies on the plea of the statute of limitations and laches.

D. L. Pritchard was formerly the owner of the land described in the complaint, and on 2 January 1886, he executed a deed therefor to J. G. Hughes, and it is at this time and in connection with the execution of this deed it is alleged the parol trust was declared.

On 14 March 1888, after the levy of an execution against said Hughes and the allotment of his homestead, the part of the land in excess of the homestead, 80 acres, was sold and a deed therefor made to the purchaser, James H. Sawyer.

After the death of Sawyer, this part of the land was, on 11 September 1899, sold for partition among the heirs of Sawyer, and a deed therefor executed to L. P. Williams.

On 15 January 1900, Williams conveyed this land to John S. McCoy; on 7 January 1907, McCoy conveyed to W. Lynch, and on 14 January 1911, Lynch conveyed this part of the land to the defendant.

On 14 January 1894, Hughes conveyed the land covered by the homestead, 160 acres, to his wife by deed purporting to convey

(321) in fee, which was registered in 1902, and on 3 May 1907, Mrs. Hughes and her daughter Elizabeth conveyed the same land to the defendant.

Mrs. Hughes died in 1913; Elizabeth Hughes in May, 1915, and this action was commenced in October, 1916.

There was a motion for judgment of nonsuit upon the ground that the action was barred by the statute of limitations upon the admitted facts. This motion was overruled and the defendant excepted.

His Honor instructed the jury if they believed the evidence to answer the issue as to the statute of limitations in favor of the plaintiffs, and the defendant excepted. The jury returned the following verdict:

1. Did Joseph G. Hughes hold the property sued for in trust to convey the same as alleged in the complaint? Answer: "Yes."

2. Did the defendant or any of those under whom he claims purchase the 160-acre tract for value and without notice of said trust? Answer: "No."

3. Did the defendant, or any of those under whom he claims, purchase the 80-acre tract for value and without notice of said trust? Answer: "No."

4. What has been the rental value since 1915? Answer: "$500."

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

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

D. H. Tillett and Meekins & McMullan for plaintiffs.

R. C. Dozier, Aydlett & Simpson, and Ehringhaus & Small for defendant.

ALLEN, J. The trust established by the verdict is that J. G. Hughes, the grantee in the deed of 1886, should hold the title in trust to convey the same to the wife of Joseph G. Hughes for life, and then to himself for life if he survived her, and then to Mary Elizabeth Hughes for life, with a remainder over in two-thirds of said lands to her children if any surviving her should live to be 21 years of age, and in one-third to the plaintiffs; and if she, said Mary Elizabeth Hughes, should die without children her surviving who should live to be 21 years of age, then to convey the whole of said lands after the death of said Mary Elizabeth Hughes to the children of said D. T. Pritchard, the plaintiffs in this action, share and share alike, in fee simple.

The verdict, when considered in connection with the charge, also establishes that neither the defendant nor any one under whom he

claims is a purchaser for value, so that the question discussed, but not decided, in *Wood v. Tinsley,* 138 N.C. 509, and *Lynch v. Johnson,* 171 N.C. 632, as to the effect of the Coroner Act on parol (322) trusts is not presented, and the learned counsel for defendant do not so contend in the oral argument or by brief.

The plaintiffs as remaindermen, vested as to one-third and contingent as to two-thirds interest, could have maintained an action to have the trust declared during the existence of the life interest, as without this right it would have been in the power of the trustee to defeat the trust, resting in parol, by a conveyance to an innocent purchaser for value. "Where, however, a party has an interest, it is perfectly immaterial how minute the interest may be, or how distant the possibility of the possession of that minute interest, if it is a present interest. A present interest, the enjoyment of which may depend upon the most remote and improbable contingency, is nevertheless a present estate; and, as in the case upon *Lord Berkley's Will,* though the interest may, with reference to the chance, be worth nothing, yet it is in contemplation of law an estate and interest, upon which a bill may be supported." Danll., Ch. Pr., Vol. 1, 317.

"A remainderman is entitled to equitable relief whenever necessary to protect his interest against loss or injury." 16 Cyc. 658. See to same effect, Story Eq. Pl., sec. 301; *Allan v. Allan,* 6 Ves. 135; *Latham v. L. Co.,* 139 N.C. 211.

This right is in the nature of a bill in equity to perpetuate testimony, with the additional element of declaring the trusts, which is no more than the jurisdiction in equity to enter a decree preserving the property when it is in danger of loss and where, but for such decree, the rights of interested parties might be destroyed.

In such proceeding by the remaindermen, the land itself, with the right of control and possession, is not before the Court. The *res* is the establishment of the respective interests in the title, and no order or decree can be entered disturbing the possession of those entitled to interests for life, and it cannot therefore be the equivalent of, nor coextensive with, an action to declare the trust and to recover possession of the land.

If this right did not exist in the remaindermen, lapse of time cannot affect the present action for possession, which could not be maintained until the death of the life tenant in 1915, and if it did exist it came into being at the same time and by the same act with the right now attempted to be exercised, to establish the trust and to recover possession. The two rights are not only not inconsistent, but one includes the other, and it is only when two rights are inconsistent that the party

is put to his election, and that the exercise of one or the failure to do so bars the other.

(323) In *Machine Co. v. Owings,* 140 N.C. 505, *Justice Hoke* quotes the approved doctrine as follows: "In Enc. Pl. and Prac., Vol 7, 362, the doctrine is stated as follows: 'As already stated, the principle does not apply to all coexistent remedies. As regards what have been termed consistent remedies, the suitor may, without let or hindrance from any rule of law, use one or all in a given case. He may select and adopt one as better adapted than the others to work out his purpose, but his choice is not compulsory or final, and if not satisfied with the result of that he may commence and carry through the prosecution of another. Thus, where a sale of chattels is induced by the fraud of the vendee, the vendor may prosecute the vendee for the price of the articles in one action and in another for damages on account of the fraud, both proceeding on the theory of ratifying the sale; but he cannot maintain either if he has rescinded the sale or if, on the theory of rescission, he has resorted to replevin to recover the property. No suitor is allowed to invoke the aid of the courts upon contradictory principles of redress upon one and the same line of facts.' In 3 Words and Phrases Judicially Defined, p. 2338, it is said: 'The whole doctrine of election is based on the theory that there are inconsistent rights or remedies of which a party may avail himself, and a choice of one is held to be an election not to pursue the other. The principle does not apply to coexisting and consistent remedies.' These statements of doctrine are supported by well-considered decisions and are very generally accepted as correct. *Whittier v. Collins,* 15 R.I. 90; *Bacon v. Moody,* 117 G. 207; *Austen v. Decker,* 109 Iowa 109; *Black v. Miller,* 75 Mich. 323." The principles has been applied in a number of cases to protect the remaindermen against the plea of time and laches.

In *Stewart v. Conrad,* 100 Va. 135, there was a misappropriation of a fund held in trust for life and then in remainder, and the Court said as to the right of action: "The remaindermen, under the terms of the will creating the trust fund, are not entitled to the possession of any part of it until the death of the life tenant, who was a party to this suit, and who, so far as this record shows, is still living. Until her death the appellants would have no standing in court except to ask a court of equity to prevent or remedy a violation of the trust and to preserve the trust fund. They had the right to invoke the aid of a court for those purposes, but they were under no legal obligation to do so, and the objection of laches or acquiescence will not lie for their failure to assert the rights which have not yet accrued."

In *Watson v. Thompson,* 12 R.I. 472, it is held that although a remainderman might maintain an action to have a resulting trust de-

clared during the existence of a life estate, that his failure to do so would not be accounted to him as laches and cause a forfeiture of his right of action on the termination of the life estate.

In *Aiken v. Suttle,* 72 Tenn. 109, defendants claimed under (324) deeds purporting to convey a fee, and relied on the statute of limitations. The Court held the plaintiff not barred as she was a remainderman, and said: "The statute of limitations could not run against her until after the termination of the particular estate by the death of C. K. Gillespie. *Miller v. Miller,* Meigs, 484; *McCorry v. King's Heirs,* 3 Hum. 267. She was not bound to sue until her right to possession should have accrued. Nevertheless, at any time prior thereto she might sue to have a cloud removed from her remainder interest and to have her rights declared. A remainderman is not obliged to wait until the right of possession has accrued, but may have a cloud removed during the existence of the particular estate."

In *Gibson v. Joyner,* 37 Miss. 167, it was held that the statute of limitations did not begin to run against remaindermen until termination of life estate, although he might have maintained an action before that time to prevent loss of the property. The case of *Wooten v. R. R.,* 128 N.C. 119, and *Baker v. R. R.,* 173 N.C. 365, also have a direct bearing on the question involved here.

In the first of these cases stock was bequeathed to Charles Bradley in 1854 to hold for Lucy Jewett for life, and upon her death for her surviving children. The stock appeared on the books of the company in the name of Bradley, trustee for Lucy Jewett. In 1869, Bradley, trustee, transferred the stock to Lucy Jewett absolutely and new stock was issued, which in the same year was sold by her to various persons. Lucy Jewett died in 1898, twenty-nine years after the sale, and the children commenced their action the following year. It was held that the action was not barred by the statute of limitations, and the Court, among other things, said: "The defendant further sets up the statute of limitations against the demand of the plaintiffs. We are not deciding that the plaintiffs had no right to interfere in the transfer of the stock to have it restored to its proper ownership at any time after the wrongful transfer, but they were not compelled to take action for the recovery of the stock or its value until after the death of their mother, which occurred in 1898. This action was commenced in 1899, and is not therefore barred by the statute of limitations."

In the *Baker* case the facts are similar, except the interest in remaindermen was contingent and forty-seven years elapsed after the breach of trust before the death of the life tenant, and it approves the *Wooten* case.

Again, neither the defendant nor any one under whom he claims

has held adversely to the plaintiffs during the existence of the life interests, as none of them are purchasers for value and all took with notice of the equity of the plaintiffs.

(325) It is true the execution of a deed by the trustee to his wife purporting to convey the fee was a renunciation of the trust by him (*Coxe v. Carson,* 169 N.C. 132), and thereafter his relation to the plaintiff was adversary, but by the same act he parted with the title and with the power to protect the interests of the plaintiffs, and he conveyed the land to his wife, for whom he held the title in trust for life, who took the conveyance with notice.

This deed operated to convey to the wife her interest for life, and as she had notice of the plaintiffs' equity she held the fee in remainder in trust for the plaintiffs, and the same rule prevails as to the conveyance to the defendant. *McMillan v. Baker,* 85 N.C. 291; *Griffin v. Thomas,* 128 N.C. 312.

In the *Baker* case, Ronald McMillan, trustee, was directed by a court of equity to invest certain money in land to be held in trust for his wife for life, and then for her children, and in 1855, in violation of the trust, he made the investment and took the title in trust for his wife in fee. The trustee died in 1860 and the wife in 1878, and the action was commenced the following year by the children against the defendant, who bought under an execution sale against the wife in 1869. It was held that the deed in favor of the wife, although in form a fee, conveyed the life estate, and that there was no adverse holding against the plaintiff by the wife or the defendant until the death of the wife.

We are, therefore, of opinion the plaintiffs cause of action is not barred by the lapse of time.

We have considered the other exceptions of the defendant and find no reversible error.

The exception principally relied on is to the refusal of his Honor to permit the defendant to prove, for the purpose of impeachment, by the cross-examination of D. T. Pritchard, who was the principal witness to establish the trust, that he qualified as executor of D. L. Pritchard, and that he made no return of the land in controversy, although the debts of the estate exceeded the assets.

The first answer to the position of the defendant is that the facts sought to be elicted from the witness substantially appeared in evidence.

The witness testified that he qualified as executor, and the fact that the title remained in Hughes and his grantee until the commencement of this action shows that he never proceeded against the land in controversy as the property of D. L. Pritchard. He also testified that he administered the whole estate of his uncle; that the whole estate was

sold and his indebtedness paid as far as it went; that the only man he owed was Mr. *Hinton*, and he owed him $9,000, which clearly implies that the assets were not sufficient to pay the debts.

Again, his failure to make return of the property is con- (326) sistent with his testimony that it was conveyed to Hughes in trust, and if not, the bias and feeling of the witness towards the cause and parties was made to appear clearly by his further cross-examination.

No error.

HOKE, J., concurring: If section 980 of our Registration Laws, commonly known as the Connor Act, applies to parol trusts, invalidating them as to subsequent purchasers holding deeds duly registered, the issues are not fully determinative of the controversy, and the cause should be remanded for further findings. Owing to the way the second and third issues are framed, "Is defendant, or any of those under whom he claims, a purchaser for value and without notice of the trust?" the response "No" may very well signify, and be made on the ground, that defendant is a purchaser for value, but with notice. There is evidence to support such a finding, and it has been repeatedly held that when the Connor Act applies, no notice however formal will affect the holder under a deed first registered on the theory that the act controls the rights of the parties. The answer, therefore, is not necessarily conclusive.

I am of opinion, however, that the act in question does not apply to parol trusts and in no way affects them or the rules by which they are established and enforced. Drawn with intelligent care and foresight by our former *Associate Justice Connor*, now an honored member of the Federal bench, it was professedly designed and intended to affect priorities arising from registrations, and from its very nature and purpose, therefore, is restricted to written instruments capable of registration, and the act, in terms, applies only to "conveyances of land, contracts to convey, and leases of land for more than three years" —all required to be in writing by other sections of the same statute. I conclude, therefore, that these trusts, resting in parol and fully recognized by our law (*Jones v. Jones*, 164 N.C. 320; *Gaylord v. Gaylord*, 150 N.C. 222; *Avery v. Stewart*, 136 N.C. 436; *Shelton v. Shelton*, 58 N.C. 292; *Strong v. Glasgow*, 6 N.C. 289), are not within the meaning, terms, or purpose of the Connor Act, and will be enforced against the holder of the legal title unless it appears that such holder or some one under whom he claims has acquired such title for a fair and reasonable value and without notice of the trust. They were no doubt omitted from the Connor Act for the reason that, being recogniz-

ed estates oftentimes of the greatest merit and incapable of registration because not in writing, it was considered unfair and subversive of right to destroy them in favor of one who had acquired his title with full notice of their existence.

This then being the correct position and the verdict on the first issue having established the existence of the trust estate, the findings (327) on the second and third issues, if they do not necessarily negative both of the requirements for the protection of defendant's title, assuredly determine that one of the essentials is lacking; either that no adequate value was paid or, which is more probable, that the defendant and all under whom he claimed the property had full notice of the trust estate and of the facts and circumstances by which it was created and, concurring in the view that, on the facts of this record, the statute of limitations does not operate in defendant's favor, I am of opinion that the decree upholding the trust should be affirmed.

CLARK, C.J., dissenting: Probably there is no constructive legislation of recent years that is more important and the maintenance of which in its integrity is more necessary to the landowners of North Carolina, whether buyers or sellers, than the Connor Act of 1885, ch. 147, now Revisal, 980. Prior to the passage of that act it was almost impossible for a lawyer to advise an intending purchaser of land, or for him to feel sure that he was not buying a lawsuit. An examination of the records would only show the conveyances that were recorded and at any time a prior unregistered conveyance might turn up and oral evidence might satisfy the jury that the purchaser or some of those under whom he claimed, had taken a conveyance with notice of the unregistered title. Besides the disabilities of those under whom the plaintiff claimed by reason of non-age, or marriage, or otherwise, might accumulate and thus a lapse of 80 years has been known to prevent the protection even of possession under color of title.

Under these circumstances it was absolutely necessary that those buying land, especially those coming from other states, should have the protection of a statute in favor of the purchaser against "actual or constructive notice" of an "unregistered" deed or "contract to convey."

It has been often held under this statute, "No notice to the purchaser, however full and formal, will supply the place of registration. All secret trusts, latent liens, and hidden incumbrances are and were intended to be cut up by the roots by force of our registration laws," citing *Blevins v. Barker*, 75 N.C. 438, under the similar statute in regard to the registration of mortgages, on which basis the registration of deeds and contracts to convey was placed. That case has been cited many times since (see Anno. Ed.) as applicable to all conveyances or

"contracts to convey" since the Connor Act. *Lynch v. Johnson* and cases cited, 171 N.C. 615-616.

Under the Connor Act, if A registers first a conveyance from B he takes a complete title to B's interest, however formal and full a notice he may have of a former unregistered conveyance, or of any "secret trust, latent liens, or hidden encumbrances." It would be strange indeed if by the terms of the act the purchaser was protected (328) only from an unregistered deed of which he has notice and which it will be dangerous to forge, but would have no security against proof of some unregistered oral agreement that was unknown to him. The latter is necessarily "unregistered," which is the evil to be eliminated. It was not exempted from the statute because "unwritten" as well as "unregistered."

In this case, the plaintiffs, the children of D. T. Pritchard who were nephews and grand nieces of D. L. Pritchard, seek to impress a parol trust upon the land described in the complaint in the hands of the defendant after the lapse of 30 years. On 2 January 1886, more than 30 years before 14 October 1916, the date of the summons in this action, D. L. Pritchard made a fee simple deed for the premises to his son in law J. G. Hughes, which was witnessed by James A. Spencer, and in March 1886, D. L. Pritchard died. On 14 March 1888, after levy of execution and allotment of a homestead in part of said land (one of the commissioners to allot being James A. Spencer, witness to the aforesaid deed), the excess was sold by Wright, the sheriff, and bought by James H. Sawyer. After the death of Sawyer the land owned by him was sold by commissioners in partition 11 September 1899, and conveyed to L. P. Williams. On 15 January 1900, Williams conveyed to McCoy; 7 January 1907, McCoy conveyed to Lynch; 14 March 1911, Lynch conveyed to the defendant.

On 14 March 1894, Hughes conveyed the other part of the land covered by the homestead to his wife, who on 3 May 1907, conveyed to the defendant and her daughter joined in the conveyance.

Each of the above conveyances purported to convey a fee simple and each of the successive grantees possessed the land, claiming absolute ownership. There is evidence that the defendant, since the date of his deed, has been in possession, cultivating the premises, and has enhanced its value by $5,000 in cash spent on buildings and other improvements.

The plaintiffs seek to prove the trust solely by the evidence of D. T. Pritchard, father of the plaintiffs, who alleges that at the time of its creation there was present besides the grantor himself Hughes, the grantee, Mrs. Hughes, and the witness Spencer. No action was brought to set up this trust until more than 30 years after the death of the

grantor, 15 years after the death of the grantee, many years after the death of the witness Spencer, and more than two years after the death of Mrs. Hughes. Before the beginning of this action, Sheriff Wright and the grantees Sawyer and McCoy had died, Williams had moved to Virginia, and Lynch, the only grantee in the chain of conveyances living and present, denied any knowledge of the alleged trust and testified on the contrary that before he purchased D. T. Pritchard himself expressly advised him to buy, and D. T. Pritchard did not deny this statement on the stand.

(329) Thus the plaintiffs, the most of them at all times *sui juris*, neglected to sue until every witness by whom the defendant could deny the trust had died and every successive grantee by whom he could negative notice had either died or moved out of the State, except Lynch only, and he was present and denied the trust on the witness stand.

Furthermore, when the defendant bought the land, D. T. Pritchard, the sole witness for the palintiffs, and their father, received a part of the purchase price in satisfaction of his judgment, for when the homestead was laid off and the excess was sold by Wright as sheriff and purchased by Sawyer, under whom the defendant claims, this was done at the instance of D. T. Pritchard, individually and also as executor of D. L. Pritchard as judgment creditors in the action against Hughes.

Without now discussing the many well-grounded exceptions taken on the trial that the statute of limitations is a bar to the plaintiffs' action, *Lynch v. Johnson*, 171 N.C. 615, and especially that suing in equity they are barred by such laches independent of any statute, it would seem that the Connor Act is a full protection against such "secret trust and latent lien."

It is true that the Connor Act does not apply except in favor of purchasers for value and creditors, but there is no clear and unambiguous finding in this record that the defendant was not a purchaser for value, nor is there such unambiguous finding that he had notice of said trust, and no evidence justifying such finding.

The issues submitted are: "Did the defendant or any of those under whom he claimed, purchase the 160-acre tract of land for value and without notice of said trust?" And there is the same issue as to the 80-acre tract. To both issues the jury answered "No," which is a finding, construed in the light of the evidence, that the defendant and some or all of those under whom he claimed, purchased for value but with notice of said trust. The two negatives make an affirmative. The form used, "purchase for value and without notice" of said trust, with the negative response, may well mean equally that the defendant was a

purchaser for value, but with notice, or took the property not as a purchaser but without notice.

The person intended to be protected by the Connor statute was the purchaser or creditor who had full notice of the prior conveyance or trust. These findings do not determine that the defendant and all those under whom he claims were or were not purchasers for value, but merely settles that if such purchasers, they did not take without notice of said trust; whereas if they were purchasers, though with notice of said trust, they were protected from the plaintiffs' claim by the terms of the Connor Act.

It is true it is claimed by the plaintiffs that the instructions (330) were so complete that, though the jury made this ambiguous response, it is cured by the instructions given. But who knows what passed unseen in the minds of the jury? The construction that the verdict finds that the defendant is a purchaser for value, but with notice, is in accordance with the evidence and does not conflict with the charge of the judge.

When a "secret trust" is thus attempted to be set up after the lapse of thirty years by only one witness, D. T. Pritchard, who is the father of the plaintiffs, and who is shown to have received a profit by the sale of the property as belonging to the grantee's estate, and who did not deny the statement on oath of a witness who testified that D. T. Pritchard had told him that the title was good, and in view of the numerous exceptions of law and the laches of the plaintiffs, who are proceeding in equity, it is surely proper to require that the findings upon which a court shall proceed to oust the defendant shall be clear and unambiguous whether he and none of those under whom he claims was a purchaser, and also a separate and distinct finding whether he and all those under whom he claimed acquired the property with notice of the trust.

The oral agreement attempted to be set up by plaintiffs after the lapse of more than 30 years was that Hughes agreed orally that "after the death of D. L. Pritchard he would execute a deed in fee simple conveying said land to his wife for life, with the remainder to himself for life if he survived her, then with remainder over in two-thirds of said land to her children and remainder in one-third to the plaintiffs on certain contingencies." This is a "contract to convey" which comes within the very letter of the Connor Act, Revisal, 980, and is therefore invalid as against the defendant both because unwritten and because unregistered if it had been written. *Lynch v. Johnson,* 171, bottom of page 616, discusses and decided this very point. The plaintiffs can be in no better condition because it was not in writing. If in writing, it would be invalid because not registered. The court should therefore have entered

a nonsuit against the plaintiffs. At best, for the plaintiff it is an implied or constructive trust arising by operation of law from the acquisition by the defendant of trust property with notice and without adequate consideration. *University v. Bank,* 96 N.C. 287; Bispham Eq., secs. 20, 93, 95; 3 Pomeroy Eq., secs. 1048, 1006, and notes; Hill on Trustees, 172; *Robinson v. Pierce,* 45 L.R.A. 56; *Starr v. Starr,* 6 Wallace 419.

The statute of limitations runs whether this trust is express or implied, for the possession of a trustee is presumed to be that of the *cestui que trust. Mitchell v. Freeman,* 161 N.C. 322. Though ordinarily the statute does not run against an express trust until the demand has been made, there is an exception when there has been an open
(331) disavowal of it to the actual or constructive knowledge of the *cestui que trust. University v. Bank,* 96 N.C. 287; *Dunn v. Dunn,* 137 N.C. 533. The most open and notorious disavowal is the making and registration of a deed. 28 A.&E. 1134; 19 A.&E. 187; 17 R.C.L., title "Limitations," par. 162, note 14; *Coxe v. Carson,* 169 N.C. 132, in which last case *Walker, J.,* carefully discusses the whole matter.

In this case, even if the trust had been express, this action has long since been tolled by reason of the open repudiation by the successive deeds made and registered, beginning with the deed for the excess by Wright, the sheriff, and deed for the homestead to Hughes. Indeed, the alleged trustee died more than fifteen years before this suit was instituted, as in *Dunn v. Dunn,* 137 N.C. 533, and *Baker v. McAden,* 118 N.C. 744, which converted it into an implied trust and started the running of the statute. As to an implied trust, "No demand is necessary, but the statute is put in motion as soon as the property is taken into possession." *Robertson v. Dunn,* 87 N.C. 195.

It is well settled that the rule that the statute of limitations does not run against the *cestui* trust applies only to express trusts, and that implied or constructive trusts are barred by the statute of limitations. 25 Cyc. 1155; *Falls v. Torrence,* 11 N.C. 413; *Edwards v. University,* 21 N.C. 325; *Wheeler v. Piper,* 56 N.C. 250; *Faggart v. Bost,* 122 N.C. 517; *Coxe v. Carson,* 169 N.C. 132.

A trust to convey, which is alleged in the complaint, with no other active duties to perform, is deemed an active trust. 3 Pomeroy Eq., sec. 992. The plaintiffs could have called for a conveyance in accordance therewith at any time after the death of D. L. Pritchard, now thirty-two years ago, and the statute began to run from the time the right accrued to call upon the court to declare the holder of the legal title a trustee. *Greenleaf v. Land Co.,* 146 N.C. 508; 39 Cyc. 509.

If this were a passive or naked trust (*Wilder v. Ireland,* 53 N.C. 85), by virtue of the statute of uses (Revisal, 1584), the plaintiffs could

have called for the legal title to be conveyed to them in accordance with the terms of the trust at any time; and if so the cause of action accrued thirty-two years ago.

The plaintiffs, on their contention, were vested remaindermen in one-third and contingent remaindermen in the other two-thirds of this land and had a right of action to have a court declare the trusts to protect their remainder from sale to some purchaser for value without notice, and having failed for thirty-two years to assert it, they are now barred. *Greenleaf v. Land Co.*, 146 N.C. 508; *In re Bateman's Will*, 168 N.C. 234; *Cedar Works v. Lumber Co., ib.*, 394; *Lynch v. Johnson*, 171 N.C. 615; 39 Cyc. 522, 523, 534.

The plaintiffs could certainly have instituted a proceeding to (332) have this trust declared on the death of D. L. Pritchard thirty-two years ago, or upon the deed conveying the property to Hughes' wife in 1894, or upon the conveyance in fee to the defendant in 1911, and certainly upon the death of the grantee, Hughes, fifteen years ago. *Greenleaf v. Land Co.*, 146 N.C. 508; *Jackson v. Farmer*, 151 N.C. 279.

If one of the plaintiffs is barred, all are, since the declaration of the trust in one action would inure to the benefit of all, for they are all in the same class. *Yarborough v. Moore*, 151 N.C. 121; *Matthews v. Joyce*, 85 N.C. 264.

The evidence is complete and overwhelming and *practically uncontradicted* that the defendant and those under whom he claims were *purchasers for value*. The finding that the defendant and those under whom he claims were *not* "purchasers for value *and* without notice," taken in connection with all the evidence, means simply that they were "purchasers, but with notice." The issue, in the best light for the plaintiffs, is insufficient and ambiguous.

The trust attempted to be proven that at the time D. L. Pritchard conveyed the land to Hughes the latter agreed verbally that "after the death of D. L. Pritchard that he would execute a deed in fee simple conveying said land to his wife for life, with the remainder to himself for life if he survived her, then with remainder over on certain contingencies," is not a trust at all but a mere "contract to convey" which, not being in writing, is void under the statute of frauds, and is moreover barred by the Connor Act as to the defendant and those under whom he claims under a chain of registered deeds.

The integrity of titles is of the greatest importance to the landowners of the State and to those who wish to buy land, and this defendant should not be dispossessed upon the allegations of this complaint and the proof of a secret and latent lien after the lapse of thirty years and after having placed $5,000 improvements on the property. It is not found that the defendant was not a purchaser for value, and if the

finding can be construed that he was a purchaser with notice, still the defendant is protected both by the Connor Act and the statute of frauds.

Cited: Fleming v. Congleton, 177 N.C. 188; *Pritchard v. Williams,* 178 N.C. 446; *Pritchard v. Williams,* 181 N.C. 47; *Harriett v. Harriett,* 181 N.C. 78; *Roberts v. Massey,* 185 N.C. 166; *Spence v. Pottery Co.,* 185 N.C. 221; *Young v. R.R.,* 189 N.C. 243; *Eaton v. Doub,* 190 N.C. 22; *Adams v. Wilson,* 191 N.C. 395; *Muse v. Hathaway,* 193 N.C. 229; *Smith v. Suitt,* 198 N.C. 8; *Lykes v. Grove,* 201 N.C. 256; *Sansom v. Warren,* 215 N.C. 437; *Abrams v. Insurance Co.,* 223 N.C. 502; *Parham v. Henley,* 224 N.C. 408.

R. FRANK HOGAN v. NORMA McGEE UTTER.

(Filed 10 April, 1918.)

1. Infants—Contracts—Deeds and Conveyances.

The deed of an infant is only voidable, and a mortgage on his lands must be repudiated by him within a reasonable time after he reaches his majority or he will be deemed to have ratified it, and after three years it will become valid and binding.

2. Mortgages—Powers—Sales—Notice—Statutes.

Revisal, sec. 641, as to notices of sales of land, is construed to apply to sales under foreclosure of a mortgage by order of court and other judicial sales, and not to such notice when sale is made under the power contained in the mortgage itself, leaving the parties free to contract with reference to the notice thereof. The dictum in *Palmer v. Latham,* 173 N.C. 61., that requirements as to advertising are directory only, is overruled except in its application to execution sales.

3. Tenants in Common—Outstanding Title — Deeds and Conveyances—Mortgages.

A tenant in common who buys the interest of another tenant in common sold under mortgage does not thus acquire an outstanding title, and the principle which prevents him from doing so has no application.

(333) APPEAL by defendant from *Devin, J.,* at the February Term, 1918 of DURHAM.

This is a petition, filed in a proceeding to sell land for partion, to determine the rights of the parties to a part of the fund derived from the sale.

J. C. Hogan was formerly the owner of the land, and he died in Sep-

tember, 1895, leaving a will by which he devised the land to his wife, Francis J. Hogan, for life, and then to his children.

Francis J. Hogan died on 12 November 1916. R. Frank Hogan was entitled to one-third of the land under the will of J. C. Hogan, and on 11 February 1907, when he was 20 years and 3 months old he conveyed his interest in said land by mortgage deed to C. L. Lindsey to secure a loan of $87.50. Said mortgage contained the following power of sale: "But if default shall be made in the payment of said bond or the interest on the same or any part of either at maturity, then and in that event it shall be lawful for and the duty of the said party of the second part to sell said land and personal property hereinbefore described to the highest bidder for cash at the courthouse door in Orange County, first advertising the same for thirty days in some newspaper published in Orange County, and convey the same to the purchaser in fee simple, and out of the money arising from the said sale to pay said bond and interest on the same, together with the costs of the sale, and pay any surplus, if any, to said party of the first or his legal representative."

Default being made in the payment of the debt secured in said mortgage, the land was sold under said power on 18 June 1908, and J. B. Hogan, another of the devisees in the will of said J. C. Hogan, became the purchaser and a deed was executed to him purporting to convey the interest of the said R. Frank Hogan in said land.

Notice of the sale was published in a weekly newspaper, the first notice appearing in the issue of 18 June 1908, and also notice was posted at the courthouse door at Hillsboro, and not elsewhere.

R. Frank Hogan was 21 years and 8 months of age at the time (334) of the sale. He did not know of the advertisement of said property for sale, but there is nothing to show that he did not know of the sale.

The proceeds of the sale have been distributed among the several parties, except that part claimed by the said R. Frank Hogan, upon the ground that the mortgage was executed when he was under 21 years of age, and that he is not bound thereby.

J. B. Hogan claims this part of the fund as purchaser at the mortgage sale.

His Honor rendered judgment in favor of the said R. Frank Hogan, subject to the payment of the amount bid by J. B. Hogan at the sale, with interest thereon, and J. B. Hogan excepted and appealed.

A. S. Hobgood for plaintiff.

E. A. Harrill for defendants.

ALLEN, J. R. Frank Hogan was 20 years and 2 months old at the time of the execution of his mortgage and 21 years and 8 months old when the land was sold under the power in the mortgage on 18 July 1908, and he did no act to disaffirm the mortgage or the sale until 1917, eleven years after the sale.

The deed of an infant is voidable, not void, and if he does not wish to be bound he must repudiate it within a reasonable time after becoming of age, and, under our decisions, this period is fixed at three years, and upon the facts admitted, the claimant, R. Frank Hogan, has waited too long and will not be heard now to disaffirm his act.

In *Weeks v. Wilkins*, 134 N.C. 522, the Court deals with the question as to the time within which a deed executed during infancy must be disaffirmed, and says: "The author of Devlin on Deeds, Vol. I, sec. 91, after discussing the authorities, says: 'The most reasonable rule seems to be that the right of disaffirmance should be exercised within a reasonable time after the infant attains his majority, or else his neglect to avail himself of the privilege should be deemed an acquiescence and affirmation on his part of his conveyance. The law considers his contract a voidable one on account of its tender solicitude for his rights and the fear that he may be imposed upon in his bargain. But he is certainly afforded ample protection by allowing him a reasonable time after he reaches his majority to determine whether he will abide by his conveyance executed while he was a minor, or will disaffirm it. And it is no more than just and reasonable that if he silently acquiesces in his deed and makes no effort to express his dissatisfaction with his act, he should, after the lapse of a reasonable time, dependent upon circumstances, be considered as fully ratifying it.' We think this is
(335) a just and reasonable rule. . . . While we have no statute fixing the time within which an infant is required to disaffirm his conveyance, we think that, upon the reason of the thing and in consonance with the policy of the law which seeks to quiet titles and encourage improvement of real estate, the infant should exercise his election within a reasonable time. The statute gives him three years after arrival at majority within which to bring his action against a disseisor. It seems to us that the same time, by analogy, should be fixed as the period within which he should determine whether he will disaffirm his deed." This case was affirmed on this point in *Gaskins v. Allen*, 137 N.C. 430; *Baggett v. Jackson*, 160 N.C. 31; *Chandler v. Jones*, 172 N.C. 574.

In the last case, involving the repudiation of a contract made by an infant, the above excerpt from *Weeks v. Wilkins* was quoted, and the Court adds: "This case was affirmed on both points in *Baggett v.*

Jackson, 160 N.C. 32, and if applicable to deeds why should not the same rule prevail as to other contracts?"

Certainly a mortgage which, under our decisions, passes the legal title and is no more than an ordinary deed with a defeasance clause, should not be excluded from the application of the principle, and, if so, the mortgage of the claimant cannot now be avoided by reason of the lapse of time, and the question remaining is as to the regularity of the sale, and this depends on whether it was properly advertised, as the failure to advertise according to law is the only attack made on the sale.

The mortgagee did more that was required of him by the mortgage in his effort to give notice of the sale, as the mortgage only requires an advertisement in the newspaper, and it appears that in addition to publishing the notice in the newspaper beginning 1 June 1917, he also posted a notice at the courthouse door; but the claimant, R. Frank Hogan, insists that at the time of the execution of the mortgage, section 641 of the Revisal, was in force and that this statute also requires a notice to be posted at three other public places, and he contends that this is fatal to the sale.

It is true that the laws in force at the time of the making of a contract enter into and become a part of the contract (*Kelly v. Williams,* 84 N.C. 285; *Wooten v. Hill,* 98 N.C. 53), but it has been held in *Palmer v. Latham,* 173 N.C. 61, that the statute relied on does apply to sales made under the power and that it "refers to sales under the foreclosure of a mortgage by order of court and other judicial sales."

The first part of the statute, where it says "deed in trust, mortgage, or other contract hereafter executed," would render this construction doubtful, but it concludes after requiring an advertisement in a newspaper by providing that the cost of the advertisement is "to be taxed as cost in the action, special proceeding or proceeding to (336) sell," thereby indicating a purpose to deal only with proceedings in court, and to leave the parties free to contract as to the terms of the mortgage, which was declared to be the rights of the parties in *McIver v. Smith,* 118 N.C. 73.

The statement in *Palmer v. Latham, supra,* that requirements as to advertising are directory only, was not necessary to the decision of the case as the question involved was as to the place of sale, and the advertisement must be in the county where the land is sold, and is in conflict with the decision in *Eubanks v. Becton,* 158 N.C. 230.

The principle is applicable to execution sales (*Shaffer v. Bledsoe,* 118 N.C. 279), as a stranger who buys at an execution sale is only required to see that an officer sells and that he has in hand an execution authorizing the sale.

We are therefore of opinion that as the claimant, R. Frank Hogan, cannot disaffirm his mortgage and as the sale was advertised according to the terms of the mortgage, that J. B. Hogan became the owner of the interest of the claimant by reason of his purchase, and that he is now entitled to the fund.

The principle which prevents one tenant in common from buying in an outstanding title does not apply to the facts in this record as J. B. Hogan was buying the interest and title of his cotenants. *Baird v. Baird,* 21 N.C. 524; 38 Cyc. 53.

Judgment will be entered in the Superior Court on the facts agreed in favor of J. B. Hogan.

Reversed.

Cited: Foster v. Williams, 182 N.C. 636; *Douglas v. Rhodes,* 188 N.C. 582, 585; *Faircloth v. Johnson,* 189 N.C. 431; *Whitley v. Powell,* 191 N.C. 478; *Cole v. Wagner,* 197 N.C. 699; *Honeycutt v. Burleson,* 198 N.C. 39; *Acceptance Corp. v. Edwards,* 213 N.C. 739.

A. N. SCOTT v. C. F. CATES.

(Filed 10 April, 1918.)

1. Same—Defense—Killing—Burden of Proof—Appeal and Error—Instructions—Trials.

One may not unnecessarily injure dogs of another, though they are trespassing on his lands; and in an action against him for damages, wherein it is shown that he shot and killed the plaintiff's dog, and he alleges that it was necessary for the protection of his turkeys, the burden is on the defendant to show matters in excuse, and it is reversible error for the court to instruct the jury to the contrary.

2. Animals—Protection—Dogs—Damages—Rule of Prudent Man.

The owner of a dog may recover damages for its unlawful killing by another, except when such appears to be necessary, under the rule of the prudent man, to protect his domestic animals. *State v. Smith,* 156 N.C. 628, cited and appealed.

(337) APPEAL by plaintiff from *Connor, J.,* at the September Term 1917 of ALAMANCE.

This is an action to recover damages for killing one bird dog and injuring another, belonging to the plaintiff.

The defendant admits in his answer that he shot at the dogs, and

upon the evidence the fact that he killed one and injured the other is not in controversy.

He alleges as defense that the dogs were pursuing a flock of turkeys on his land at the time he shot, and he offered evidence tending to prove that it was necessary to shoot to preserve the turkeys from destruction.

There was also evidence tending to prove that the danger to the turkeys was not imminent and that it was not necessary to shoot the dogs.

His Honor charged the jury, among other things, as follows:

"Upon these allegations and denials, in order that the court may render a judgment in this case, it is necessary to ascertain whether or not the admitted shooting was unlawful and wrongful. This will depend upon how the facts are, and inasmuch as under our system of jurisprudence the jury ascertains the facts from the evidence, the court has formed an issue which is submitted to you in the form of a question, the issue being as follows: 'Did the defendant unlawfully and wrongfully shoot the dogs of the plaintiff as alleged in the complaint?' You will note that the determining words in this issue are 'unlawfully' and 'wrongfully,' there being no controversy that the defendant did shoot the dogs of the plaintiff.

("I instruct you that the burden of this issue is upon the plaintiff; that is, that unless the evidence offered by the plaintiff in this case, and by the defendant, satisfies you that the shooting was unlawful, you should answer this issue 'No,') and it is only in the event that you find the facts which the court instructs you must be found in order to make the shooting unlawful and wrongful by the greater weight of the evidence, that you would answer 'Yes.'"

The plaintiff excepted to the part of the charge in parenthesis.

There was a verdict and judgment in favor of the defendant, the jury having answered the issue read to them "No," and the plaintiff appealed.

Thomas C. Carter for plaintiff.
Long & Long for defendant.

ALLEN, J. It is the settled law of this State that an action may be maintained to recover damages for the unlawful killing or injuring of the dog of another, but if the dog is in pursuit of a domestic animal, and "if the danger to the animal, whose injury or destruction is threatened, be imminent or his safety presently menaced, in the sense that a man of ordinary prudence would be reasonably led to (338) believe that it is necessary for him to kill in order to protect his property, and to act at once, he may defend it, even unto the death

of the dog, or other animal, which is about to attack it." *State v. Smith,* 156 N.C. 628, and cases cited in the opinion.

This is but an application of the doctrine of self-defense to the protection of property, and, as in homicides, the burden is on the defendant to prove matters of excuse to the satisfaction of the jury, the killing being admitted, the same rule prevails when it is sought to avoid liability for the destruction of property.

"The law esteems all private property sacred from the violent interference of others, and he who takes, injures, or destroys it, will be held a trespasser, until he shows a justification." *Hale v. Lawrence,* 47 A.D. (N.J.) 195.

The presence of the dogs on the premises of the defendant gave him the right to drive them away, but not to injure them unnecessarily, although trespassing. 3 C.J. 134; 2 Cyc. 418; 1 R.C.L. 1136.

It follows that it was erroneous to charge the jury that the burden was on the plaintiff to satisfy the jury that the shooting was unlawful and wrongful, instead of instructing them that the shooting being admitted, the burden was on the defendant to prove a legal excuse, as heretofore defined, to the satisfaction of the jury, and the error was very prejudicial to the plaintiff as the shooting was on the premises of the defendant, and the only evidence of the circumstances surrounding the shooting came from the defendant and his witnesses.

New trial.

Cited: Jones v. Craddock, 210 N.C. 431; *S. v. Dickens,* 215 N.C. 305.

SOUTHERN NATIONAL BANK v. A. D. O'BRIEN, THOMAS W. DAVIS, AND P. A. WILCOX.

(Filed 10 April, 1918.)

1. Attorney and Client—Fees—Prior Assignment — Notice—Action — Prima Facie Case.

Where an attorney has collected by suit monies for his client upon the latter's building contract, and has retained a part thereof as compensation for his services, in an action by a prior assignee of the contract, the plaintiff makes out a prima facie case against the attorney by showing the assignment of the contract to himself, the amount of the indebtedness and that the attorney acted with notice of his claim.

2. Same—Burden of Proof—Quantum Meruit.

Where an attorney has collected in part upon his client's contract and has retained a part thereof as his fee, the burden is on him to show, in

an action by the assignee of the contract, upon his making a prima facie case, in the absence of a special contract between them, that he is entitled to his compensation upon a *quantum meruit*, and that he has properly distributed the funds in his hands.

3. Same—Pleadings—Amendments—Courts.

Where the plaintiff sues his debtor's attorney for the entire sum collected by the attorney upon a contract assigned to him for security of a loan, the position taken by the trial judge that he could not recover without an amendment setting up a *quantum meruit* is incompatible with the priciple cause of action, and a nonsuit upon his failure to so amend, when he has made out a prima facie case, is reversible error.

CLARK, C. J., concurring.

WALKER, J., did not sit on the hearing of this case.

APPEAL by plaintiff from *Lyon, J.*, at February Term, 1918, of (339) NEW HANOVER, on judgment of nonsuit.

John D. Bellamy & Son for plaintiff.

E. K. Bryan, McClammy & Burgwyn, and George Rountree for defendants.

BROWN, J. In 1909, defendant O'Brien entered into a contract with the County of Kershaw, South Carolina, to build the concrete abutments to a bridge over the Wateree River. This contract, "with all of the equity, payments, and other considerations received and to be received from the County of Kershaw," was duly assigned to plaintiff as collateral security to O'Brien's notes to plaintiff, given for money advanced with which to prosecute the work.

It becoming necessary to sue the County of Kershaw on the contract, suit was instituted in name of O'Brien in the Federal Court of South Carolina and prosecuted for several years by defendants Davis & Wilcox as attorneys. They finally recovered $3,106.10, of which they paid $606.10 to O'Brien and retained $2,500 for their professional services.

The plaintiff bank now sues to recover the whole of the $3,106.10 from defendants Davis & Wilcox, claiming that they should have paid it over to plaintiff as assignee of the contract with Kershaw County. The defendants deny the right to recover and aver that they are entitled to retain the $2,500 as the value of their professional services in conducting the protracted litigation.

At the conclusion of plaintiff's evidence the court sustained motion to nonsuit upon the ground that in no view of the evidence could plaintiff recover the entire sum and offered to allow plaintiff to amend its

complaint and set up a *quantrum meruit*. The plaintiff declined to amend and appealed from the judgment of nonsuit.

We are of opinion that the court erred. The plaintiff could not be required to make an amendment to its complaint that is in-
(340) compatible with its principal cause of action. If the evidence was sufficient in any view of it to make out a prima facie case, plaintiff had a right to have it submitted to the jury in a proper issue and under proper instructions.

When plaintiff put in evidence the contract with Kershaw County and its assignments to it and proved O'Brien's indebtedness for which the contract was security, and proved by the answer or otherwise notice of the assignment and the collection of the money by said defendants, plaintiff made out a *prima facie* case.

It was then incumbent on defendants to account for the money received under the contract and to justify its disposition. As there is no evidence of a special contract for their legal services, the burden was on the defendants to set up the *quantum meruit* and show what their legal services were worth and that they had the legal right to retain their compensation out of the sum collected by them.

The testimony of the president of the plaintiff, the only witness examined, is to the effect that "he did not agree to pay Mr. Davis any fee in the prosecution of the suit."

The evidence of the witness is somewhat ambiguous. It may be that the jury would draw the inference that the bank was to bear no part of the expenses of litigation, and that nothing was to be deducted on that account from the proceeds of litigation. Or it may be the jury would conclude from the transactions and negotiations between witness and Davis that the attorneys were not to look to the plaintiff for any compensation, but were to retain it out of the fruits of litigation only.

We know that it is a common custom for attorneys to accept claims for collection and to retain their compensation out of the proceeds of collection. It is possible the jury may infer that defendants did not intend to release their right to compensation but only to forego the liability of the plaintiff for it. We think that an issue should be submitted as to how much, if any, is plaintiff entitled to recover.

Under such issue every phase of the case can be presented to the jury by plaintiff as well as by defendant.

New trial.

CLARK, C.J., concurring: O'Brien borrowed from the plaintiff bank $8,500 to be used in building bridges for Kershaw County, S. C., and to secure the same assigned his contract with said county. O'Brien

brought suit against the County of Kershaw to collect $20,000, the sum he alleged to be due on said contract, and employed his codefendants Thomas W. Davis and P. A. Wilcox in the litigation. To this action the bank was not a party.

In said litigation judgment was recovered in O'Brien's name for $3,090.59. This sum was paid over to O'Brien's lawyers. The bank, thereupon, demanded payment to it under its lien of which (341) counsel had notice when they began the suit, alleging that the bank did not retain Davis and Wilcox and would not have done so because it had its own counsel and had refused to retain O'Brien's lawyers at the time.

The defendants, in their answer, admitted the collection of the $3,-090.59, stated that they had retained $2,500 as their fee; that O'Brien had paid them $950 additional, and that they had not paid anything to the plaintiff, "but politely and positively refused to do so," and they did not tender anything. They further averred that the plaintiff contracted with them to prosecute the action. The complaint averred that plaintiff had no connection with the suit, had refused to be liable for fees and expenses, and took no part except to give information when asked by the defendant.

At the trial the judge required the plaintiff to amend his complaint and to rest his action upon a *quantum meruit* for services rendered. The plaintiff put on evidence that it had not contracted with Davis and Wilcox nor assented to their employment. The defendants offered no evidence. The plaintiff's plea raised the issue that it was not liable to the defendants in any sum and it refused to amend. Thereupon the judge directed a nonsuit.

The questions raised are of grave and general importance. At common law counsel not only had no lien on the fund, but in England to this day they cannot recover for their services. In this State counsel can recover their fees, but they have no lien on the funds recovered. In the Federal Court there is no such lien "unless given by State statute." 6 Corpus Juris., 766, and note 73. It is not likely that any Legislature will give counsel a lien upon the recovery, for this would give them priority to the client and would make counsel a necessary party to every action, and would reverse the age-long principle that has made champerty illegal. Therefore the counsel had no lien on the fund even against O'Brien, but merely a simple contract debt, and they could not possibly have any lien against the prior lien of the bank, which was not even a party to that action. Their right to set up a counter claim against the bank depends upon whether there was any contract, express or implied, on the part of the bank. This is alleged by defendants Davis

and Wilcox (who put in no proof of it) and is denied by the bank, who sustained it by testimony. The burden of this issue is on defendants to prove that the plaintiff was indebted to them for their fees by way of counter claim. Even if counsel had a lien on the fund against O'Brien (which they did not), such lien was subject to the prior lien O'Brien had given the bank. He could not cancel the bank's lien nor could his lawyers do so merely because he owed them for their services.

(342) The judge could not nonsuit the plaintiff on the ground that the defendants had proven their counterclaim, for the burden was on them, and, besides, they had put on no evidence in rebuttal of the plaintiff's testimony to the contrary, and this was a matter for the jury. The testimony of the plaintiff was that it had not waived its lien in any way.

Nor could the judge nonsuit the plaintiff for refusing to amend by abandoning its plea that it owed the defendants nothing. Indeed, it is not easy to see how the recovery by counsel of a fund (not one cent of which the plaintiff has received) could entitle them to a claim that they had benefited the plaintiff to that extent, though not a party to the action. The plaintiff received no benefit at all, much less can it be benefited to the extent of $3,090.59, for which it has got nothing at all.

The issue should be "Is the plaintiff indebted by way of counter claim to the defendants, and if so, how much?" In any aspect, it was error to nonsuit the plaintiff, for the burden of the issue was upon the defendants.

Cited: In re Stone, 176 N.C. 345.

C. H. CLARK v. D. M. FAIRLY.

(Filed 10 April, 1918.)

1. Costs—Mortgages—Statutes—Foreclosure.

The clerk of the Superior Court may foreclose a mortgage on land given by plaintiff to secure costs of his action when the costs are awarded against him, or the clerk may report the matter to the court for a decree of sale by himself, the latter being the better practice to insure a safer title and prevent a needless sacrifice. Revisal, sec. 266.

2. Same—Court's Supervision—Payment of Costs.

Where a mortgage on land has been given by the plaintiff to secure the costs in his action, which are awarded against him, and the Superior Court, in term, acting through the presiding judge, has duly acquired

jurisdiction to decree foreclosure, it is his duty to supervise the sale and see that the land brings a fair price; and when such sale has not been made accordingly, he may set aside the sale, and permit the plaintiff to pay the costs properly chargeable against him. Revisal, sec. 266.

3. Costs—Mortgages—Foreclosure—Confirmation—Statutes.

Where the Superior Court has assumed jurisdiction to decree foreclosure of a mortgage given by the plaintiff to secure the costs of his action, it is proper for the court to confirm the sale, and possibly it is necessary for him to do so. Revisal, sec. 266.

4. Costs—Mortgages—Foreclosure—Decree Set Aside—Powers of Court.

A decree of confirmation of the sale of lands to pay the costs of an action under a mortgage given to secure them, Revisal, sec. 266, may be set aside by the judge during the term of the Superior Court at which it was entered.

MOTION to set aside sale of land, heard by consent by *Bond,* (343) *J.,* at November Term, 1917, of CUMBERLAND.

The court found the facts and rendered judgment setting aside the sale. Defendant appealed.

Hinsdale and Shaw for plaintiff.
E. G. Davis and Murray Allen for defendant.

BROWN, J. The substance of the judge's findings is that plaintiff executed a mortgage upon certain land to secure costs in lieu of prosecution bond in this action. Revisal, 266. The plaintiff was cast in the action and judgment rendered against him for costs. Upon application of the clerk at August Term, 1917, a decree of sale for foreclosure was entered by the court. The land was sold accordingly by the clerk and purchased for $400 by defendant. The sale was reported by the clerk and confirmed at October Term, 1917.

At same term of court a motion was made by plaintiff to set aside the order of confirmation upon the ground of gross inadequacy of price; at same time plaintiff offered to pay the judgment for costs in full and all costs and expenses of sale.

His Honor found that the sale was duly advertised in accordance with law, but that plaintiff had no actual knowledge of it and that the defendant in the action purchased the land at less than one-third of its actual value. The judge set aside the sale and entered judgment as set out in record.

It must be admitted that if the Superior Court in term, acting through the presiding judge, had jurisdiction to enter the decree of foreclosure of the mortgage given for costs, it had the power and it was

its duty to supervise the sale and see that the land brought a fair price. The right to set aside, at same term when made, an order of confirmation or any other decree is unquestioned.

We are of opinion that where a mortgage or deed in trust is made to a clerk of the Superior Court to secure costs under Revisal, 266, conferring upon the clerk a power of sale in default of payment of costs when adjudged against the party giving the mortgage, the clerk can exercise the power or he may report the matter to the court for a decree of sale, as was done in this case.

The latter is undoubtedly the safest course and the better practice, as it insures a safer title and a better price and prevents a needless sacrifice, as would have been the case in this instance.

Where the court assumes jurisdiction and undertakes to foreclose by decree, confirmation is of course proper and possibly necessary.

(344) Under such conditions, the parties are all before the court and it has jurisdiction over the *res*, the land. We see no reason why such mortgage should not be foreclosed by the clerk by judicial decree in the nature of foreclosure proceedings, and under the supervision and control of the court.

We have a precedent directly in point in *Ryan v. Martin*, 103 N.C. 282, where it is held that a mortgage given under section 120 of the Code (now 266, Revisal), in lieu of prosecution bond, may be foreclosed by the court upon motion upon notice, in the original action.

In order to understand and comprehend the syllabus to this case, and its bearing upon the case at bar, it is necessary to consult the original record.

The judgment of the Superior Court is

Affirmed.

DURHAM LIFE INSURANCE COMPANY v. A. M. MOIZE ET AL.

(Filed 10 April, 1918.)

1. Vendor and Purchaser—Corporations—Shares—Offer to Sell—Withdrawal of Offer—Contracts—Consideration—Agreement.

Where the bare offer to sell certificates of stock in a corporation is withdrawn before acceptance, there is no binding contract to sell, owing to the lack of consideration and agreement of the parties, and no obligation is imposed upon the owner of the shares.

2. Corporations—Shares of Stock—Right of Purchase—Charters.

An offer to sell to a corporation shares of its own stock does not fall

within the provisions of its charter requiring its shareholder to notify the company of any *bona fide* offer made therefor and giving it the privilege of buying at the same price within a specified time.

CIVIL ACTION, tried before *Connor, J.*, at September Term, 1917, of DURHAM, upon these issues:

1. Did the defendants offer to sell the plaintiff their stock in the Durham Life Insurance Company, as alleged in the complaint? Answer: "Yes."

2. Did the defendants withdraw said offer before its acceptance, as alleged in the answer? Answer: "Yes."

At the conclusion of all the evidence, the court charged the jury if they believed the evidence they would answer each of the said issues in the affirmative. The plaintiff appealed.

W. G. Bramham and Fuller, Reade & Fuller for plaintiff.

E. J. Hill and Bryant & Brogden for defendants.

BROWN, J. It is admitted that defendants offered to sell to (345) plaintiff 90 shares of its capital stock at $125 per share, and this action is brought to enforce its delivery. The defendants allege that before the offer was accepted it was withdrawn. The offer to sell was made in writing on 8 May. A call was issued for plaintiff's board of directors to meet on 13 May to consider the offer. On 12 May, before the offer was acted on or accepted, it was withdrawn in writing.

It is well settled that no contract is complete without the assent of both parties and an offer to sell imposes no obligation until it is accepted, according to its terms.

The undisputed evidence shows that defendant's offer to sell was withdrawn before acceptance. Therefore, no contract was entered into between the parties. *R.R. Co. v. Mill Co.*, 119 U.S. 149.

The offer to sell was without consideration, was an option merely, and could be withdrawn at any time before acceptance.

It is contended that the defendants were compelled to sell to plaintiff under a provision of its charter which provides that "A holder of stock desiring to sell or transfer any part of such stock shall first notify this corporation of such desire, and if such stockholder so elect, also of any bona fide offer such stockholder may have received therefor. Within fifteen days after the receipt of notice from such stockholder of the desire to sell such stock and of a bona fide offer received by such stockholder therefor, together with the name and address of the person by whom it is made, this corporation, through its board of directors or executive committee, may elect to purchase such stock at any price not lower than the price named in such offer, and upon payment or

tender of such price by this corporation within ten days after such election, the holder of such stock shall sell and transfer the same to this corporation forthwith."

It is manifest that the parties were not proceeding under the charter, as no offer had been made by an outsider to defendants to purchase their stock and no such offer is mentioned in defendant's communication to plaintiff.

The transaction does not come within the provisions of the charter but can only be regarded in the light of a unilateral contract or option given to plaintiff to purchase. As it is undisputed that the offer was withdrawn in writing before acceptance, the charge of the court is correct.

No error.

Cited: McAden v. Craig, 222 N.C. 503.

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WEST SLADE v. W. J. SHERROD ET AL.

(Filed 10 April, 1918.)

1. Torts—Joint Tort Feasors—Independent Tort—Payment—Release—Covenant Not to Sue.

While a release of one joint *tort feasor* from liability from the same tort will release the other, a covenant not to sue one of them and a compromise and settlement with him of his liability for a separate tort will not have this effect.

2. Same—Nonsuit.

Where a passenger in an automobile has been sued for damages alleged to have been caused to the plaintiff's buggy by his negligence in driving the machine, and also for an assault upon him while taking its license number, and a compromise has been made as to the assault with the statement that the plaintiff did not consider him responsible for the damages to the buggy, and a voluntary nonsuit has consequently been taken, the plaintiff, in his action against the owner of the machine for the alleged negligence of his driver, is not barred by his compromise of the separate tort or his voluntary nonsuit in the former action.

3. Estoppel—Judgment—Nonsuit.

A voluntary nonsuit does not operate as an estoppel by judgment of the matters alleged in the pleadings.

4. Instructions—Verdict Directing—Tort Feasors.

Where there is evidence tending to show that one of several joint *tort feasors* has compromised with the damaged person for a separate and in-

dependent tort, it is error for the trial judge to instruct a verdict, in an action against another of the *tort feasors* for the other tort, that such compromise operated as a release to the defendant in the action.

5. Torts—Covenant Not to Sue—Payments—Credits.

A covenant not to sue one of several joint *tort feasors* does not release the others, and any amount paid by him is only a credit to be entered in the final recovery.

BROWN, J., dissenting; WALKER, J., concurring in the dissenting opinion.

APPEAL by plaintiff from *Harding, J.*, at June Term, 1917, of ROCKINGHAM.

The plaintiff, a colored man, brings this action against the defendant Sherrod, the owner of an automobile, and the automobile company of which he is president to recover damages for the loss of his horse and injury to himself and his buggy, alleged to have been caused in the operation of an automobile owned by the defendant Sherrod and operated by his servant. The plaintiff brought a former action against James N. Williamson, Jr., in which this defendant was named as codefendant in the summons, but the complaint was filed against Williamson only, in which there were two causes of action alleged, one for this injury and a second cause of action for an assault and battery (347) committed on the plaintiff by said Williamson, who was a passenger in the machine, to prevent the plaintiff from ascertaining the number of the machine.

In said former action the plaintiff took a voluntary nonsuit as to all the defendants and made a settlement with the said Williamson, evidenced by the following paper-writing:

"Received of James N. Williamson, Jr., by and thru his attorney, F. S. Parker, Jr., the sum of two hundred dollars ($200), in full for any and all claims which the undersigned has or can have against the said Jas. N. Williamson, Jr., or Stephen I. Moore, arising out of a collision between an automobile and a wagon and horse, the property of the undersigned, which occurred in Guilford County some time during the month of November, 1913.

"This settlement is specifically to cover any and all claims which the undersigned or any other parties, occupants of the wagon, have or can have against the said Jas. N. Williamson, Jr., or Stephen I. Moore, because of any incident occurring at the time of or after said collision, and said payment is accepted in full for all claims of any kind or nature which the undersigned or any other occupant of said wagon could have against the said James N. Williamson, Jr., or the said Stephen I. Moore, for and on account of any reason whatsoever.

"This receipt is not intended to cover any claim which the under-

signed might have against the owner of the automobile which was in said collision for injuries to horse and wagon, the plaintiff being at this date of opinion the said Williamson or Moore are not responsible for said collision. WEST SLADE.

By P. W. GLIDEWELL,
W. M. HENDREN,
15 June 1915. *Attorneys for West Slade."*

The defendant pleaded the above settlement with Williamson as a bar to this action. The following issues were submitted to the jury:

1. Was the plaintiff injured in his person and his property by the negligence of defendant, as alleged in the complaint? Answer: "Yes."
2. If so, did the plaintiff by his own negligence contribute to said injury, as alleged in the answer? Answer: "No."
3. Did the plaintiff receive from J. N. Williamson $200 in settlement and satisfaction of said injury? Answer: "Yes."
4. If so, did said settlement and satisfaction of said injury operate as a discharge of defendant? Answer: "Yes."
5. What damages, if any, is plaintiff entitled to recover of defendant? Answer: "$150."

(348) The jury answered the first, second, and fifth issues in favor of the plaintiff as above. But the court directed the jury to answer the third and fourth issues in favor of the defendant and entered judgment upon the verdict against the plaintiff, who appealed.

Manly, Hendren & Womble and P. W. Glidewell for plaintiff.
W. J. Sherrod for defendant.

CLARK, C.J. The direction to the jury to enter a verdict that the settlement with Williamson was a bar to this action against Sherrod was a finding by the court as a matter of law, that the receipt given by the plaintiff to Williamson was a release of the cause of action as against the defendant. And this presents the only point in this appeal.

It is true that the former action was brought against Williamson and the defendant Sherrod (no complaint being filed against the latter) in which there was a first cause of action set up against Williamson for the injury to the plaintiff and his horse and buggy, and a second cause of action against Williamson only for the assault. The plaintiff in this action put on testimony that having ascertained that Williamson was merely a passenger and nowise liable for the injury caused by the collision, he took a nonsuit as to both causes of action and comprised with Williamson as to the second cause of action as to the assault for which Williamson only was liable.

However, that may be, the plaintiff is not estopped by his pleadings in the first action, for there was no judgment, but merely a voluntary nonsuit.

The correctness of the judge's ruling that the receipt given to Williamson is a bar to this action against Sherrod depends upon the construction given to that settlement.

It is true that where there are joint *tort feasors*, there can be but one recovery and a settlement with one is a release of the other. *Sircey v. Rees*, 155 N.C. 297; 24 A. & E. 306. There is an exception when there is not a release, but merely a "covenant not to sue" is given to one *tort feasor*, in which latter case the amount paid is simply a credit to be entered on the total recovery. *Mason v. Stephens*, 168 N.C. 370.

But this action is against the owner of the automobile alone, and the motor company of which he is president, and the paper-writing is a release to Williamson of the second cause of action in the former suit only, which was against Williamson alone, upon an assault and battery committed upon the plaintiff after the collision and the injury done to his horse and buggy, in which assault the defendant Sherrod was in no wise concerned. The plaintiff admits in the receipt that Williamson was in no wise liable for the injury to the horse and buggy from the collision. But if he had been jointly liable therefor, the re- (349) ceipt embraced only the assault as to which Williamson alone was liable, for the receipt given Williamson recites in the last clause: "This receipt is not intended to cover any claim which the undersigned might have against the owner of the automobile which was in said collision for injuries to horse and wagon, the plaintiff being at this date of opinion the said Williamson or Moore are not responsible for said collision."

The receipt on its face states that the settlement was with Williamson and Moore only, and that the plaintiff did not deem that Williamson or Moore were in any wise responsible for the collision. It was error to instruct the jury that such receipt was a settlement for the damages sustained by the collision contrary to such statement in the receipt. There was evidence by Mr. Glidewell: "The settlement was with the distinct understanding that nothing was settled except the assault." Also that he told the defendant Sherrod that he was "going to settle with Mr. Williamson for the assault and hold him (Sherrod) liable for the collision." The instruction of the court to find the third and fourth issues to the contrary was an instruction to the jury to disregard this evidence as erroneous.

In the strongest light for the defendant, the issues 3 and 4 should have been submitted to the jury. It may be we might grant a partial new trial upon those two issues, but the defendant in this court, ap-

pearing for himself, states in his brief that it is agreed that if this court held there was error in the instruction of the judge that the legal effect of the receipt was to bar this action, that judgment might be entered here in favor of the plaintiff for $150, as found by the jury in answer to the fifth issue, as the damages sustained by reason of the collision.

Judgment will, therefore, be entered accordingly in this court.

Reversed.

BROWN, J., dissenting: I am of opinion that the judge of the Superior Court correctly held that the defendant, as well as Williamson, was released from all liability "arising out of a collision between an automobile and a wagon and horse, the property of the undersigned" (the plaintiff). The paper-writing is specific in its terms in releasing Williamson from such liability, and therefore, it releases the defendant, a joint *tort feasor. Howard v. Plumbing Co.*, 154 N.C. 224.

The release does not mention any assault, but on the other hand, specifically states it is settlement of damages arising out of a collision between plaintiff's wagon, which it is admitted is the collision for which this action was brought.

In *Howard v. Plumbing Co., supra*, it is held: "Therefore, if he accepts the satisfaction voluntarily made by one, that is a bar to
(350) all. And so a release of one releases all, although the release expressly stipulates that the other defendant shall not be released. And this rule is held to apply even though the one released was not in fact liable."

The ruling above quoted settles conclusively any question as to the effect of the last paragraph of the release, in which it stipulates that it shall not bar any action against this defendant.

Cited: Braswell v. Morrow, 195 N.C. 132; *Holland v. Utilities Co.*, 208 N.C. 291; *Johnson v. Coppersmith*, 211 N.C. 734; *Briley v. Roberson*, 214 N.C. 299; *King v. Powell*, 220 N.C. 513.

MARY WALSER v. GATE CITY LIFE AND HEALTH INSURANCE CO.

(Filed 10 April, 1918.)

1. Insurance—Beneficiary—Policies—Contract—Vested Interest.

The beneficiary designated in an ordinary life policy or a life, accident, and health policy of insurance has a vested interest therein, which in the absence of stipulation or condition affecting it, cannot be altered or destroyed without his consent.

2. Same—Stipulations—Election—Payment to Others—Good Faith.

A stipulation incorporated into a life, accident, and health insurance policy, appearing on the back thereof and referred to on its face as affecting the rights of the named beneficiary, permitting the insurer to pay the loss, among others, to the brothers and sisters of the deceased, etc., is for the lawful and desirable purpose of saving cost of administration and expense of contests among conflicting claimants; and where the insurer, in good faith, has made payment to the brothers and sisters of the deceased, who had incurred expenses in consequence of his last illness and his burial, its election will not be disturbed in favor of the wife, the named beneficiary, who had neglected him.

APPEAL by defendant from *Adams, J.*, at May Term, 1918, of FORSYTH.

This was a civil action tried originally in the County Court of Forsyth County before his Honor, H. R. Starbuck, Judge, at May Term, 1917.

The action was to recover on two policies of insurance on the life of George Walser, deceased, issued by defendant company in 1913, one of straight-life insurance for $70, No. 118306, and another a life, accident, health policy for $62.60, No. 22858, in both of which the plaintiff's then wife and now the widow of the insured was originally named as beneficiary.

There was evidence on the part of plaintiff that she paid the weekly premiums on said policies until his death, the 23rd of December, 1916, and shortly thereafter she demanded payment from the company and the same was refused; that when the policies were being bargained for between plaintiff and defendant's agent, the latter assured plaintiff that she would get the money if she survived her husband (351) and, when policies were issued, plaintiff was designated as beneficiary and had never, in any way, surrendered her rights under the policy nor consented to any change therein.

There was evidence on the part of defendants that the insured paid all the premiums on these policies while he was able to work, and thereafter and for 20 weeks before his death, said premiums were paid out of the sick benefits due under one of the policies; that the plaintiff, his wife, badly neglected him, particularly in the latter part of his

sickness, and so much so that his brothers had to care for him to a great extent, employed their sister for a nurse and paid her and provided for him and became responsible for his physician's fees and his funeral expenses, which last were paid out of the policies and amounted to $82.40; that, under these conditions, the defendant companies paid to said brothers the full amount of both policies, one of them having been designated as beneficiary on both in lieu of plaintiff some time prior to the death; that this was done on the formal application of the insured, he saying that his wife was cruel and neglectful of him and that his brother had to keep him up and he wished them to have the money.

It appeared that the straight-life policy contained a provision giving the insured the privilege of changing the beneficiary at his election and, thereupon his Honor, being of opinion that, under the stipulations, the change of beneficiary to the brother in the life policy was valid, held that defendant was protected as to that payment, but that as to the accident and health policy, as that in his opinion contained no such provision, the plaintiff was entitled to recover, notwithstanding the payment of same to the brothers designated as beneficiaries at the insistence of the insured and so appearing at the time of his death. Pursuant to an instruction to this effect, there was verdict in favor of plaintiff for the amount of the accident and health policy No. 22858.

Judgment on the verdict and defendant excepted and appealed to Superior Court. This judgment having been affirmed in Superior Court, Adams, J., presiding, defendant again excepted and appealed to the Supreme Court.

No counsel for plaintiff.
L. M. Swink for defendant.

HOKE, J., after stating the case: It is the recognized general rule that, in the absence of stipulation or condition affecting it, the beneficiary designated as such in an ordinary life policy or a life, accident and health policy has a vested interest therein which cannot be destroyed or altered without his consent, and certainly in so far as any (352) action of the insured is concerned. *Hooker v. Sugg,* 102 N.C. 115; Vance on Insurance, 390. Though in reference to mutual benefit societies or fraternal orders having an insurance feature, the general rule is the other way. *Pollock v. Household of Ruth,* 150 N.C. 211; Vance on Insurance, 400.

On the present record, it appears that plaintiff was designated as beneficiary in the original policies and that she has never given her consent to any change therein, and the questions presented here are

what were her interests as such designated beneficiary and whether there were any stipulations or conditions in the present policy which affected and controlled her interest and justified the payment made by the company to the brothers of the insured in settlement of the claim. So far as the straight-life policy is concerned, his Honor has ruled that the change of beneficiaries was justified by reason of a direct stipulation in the policy itself, and plaintiff not having appealed, no question is presented in reference to it.

As to life, accident, and health policy, on which recovery has been allowed, it contains a stipulation for the payment of the specified sum to the beneficiary designated therein within 24 hours after satisfactory proof of death is received at the home office, "Unless settlement be made under the provisions of Article III on the reverse side hereof." And further, "That this policy is issued and accepted, subject to the conditions and agreements below and on the reverse side hereof."

This Article III, on the reverse side, is in terms as follows:

"III. Facility of Payment.—The company may make any payment provided for in this policy to husband or wife or any relative by blood, or lawful beneficiary of the insured, or to any other person who may be equitably entitled to the same, by reason of having incurred on behalf of the insured for his or her burial, or for any other purposes; and the production by this company of a receipt signed by any or either of said persons, or of other sufficient proof of such payment to any or either of them shall be conclusive evidence that such benefits have been paid to the person or persons entitled thereto, and that all claims under this policy have been fully satisfied."

Such a provision appearing in policies of this character is inserted for the reason, chiefly, that the insurance being usually for small amounts, among necessitous persons and under conditions calling for speedy payment, it is considered well that the expense of taking out letters of administration and the delay and costs incident to a contest among opposing claimants should be avoided as far as possible. Designed and calculated to promote this desirable aim and purpose, it has been upheld as valid in many authoritative decisions and construed to confer upon the company acting in good faith the right of election as to payment among the classes specified and constitutes such payment and receipt therefor "conclusive evidence that such (353) benefits have been received by the persons entitled thereto, and that all claims on the policy have been satisfied. *John Breman, Admr., v. Prudential Ins. Co.*, 170 Pa. St., 488; *Bradley, Admr., v. Prudential Ins. Co.*, 187 Mass. 226; *Thomas, Admr., v. Ins. Co.*, 148 Pa. St. 594; *Thomas v. Ins. Co.*, 158 Ind. 461.

So far has the public policy involved in this stipulation and its clear

meaning and purpose been allowed to prevail that, in the Indiana case just cited, where it appeared that the insured having become unable to pay the premiums, an arrangement was entered into by which the wife agreed to pay them and take an assignment of the policy, the Court held that this had only the effect of substituting the wife as beneficiary and a payment to the mother of the insured, selected as payee under the clause in question, was upheld in exoneration of any further liability by the company. In *Shea v. U. S. Industrial Ins. Co.,* 48 N.Y. Supp. 548, a payment by the company to a claimant other than the designated beneficiary was disallowed, but, in that case, it appeared that the beneficiary who made the contract and paid the premiums was an ignorant person who could neither read nor write and there was held to be some evidence tending to show fraudulent representations by the company's agents as to the contents of the policy at the inception of the contract and convincing evidence of fraud on the company's part in the selection of the payee. Such a case is not apposite to the facts of this record, where it appears that the company has paid the full amount of the policies to the brothers of the insured and produced their receipts for the same. And it further appeared that these brothers were callled on to maintain the insured in his last illness; provided a nurse for him; became responsible for his physician's fees and the undertaker's bill, this having been already paid out of the insurance money, amounting to $82.40.

There is neither allegation nor evidence in the record that would justify a finding of fraud on the part of the company in the exercise of its power of election conferred by the contract and, on the facts in evidence, as they now appear, his Honor should have charged that, if they believed the evidence, no recovery should be allowed on this policy also.

Error.

Cited: Wooten v. Order of Odd Fellows, 176 N.C. 59; *Mitchell v. Insurance Co.,* 204 N.C. 594; *Miller v. Potter,* 210 N.C. 270; *Wilson v. Williams,* 215 N.C. 412; *Wright v. McMullan & Wright v. Wright,* 249 N.C. 596.

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D. E. BONEY AND WIFE v. ATLANTIC COAST LINE RAILROAD CO.

(Filed 10 April, 1918.)

1. Evidence—Nonsuit—Trials.

Upon a motion to nonsuit, the evidence in support of plaintiff's claim must be accepted as true and construed in the light most favorable to him.

2. Railroads—Fires—Negligence—Prima Facie Case.

In an action to recover damages against a railroad company for negligently setting out fire to the damage of the plaintiff's land, evidence tending to show that the fire originated by sparks from defendant's locomotive, or that this is the more reasonable probability, makes out a *prima facie* case, requiring that the issue be submitted to the jury.

3. Same—Evidence—Trials—Questions for Jury.

In an action to recover against a railroad company for negligently setting out fire to the damage of plaintiff's land, evidence tending to show that a heavy freight train passed the place about midnight, throwing out sparks, with the wind blowing in the direction of plaintiff's land, that plaintiff's gin, etc., was discovered, with bales of cotton thereat, on fire within one-half to three-quarters of an hour thereafter, and theretofore it was as usual; that there was indication from the character of the burning that it had commenced at the railroad, is sufficient for the determination of the jury of the issue of defendant's actionable negligence. *Moore v. R. R.*, 173 N.C. 311, cited and distinguished.

4. Actions—Parties—Fires—Railroads.

The husband, the owner of the homestead in lands, and who had equipped a gin-house thereon with his own money, and the wife holding the title in remainder, may join in an action against a railroad company for negligently setting out fire from its passing locomotive to the damage of the land and injury of the property.

5. Actions—Misjoinder—Demurrer—Answer—Waiver.

Objection to misjoinder of plaintiffs in an action must be taken by demurrer, and is waived by an answer on general denial.

APPEAL by defendant from *Stacy, J.*, at August Term, 1917, of DUPLIN.

Civil action for "damages to real and personal property situate upon lands in the town of Wallace, N. C., claimed to be owned by D. E. Boney, subject to the rights of his wife and coplaintiff, who owned a remainder in the land after the homestead of D. E. Boney, plaintiff claiming that said property was destroyed by defendant by emitting sparks from one of its locomotives, and tried before his Honor W. P. Stacy, Judge, at August Term, 1917, of the Superior Court of Duplin County; that the property destroyed, situate on the lot held, as stated,

was a gin-house and machinery therein, a shed under which were
(355) the weighing scales and crates for seed cotton and a lot of loose cotton belonging to Boney and some of it to other persons, the evidence tending to show that the machinery had been bought and paid for by husband plaintiff, D. E. Boney.

A motion for nonsuit for lack of evidence that the fire originated with plaintiff was overruled. On denial of liability, the cause was submitted to a jury, who rendered a verdict as follows:

1. Were the plaintiffs the owners of the property described in the complaint and as alleged therein? Answer: "Yes."

2. Did the defendant negligently set fire to and burn the property of the plaintiffs as alleged in the complaint? Answer: "Yes."

3. If so, what damage, if any, are plaintiffs entitled to recover therefor? Answer: "$2,985.47."

Judgment on the verdict for plaintiffs, and defendant excepted and appealed, assigning for error chiefly the denial of their motion to nonsuit.

George R. Ward, H. D. Williams, and A. D. Ward for plaintiffs.
Stevens & Beasley and Rountree & Davis for defendant.

HOKE, J. It has been uniformly held with us that, in considering a motion to nonsuit, the evidence in support of plaintiff's claim must be accepted as true and construed in the light most favorable to him. *Edge v. R.R.*, 153 N.C. 212-220; *Cotton v. R. R.*, 149 N.C. 227; *Biles v. R. R.*, 139 N.C. 528; *Hopkins v. R. R.*, 131 N.C. 464. And it is also fully established that when it is shown that the fire which destroyed complainant's property originated by sparks from defendant's locomotive, or there is proof offered which makes this the more reasonable probability, a *prima facie* case is made out which requires that the issue be submitted to the jury. *Simmons v. Roper Lumber Co.*, 174 N.C. 221; *McRainey v. R. R.*, 168 N.C. 570; *Aman v. Lumber Co.*, 160 N.C. 370; *Currie v. R. R.*, 156 N.C. 419; *Williams v. R. R.*, 140 N.C. 623.

In *McRainey v. R. R., Associate Justice Allen*, for the Court, said: "In actions against railroad companies to recover damages caused by fire, the plaintiff makes out a prima facie case which entitles him to have an issue of negligence submitted to the jury upon offering evidence tending to prove that the fire which caused him damage originated from an engine of the defendant."

And in *Aman v. Lumber Co., Associate Justice Walker*, delivering the opinion, said: "Where the act of negligence is charged to be a defective engine, it can make no material difference whether the spark lights

within or without the right of way," and quotes with approval from Sherman and Redfield on Negligence as follows: "The de- (356) cided 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 had used all of those precautions for confining sparks or cinders (as the case may be) which have already been mentioned as necessary."

Considering the record in recognition of these accepted principles, there are facts in evidence on the part of plaintiffs tending to show that on the night of 7 February 1915, plaintiffs were the owners of a lot in the town of Wallace, the husband, D. E. Boney, having a homestead in the same and his wife owning the remainder; that the same abutted on the right of way of the defendant railroad, which was at that time 65 feet on each side of the road; that about 65 feet, or 130 feet from the center of the track, there was a gin-house on said lot with usual machinery therein, the house having been built by the husband plaintiff and the machinery bought and paid for by him; that near the right of way and in part between the gin-house and the railroad right of way was a shed under which was placed the weighing scales and the crates for ginned cotton, etc., and between the shed and the railroad right of way and extending to it was a lot of cotton in bales on the ground west and south of the shed and more cotton on the north of the lot also extending to the right of way.

There was also on the south side of said lot a boiler room some 65 feet from the gin-house and 45 feet from the right of way, with a ditch between the boiler house and the gin and also between the boiler house and the shed which was about the same distance off; that on the night in question about 12 o'clock, a good sized freight train of defendant company passed Wallace going south; that the engine was emitting a lot of sparks and cinders, with the wind blowing from the railroad towards the property, and not long after said train had passed, within one-half to three-quarters of an hour, a fire was discovered burning the baled cotton, the shed and crates, and burned the gin-house and machinery and a lot of cotton, etc. One witness said he had passed by the gin going towards the train that night and which he met a little further north, and that he saw nothing unusual at the gin-house as he passed, no excitement of any kind. There was evidence further to the effect that the cotton lying on or near the sidewalk and nearest to the right of way was the worse burned. Quite a lot of that lying to the north of the gin-house was saved. R. M. Turner, a witness for the plaintiff, testified that he lived about a hundred yards from the gin-house and when he got there about a quarter to one, it looked like

everything was on fire; that he did not know just where it was burning when he first got there; the cotton next to sidewalk had singed
(357) and burned black and that on the south side was burning and the gin-house was on fire. When he got there the fire was burning mostly on the front and south sides. "When I first got there it had caught on the top of the gin-house." In other words, the gin-house had just caught when witness first saw it; it had not gone far to the gin-house; it was burning good fashion at the scale house; those crates were burning; they were under the shed on the south side of the gin-house and some of the crates were under the shed. There was a stiff breeze from the northwest and to the southeast, and it was dry weather.

On the question as to the engine of that train and emitting sparks on the night in question, Isaiah Teachy, who saw the train just north of Wallace, said it was a long freight train and throwed out sparks. J. O. Ward testified that he lived just back of the gin-house; was up when he heard the train coming; that it was making an awful pumping and that he looked out from his window and saw the train and there was a volume of fire coming out of the smokestack. This was about 12 o'clock. This witness also testified that when he got to the fire there was not much fire between the cotton gin and the scale house; the cotton next the street was burning; the hoops were hot and the sacking on cotton had burned down (This sidewalk was on or near the railroad right of way). L. W. Sellars, who passed the train at a point near the gin: "In passing the train that night, I saw it emitting sparks and smoke; it was unusual and there was too much light, etc."

James Powers testified: "That he saw the train that night north of Wallace; that it was throwing a lot of sparks and he pulled his hat down to keep them out of his eyes; it was throwing some awful sparks."

Miss Ruby Foy and Mrs. Henderson testified to the same effect: "That the train passed going south about 12 m.; that they could see big sparks flying and falling out." The owner also testified: "That he was always careful to lock up his gin or to see that it was done, and there was no fire to amount to anything when he left that night."

There were facts in evidence tending to exculpate defendant, but from this testimony in support of plaintiff's position, showing that the direction of the wind was from the train towards the property, the unusual character and extent of the lighted sparks thrown from this engine as it passed through Wallace; from the time and course and probable commencement of the fire, it would seem not only the reasonable but well nigh the necessary inference that it was caused by sparks emitted from the engine, and this being true, his Honor correctly ruled that the issue should be submitted to the jury, and, on the facts as accepted by them, many well-considered cases with us are in support

of plaintiff's recovery. *Moore v. Lumber Co.*, at present term; *Bailey v. R. R.*, at present term; *Simmons v. Lumber Co., supra; Deppe v. R.R.*, 152 N.C. 79; *Manufacturing Co. v. R. R.*, 122 N.C. 881.

In the case of *Moore v. R.R.*, 173 N.C. 311, cited and very (358) much relied on by defendants, there was no evidence offered that sparks were thrown from the engine or that the same was in any way defective and both in the principal and concurring opinions this was noted and referred to as one of the principal grounds of decision.

In regard to defendant's position as to misjoinder of parties and causes of action, it is very generally held that, when property is wrongfully destroyed by a single fire, of same defendant, all persons having an interest in the same property may, as a rule, join in a suit for recovery and a life-tenant and remainderman may join where both interests are injuriously affected. *McIntire v. Coal Co.*, 118 Pa. St. 108; *Ashbey v. R. R.*, 5 Metcalf 368; 15 Enc. Pl. and Pr. 543.

And even if there was a misjoinder of causes of action as to the personal property owned by the husband and the realty owned by him and his wife, it must be taken advantage of by demurrer and is waived by an answer in general denial by defendant, as in this instance. *Teague v. Collins*, 134 N.C. 62.

In all the cases cited by defendant the objection is presented by demurrer formally entered.

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

No error.

Cited: Perry v. Manufacturing Co., 176 N.C. 71; *Bradley v. Manufacturing Co.*, 177 N.C. 155; *Royal v. Dodd*, 177 N.C. 212; *Kearney v. R.R.*, 177 N.C. 253; *Dickerson v. R.R.*, 190 N.C. 299; *Manufacturing Co. v. R.R.*, 191 N.C. 111.

ROBERT GADSDEN v. GEORGE H. CRAFTS & CO., ATLANTIC COAST LINE RAILROAD COMPANY, AND SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 10 April, 1918.)

1. Pleadings—Amendments—Cause of Action.

Where negligence is alleged in an action for damages against a railroad company and its contractor for injury to plaintiff while engaged in building a bridge, that the place provided for the employee to work was insecure by reason of a scantling used in the construction of the bridge, where plaintiff was at work, having been nearly sawed in two, and there-

fore weak, it is within the discretion of the trial judge to permit an amendment, in conformity with defendants' evidence, that the weakness of the plank was caused by a knot-hole therein, such amendment not constituting a new cause of action.

2. Same—Limitation of Actions.

Where such an amendment to the complaint is properly allowed by the trial judge, in his discretion, it relates back to the commencement of the action, and prevents the bar of the statute of limitations if the action was originally brought in time.

3. Principal and Agent—Negligence—Liability to Third Persons—Relative Liability—Judgment Against Agent.

Both the principal and agent are jointly and severally liable to an employee of the latter for injuries caused by the latter's negligence, the liability of the former being secondary; and where the agent has been sued alone, the principal is not required to defend the action upon notice, or otherwise, and is not bound by the judgment obtained; especially is this true when the agent has expressly indemnified his principal against such loss. The relative rights of and remedies against joint *tort feasors*, discussed and applied by WALKER, J.

4. Same—Nonsuit as to Principal—Appeal and Error—Reversal—Trials—Railroads—Contractors.

Where a railroad company and its contractor are sued for damages alleged to have been negligently caused by the latter to its employee in constructing a bridge for the former, and during the trial the plaintiff takes a nonsuit and appeals upon the intimation of the court that he could not recover against the railroad company, but prosecutes his action to judgment against the contractor; and upon reversal on appeal to the Supreme Court the trial is proceeded with against the railroad company in the Superior Court; *Held*, the amount of the judgment formerly rendered against the contractor is not conclusive upon the railroad company as to the damages, and an instruction by the court that it is constitutes reversible error.

(359) CIVIL ACTION, tried before *Devin, J.*, and a jury at December Term, 1917, of NEW HANOVER.

The plaintiff sued the three defendants, Crafts & Co., Atlantic Coast Line Railroad Company, and Seaboard Air Line Railroad Company, alleging that he was injured by the negligence of Crafts & Co., by whom he was employed as a servant in building a bridge over the tracks of the two railroad companies on Fourth Street in the City of Wilmington, the said Crafts & Co. being the servant or employee of the railroad companies in building the bridge.

Crafts & Co. did not appear or plead, and judgment by default was taken against them. The railroad companies answered separately, alleging, among other things, that Crafts & Co. were not their servants, but independent contractors, and that they were not liable to the plaintiff for their negligence.

The case was before us at a former term (173 N.C. 418). It appears from the record that, at the first trial of the case in the Superior Court, the presiding judge, at the close of the testimony, held, or intimated, that he would hold, that Crafts & Co. were independent contractors, and consequently that the railroad companies were not liable to plaintiff for their negligence in injuring him. When this was done, plaintiff, instead of trying the case out, submitted to a nonsuit, and judgment was accordingly entered as to the railroad companies, and plaintiff appealed to this Court. We reversed the judgment of (360) nonsuit and ordered a new trial (173 N.C. 418).

When the plaintiff submitted to a nonsuit in the court below at December Term, 1916, the trial proceeded against Crafts & Co. for the assessment of damages under the judgment by default and inquiry against them, for want of appearance or answer, which had been entered at October Term, 1915, and the jury assessed the damages against Crafts & Co. at $1,250, for which judgment was entered against them. The railroad companies took no part in the trial of the case, as to the assessment of damages against Crafts & Co., after the judgment of nonsuit against the plaintiffs was entered, but examined and cross-examined witnesses so long as they remained in the case, and before the court had decided that they were not liable to the plaintiff.

When the opinion of this Court was remitted to the court below, a trial as to the railroad companies was had, and resulted in a verdict for the plaintiff, assessing his damages at $1,350. At the trial the plaintiff offered in evidence the record of the judgment against Crafts & Co. for $1,250. The court admitted it and held that it was conclusive on the defendants as to the amount of damages. Defendants (railroad companies) excepted. The court charged upon the third issue, relating to damages, as follows: "Now, on the former trial, that portion of this case, the amount of damages, or the amount of money sufficient to compensate the plaintiff for the injury sustained upon this occasion, having been ascertained and fixed by a verdict and judgment, the court charges you that would be binding. So the amount arrived at there, to wit, $1,250, has been determined, so far as this case is concerned, and that amount stands as an equivalent for the injury which he sustained upon this occasion and under circumstances which he makes the basis of his action. So that amount has been now found to be $1,250, in money, which is to compensate him once and for all for the injury occasioned to him under the circumstances of this case, and if you have answered the first issue 'Yes,' and the second issue 'No,' your answer to the third issue would be $1,250." Defendants (railroad companies) excepted. There were other exceptions, which are noticed in the opinion

of the Court. Judgment was entered upon the verdict, and defendants (railroad companies) appealed.

E. K. Bryan and A. G. Ricaud for plaintiff.

John D. Bellamy & Son for defendant Seaboard Air Line Railway Co.

Rountree & Davis for defendant Atlantic Coast Line Railroad Co.

WALKER, J., after stating the case: The plaintiff alleged that his injury was caused by a defect in one of the scantlings used in con-
(361) structing the bridge, it having been sawed nearly in two, so as to weaken it and diminish its support of the trough in which he was mixing material and the platform upon which he stood to perform his work. The defendants' evidence tended to show that the weakness of the scantling was caused by a knot in it. Thereupon plaintiff requested that he be allowed to amend his complaint by alleging this fact as an additional act of negligence. The Court permitted the complaint to be amended, as indicated, and, we think, properly so. The cause of action was the negligence in having a weak plank which was insufficient to support the heavy material placed upon it. The amendment was not the statement of a new cause of action, so as to be bared by the statute of limitations, which the defendants proposed to plead, but merely a more accurate statement of that originally pleaded.

We said in *Simpson v. Lumber Co.*, 133 N.C. 95: "It can make no difference with respect to the plaintiff's right to recover whether the burning was caused by a defective engine or by setting on fire combustible material carelessly left by the defendant on the right of way. Amendments which only amplify or enlarge the statement in the original complaint are not deemed to introduce a new cause of action, and the original statement of the cause of action may be narrowed, enlarged, or fortified, in varying forms, to meet the different aspects in which the pleader may anticipate its disclosure by the evidence. 1 Enc. Pl. and Pr., 557-562. In suits founded on negligence, allegations of fact tending to establish the same general acts of negligence may properly be added by amendment. 1 Enc. Pl. and Pr., 563; *R. R. v. Kitchin*, 83 Ga. 83. An amendment can be allowed under our law when it does not substantially change the claim or defense (Code, sec. 273), and the statement of the additional grounds of negligence is not a new cause of action or a substantial change of the plaintiff's claim," citing numerous cases, and among them *Smith v. Bogenschultz*, 19 S.W. (Ky.), 667, where it was held that a complaint which alleged that a certain injury caused by the overflow of molten iron from a ladle in which it was being carried was due to the jostling of the carriers in a narrow pass-

way, could be amended so as to allege that the overflow was due to a defect in the ladle, without introducing any different cause of action. See, also, *Steeley v. Lumber Co.*, 165 N.C. 27; *Deligny v. Furniture Co.*, 170 N.C. 189; *Johnson v. Telegraph Co.*, 171 N.C. 130. Such an amendment relates back to the commencement of the action. *Lefler v. Lane*, 170 N.C. 181, and, therefore prevents the bar of the statute, if the action was originally brought in time. This exception is overruled.

The real question involved is whether the railroad companies are conclusively bound as to damages by the judgment against Crafts & Co. We are of the opinion that they are not. "Absolute identity of interest is essential to privity. The fact that two parties as (362) litigants in two different suits happen to be interested in proving or disproving the same facts creates no privity between them." 24 A. & E. Enc. of Law (2 Ed.), 747.

"The application of the principle of *res judicata* to persons standing in the relation of principal and agent or master and servant has, by some authorities, been supported on the ground that privity exists between persons standing in these relations. But other authorities deny the existence of such privity, and hold that in such cases the technical rule is, upon grounds of public policy, expanded so as to embrace within the estoppel of a judgment persons who are not, strictly speaking, either parties or privies." *Ibid.*, 752.

In all the cases cited by the learned counsel of the plaintiff, the first judgment was taken against a party who was either expressly or impliedly entitled to be indemnified by the party against whom the second suit is brought, and who had notice of the first suit and a fair opportunity to defend the same with the right of appeal. This was so in *Lovejoy v. Murray*, 3 Wall 1, at p. 19, upon which he mainly relies, and very much so, because there the plaintiff had paid a judgment for damages recovered for his committing a trespass which the defendants had expressly directed him to commit, and had indemnified him against any loss resulting from it; and, further, the sheriff, who had committed the trespass, and was indemnified against loss, with a just appreciation of their relations in the transaction, called upon Lovejoy and others, defendants below, when he was sued for the trespass, to come in and defend the action in his behalf, and they did so. It was held that the effect of giving the bond was to make Lovejoy and his codefendants principals in the trespass, and that so far as the action of the sheriff after that was a wrong it was directed by them and was for their benefit, and they were defending their own acts, although the suit was in the sheriff's name.

For this position, *Justice Miller*, who wrote the opinion for the Court, quoted from 1 Greenleaf on Evidence, sec. 522-523: "Justice requires

that every cause be once fairly and impartially tried; but the public tranquility demands that, having been once so tried; all litigation of that question and between the same parties should be closed forever. It is aso a most obvious principle of justice that no man ought to be bound by proceedings to which he is a stranger; but the converse of this rule is equally true, that by a proceeding to which he was not a stranger, he may well be bound. Under the term 'parties,' in this connection, the law includes all who are directly interested in the subject-matter, and had a right to make defense or to control the proceedings, and to appeal from the judgment. This right involves, also, the (363) right to adduce testimony, and to cross-examine the witnesses adduced on the other side. Persons not having these rights are strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties and claim under them, or in privity with them, are equally concluded by the same proceedings."

This is the underlying principle of all the cases upon which the plaintiff bases his contention that the ruling of the judge was correct. But it does apply to a case of this kind, for here the railroad companies would not be liable to Crafts & Co., if they had paid the judgment against them. They were not directed by the railroad companies to commit the tort, but, on the contrary, Crafts & Co. expressly indemnified them against loss caused by their negligence in performing the work under the contract, and besides, if there had been no such express indemnity, Crafts & Co. would be liable over to the railroad companies for such loss. They are also liable for injury to the property.

"There can be no doubt as to the proposition that a servant is liable to his master for any damage occasioned by the servant's negligence or misconduct, for which the master is liable to another. As between the master and a stranger, the servant represents the master, and the master is answerable for the servant's acts under the doctrine of *respondeat superior*. But this maxim does not apply as between master and servant, whose liability is based upon his contract. He is bound to indemnify the master for damages resulting from his failure to perform the duty which he owes to the master in every case. Even in those jurisdictions where the courts still adhere to the doctrine that a servant is not responsible to third persons for mere nonfeasance, the courts do not hold that the servant would not be liable to his master therefor. Every servant is bound to take due care of his master's property entrusted to him. If guilty of gross negligence, whereby it is injured, he is liable to an action. So, too, if guilty of fraud or misfeasance, whereby damage has accrued to his master. Although it is a general rule that a pilot is not an insurer, he is bound to use due diligence and reasonable care and

skill, and is liable to his employer for the damages which the latter's vessel sustains, or which he is compelled to pay on account of injuries to another's vessel in consequence of the failure to exercise such care and skill." 7 Labatt on Master and Servant (2 Ed.), 8011, 8012, 8013.

It was held in *Grand Trunk R. R. Co. v. Latham*, 63 Me. 177, that "a servant is liable to his master for what the master has had to pay on account of the servant's negligence." To the same effect are the following cases: *Mobile, etc., R. R. Co. v. Clanton*, 59 Ala. 392; *Costa v. Yochim*, 104 La. 170; *Gilson v. Collins*, 66 Ill. 136, citing Story on Agency, sec. 217 (c); *Dean v. Angus*, Bec., 378 (Fed. Cases, No. 3703), and *Purviance v. Angus*, 1 Dall (U.S.) 180, 184, where, (364) speaking of the agency of the master of a vessel, it is said: "It is insisted upon that a master of a ship is one who, for his knowledge in navigation, fidelity and discretion, hath the government of the ship committed to his care and management; that he must give an account for the whole charge, and, upon failure, render satisfaction. And, therefore, if misfortunes happen, if they are either through the negligence, willfulness, or ignorance of himself or mariners, he must be responsible; and his owners may sue him for reparation of damages jointly or separately, both according to the common law and marine law. . . . And it must appear very strange to any understanding that the owners of a vessel should be answerable in damages for the misconduct of the master, merely because they appointed him master, and that the master, the actual malefeasor, should not be accountable over to them—that the innocent should suffer, and the guilty person go scot free."

And because of this liability of the servant to the master, and his primary liability to the person injured, Labatt again says, Vol. 7, p. 8014: "A servant who requests his master to defend a suit for injuries occasioned by the former's misconduct has been held liable for the costs and counsel fees therein, as well as for the amount recovered as damages. And it has been declared that a judgment against the master in favor of a third person, for damages caused by a servant's negligence, is correctly taken as the basis for the judgment in the case against the servant, unless error is shown."

The same view of liability of the servant to the master, and of the primary liability of the servant and the secondary liability of the master, was adopted by this Court in *Smith v. R. R.*, 151 N.C. 479, where it was held that a release to the servant would inure to the master and completely exonerate him, as the servant was responsible to him in damages for the tort, if the master is injured or is subjected to loss.

The doctrine is made clear in 24 A. & E. Enc. of Law (2 Ed.), where it is said, at pp. 740-741: "Where a person is responsible over to another, either by operation of law or by express contract for whatever

may be justly recovered in a suit against each other, and he is duly notified of the pendency of the suit and requested to take upon himself the defense of it, and is given an opportunity to do so, the judgment therein, if obtained without fraud or collision, will be conclusive in a subsequent suit against him for the indemnity, whether he appeared in the former suit or not. In such case the person responsible over is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means of controverting the claim as if he were the real and nominal party upon the record, and it would be unreasonable to permit him to contest the justice of
(365) the claim in the suit against himself, after having neglected or failed to show its injustice, in the suit against the person he was bound to indemnify. But to make this doctrine applicable, the person first sued must have a right of action over against another for indemnity in case of loss. Therefore, if the indemnitor be sued first by one who has a right of action against both the indemnitor and the indemnitee, the judgment in such action will not conclude the indemnitee in a subsequent action against him by the same plaintiff."

Speaking of the relation of principal and agent, or master and servant, and with special reference to the question we are now discussing, the Court said, by *Justice Hydrick,* in *Roockhardt v. R. R.,* 84 S.C. 390; 27 L.R.A. (U.S.), at p. 436: "While both are liable, and while they may be sued jointly or severally, still there is no such privity between them as makes their interests in actions arising out of the torts of the agent identical. In the first place, the agent is primarily liable for its own torts, and it is liable over to the principal. 'The fact that two parties, as litigants in two different suits, happen to be interested in proving or disproving the same facts, creates no privity between them.' 24 A. & E. Enc. of Law (2 Ed.), 747. A judgment on the merits in favor of the agent is a bar to an action against the principal for the same cause, because the principal's liability is predicated upon that of the agent. But a judgment against the agent is not conclusive in an action against the principal. A judgment against the principal would not conclude the agent, unless the agent had been vouched or given notice and an opportunity to defend," citing numerous authorities.

The doctrine as to the legal effect of a judgment as to one who is not a party to it, but is liable over to the defendant by reason of the relation between them, if he had notice of the suit in which the judgment was rendered, is discussed in *Jones v. Balsley,* 154 N.C. 61, and also in *Gregg v. City of Wilmington,* 155 N.C. 18, which was an action for a tort, where it is said: "The principal and moving cause resulting in the injury sustained was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the

defect caused by the positive act of the principal," citing *Union Stock Yards v. R. R.*, 196 U.S. 217. See, also, *Brown v. Louisburg*, 126 N.C. 701; *Raleigh v. R. R.*, 129 N.C. 265. The cases of *Chicago v. Robbins*, 67 U.S. (2 Black), 418, and *Robbins v. Chicago*, 71 U.S. (4 Wallace), 657, and *Washington Gas Co. v. District of Columbia*, 161 U.S. 316, are of the same nature.

But in this case, as we have seen, the railroad companies are not under any duty to indemnify Crafts & Co., but the latter, both expressly and impliedly, are under an obligation to protect and save harmless the railroad companies, though they may both be liable to the plaintiff, and could be sued jointly or severally for the tort. The rule (366) in this respect, as stated in the cases being as follows:

1. That persons engaged in committing the same trespass are joint and several trespassers, and not joint trespassers exclusively. Like persons liable on a joint and several contract, they may be all sued in one action; or one may be sued alone, and cannot plead the nonjoinder of the others, in abatement; and so far is the doctrine of several liability carried that the defendants, where more than one are sued in the same action, may sever in their pleas, and the jury may find several verdicts, and on several verdicts of guilty may assess different sums as damages.

2. That no matter how many judgments may be obtained for the same trespass, or what the varying amounts of those judgments, the acceptance of satisfaction of any one of them by the plaintiff is a satisfaction of all the others, except the costs, and is a bar to any other action for the same cause. *Lovejoy v. Murray*, 70 U.S. (3 Wall.), 1 and 19; *Howard v. Plumbing Co.*, 154 N.C. 224; *Gregg v. City of Wilmington, supra.*

This is so, because as to a third person the tort is joint or several, and he may sue all or any one or more of them, but can have only one satisfaction. As between the *tort feasors*, while there is no contribution, the ultimate liability will be upon him who committed the wrong originally, if the other is made to pay for it by the injured party, but a judgment against the wrongdoers so liable to the plaintiff and ultimately to the other *tort feasor*, will not be conclusive against the latter, as he is under no legal obligation to defend the suit against the party, who has also wronged him, as he is under no obligation to indemnify him.

A case which seems to be precisely applicable is *Schaefer v. City of Fond du Lac*, 99 Wisconsin 333-334, where it was held as follows: "The doctrine that where a person against whom suit is brought to recover damages is entitled to indemnity from another in case of being compelled to pay such damages, such other is bound by the judgment

against such person if he be notified of the pendency of the suit and has an opportunity to defend against the same, does not apply to the facts of this case. The judgment against the indemnitee in such a case is binding on the indemnitor, but if the latter be first sued the judgment in a subsequent suit by the same plaintiff against the indemnitee will not effect the plaintiff as to any question litigated in such first suit."

Remembering that Crafts & Co. are the indemnitors, as between them and these defendants, the analogy between the two cases is perfect, for the principle of that case, when applied to the case at bar, produces this legal result, that a judgment for a third person (here the plaintiff) against the indemnitor (Crafts & Co.) will not affect
(367) the parties to a second suit by the same plaintiff against the indemnitee (railroad companies).

In *Schaefer v. Fond du Lac, supra,* the Court, after referring to the doctrine as we have stated it, and commenting on *Robbins v. Chicago* (4 Wall.), 657, and other cases of the same class, thus sums up the matter: "It is clear that to make the doctrine under discussion apply, the person first sued must have a right of action over against another for indemnity in case of loss. The conclusive character of the first judgment is only where the person first sued himself becomes the plaintiff against the indemnitor, to recover over for the loss sustained by being compelled to pay in the first case. Here we are asked to apply it, not in favor of the indemnitee who has paid the loss against the indemnitor, but against the indemnitee. No precedent for that, we may safely venture to say, can be found in the books. Certainly none was cited by the counsel."

In this record it appears that the plaintiff after the railroad companies had been dismissed from the case by the nonsuit, proceeded to have executed the inquiry as to damages, after taking a default judgment against Crafts & Co. When the inquiry was being executed and the judgment was entered, the defendants were not parties. It is true they examined witnesses up to the time of their departure from the court, at the invitation of the plaintiff, who submitted to the nonsuit, but they had been defendants charged with negligence and threatened by the plaintiff with a verdict for damages because of their separate liability as *tort feasors,* and they could do nothing else, in their own defense, but examine witnesses, until the court had determined upon *their* liability. After this was done, they ceased to be parties and participated no longer in the trial of the case, and were not present when the judgment was entered, and could not appeal therefrom, as they were not appearing for Crafts & Co., but solely for themselves; had not been requested by them to assume the defense of the suit against them, and were not depending upon any ground which imposed upon

them the duty of defending Crafts & Co., but were defending for a very different and contrary reason. Crafts & Co. had not only failed to ask for their assistance, but had no right to do so, and themselves defaulted and abandoned the case entirely to the control of the plaintiff. Under such circumstances and as they were not liable to indemnify Crafts & Co., and had obtained a judgment in their favor, how could they appeal from the judgment for damages?

The case of *Lovejoy v. Murray, supra,* decided that they must be called in to defend, or notified of the suit, and have a fair opportunity to examine and cross-examine witnesses, with the right of appeal. They could not be vouched to defend, unless under a duty to do so by reason of being indemnitors to Crafts & Co., which they are not. The case stands just as if they had been sued separately as *tort* (368) *feasors,* and the rule applies that "there can be no contribution between joint trespassors," and one is not bound by a judgment against the other, where that simple relation exists. It would be quite different if the judgment had been first taken against the railroad companies and they had notified Crafts & Co. to come in and defend for them, the former being liable for their indemnity in case of a loss. The judgment then would have been binding on Crafts & Co. by reason of this fact, but as Crafts & Co. were liable for the indemnity of the railroad companies, and the latter, therefore, not liable for the indemnity of Crafts & Co., the judgment against the latter cannot affect the defendants.

The court erred in its charge as to the legal effect of the judgment. There is no error in other respects.

New trial as to damages only.

New trial.

Cited: Armfield Company v. Saleeby, 178 N.C. 302; *Goins v. Sargent,* 196 N.C. 481; *Leary v. Land Bank,* 215 N.C. 506; *Pinnix v. Griffin,* 221 N.C. 352; *Webb v. Eggleston,* 228 N.C. 580, 582; *Hayes v. Wilmington,* 243 N.C. 543.

R. M. COX ET AL., ADMINISTRATORS, v. C. V. S. BOYDEN, ADMINISTRATOR.

(Filed 10 April, 1918.)

1. Appeal and Error—Superior Courts—Judgments—Motions—Procedure.

Where the Supreme Court has reversed a judgment of the Superior Court, refusing to set aside a former judgment of the latter court upon the ground that the court was without jurisdiction to set aside a judgment theretofore rendered, apparently by consent of a party when such consent had not in fact been given, a subsequent hearing of this motion, in accordance with the course and practice of the court, is a compliance with the decision of the Supreme Court, and a denial of the motion does not deprive the movant of the benefit of the decision, or ignore the fact that the prior Superior Court judgment had been reversed on appeal.

2. Appeal and Error—Judgments—Motions—Evidence—Findings—Duress.

The findings of the Superior Court upon the evidence on motion to set aside a judgment are conclusive on appeal; and where a movant has appeared in court with her attorney and upon affidavit withdraws her motion to set aside the judgment and requests that it be enforced as rendered, which is accordingly granted, without exception or appeal; and thereafter she again moves to set aside the judgment upon the ground of duress or coercion, the denial of the motion by the trial judge, upon findings that she had been fairly and impartially treated, without duress or coercion, will not be disturbed on appeal.

CIVIL ACTION, heard by *Adams, J.*, at September Term, 1917, of FORSYTH.

This is a motion to set aside a judgment rendered at August Term, 1913, in the above entitled cause.

(369) The following are the facts as found and recited by Judge Adams in the judgment rendered by him:

"This cause was instituted in Surry County, and Judge Lyon rendered a judgment herein the county of Forsyth at the December Term, 1911, purporting to be by consent of the parties. At the October Term, 1913, C. V. S. Boyden entered a motion on notice to set aside this judgment on the ground that it was made without her knowledge and without the consent of either herself or her counsel. This motion was heard at the February Term, 1914, of the Superior Court of Forsyth County, and his Honor, *Judge Devin,* declined to consider the affidavit and motion on the ground that he was without power to disturb the judgment rendered by *Judge Lyon.* An appeal was taken to the Supreme Court, and after the opinion of the Supreme Court was rendered in the cause (167 N.C. 320), the motion again came on to be heard before *Judge Cline* in Surry County at August Term, 1915. At the hearing C. V. S. Boyden signed a paper-writing and acknowledged the

execution of the same before J. A. Jackson, Clerk of the Superior Court of Surry County, which is filed in the cause, to which reference is made, and at the same time *Judge Cline* rendered a judgment in the cause in Surry County, to which also reference is made. No appeal was taken by C. V. S. Boyden or any other party from the judgment of *Judge Cline.*

"C. V. S. Boyden now comes in her own proper person and as administratrix of N. A. Boyden and files an affidavit and petition subscribed and verified by her before Ernest Transou, deputy clerk Superior Court of Forsyth County, 17 September 1917, which is filed in the cause, praying this court, sitting in Forsyth County, to set aside the judgment rendered by *Judge Cline.* C. V. S. Boyden appears in court in person and by her attorneys, Benbow, Hall & Benbow, in her personal capacity and in her capacity as administratrix of N. A. Boyden, and requests the court to hear this motion in Forsyth County, and produces a written paper signed by her consenting that the cause be heard in Forsyth County at the May Term, 1917, of the Superior Court, instead of being heard in Surry County. The hearing having been continued by consent, C. V. S. Boyden now requests the court, in person and through her attorneys, to hear the motion in Forsyth County, and expressly states that in her personal capacity and in her representative capacity she consents that the motion be heard here. As stated, C. V. S. Boyden did not appeal from the order of *Judge Cline,* but filed certain affidavits before *Judge Stacy* at the October Term, 1916, Superior Court of Surry County, and it seems that the motion was continued from time to time in Surry, and now comes on for hearing in Forsyth County by consent of all parties."

The following judgment was entered by *Judge Cline* at August (370) Term, 1913:

"This cause coming on to be heard before his Honor, *E. B. Cline,* judge presiding, and being heard by him, and the defendant, C. V. S. Boyden, being present in open court in her proper person and being also represented by counsel, W. L. Reece, and thereupon the said C. V. S. Boyden having assigned and acknowledged a paper-writing, which said paper-writing is made a part of the record in this cause, whereby the said C. V. Boyden, individually and as said administratrix, withdrew her motion to set aside the judgment rendered in this cause by his Honor, *C. C. Lyon,* judge presiding at December Term, 1911, of the Superior Court of Forsyth County, and whereby she further agrees and consents that said judgment should be declared valid by this court at this term, and that all other judgments heretofore signed subsequent to said judgment of December, 1911, shall also be declared valid judgments and binding upon all the parties to this action: Now, therefore, it

is ordered and adjudged that the judgment signed by *C. C. Lyon,* judge presiding, at the December Term, 1911, of Forsyth Superior Court, is a valid judgment and binding upon all the parties hereto, and that the judgment signed by his Honor, *C. M. Cooke,* judge presiding, at Forsyth Superior Court, and that all judgments and orders made in this cause since the judgment at December, 1911, are hereby declared valid and binding on all the parties in this cause. And it is further ordered that all sales of land heretofore made by commissioners in this cause are hereby ratified and confirmed in all respects."

The Court then further adjudged that E. L. Gaither, Esq., the commissioner, collect the purchase money for the lands theretofore sold by him from S. E. Marshall, the purchaser, and distribute the proceeds as therein directed.

It is further stated that C. V. S. Boyden bases her motion to set aside the judgment upon her denial that she had ever signed any paper-writing, for plaintiff or others, in which she withdrew objection to the judgment rendered by Judge Lyon and the orders and judgments subsequent thereto, or that she had waived all objection to the paper she signed at August Term, 1913 (Exhibit A), which she alleges was obtained by intimidation, coercion, and duress, and which was a waiver only of her right to object to the judgments, because they were rendered, and to the orders, because they were made, in Surry County, all other objections being reserved by her. The following is a copy of the paper so signed by C. V. S. Boyden:

"While this case was being heard before his Honor, *E. B. Cline,* judge presiding at the August Term, 1915, of Surry Superior Court, upon a motion to set aside the judgment heretofore rendered by his Honor, *C. C. Lyon, Judge,* and in obedience to the order and direction
(371) of the opinion of the Supreme Court rendered in this cause, as reported in 167 N.C., at page 320, when the Court had intimated and stated that it would not set aside the judgment of *Judge Lyon* rendered and signed in Forsyth County and any other orders, judgments and decrees thereon, consider the findings and report of the referee, and if the court decided to confirm the report of the referee would direct a sale of all the real estate according to the recommendations of the referee, the defendant C. V. S. Boyden being present in court in her own person and as administratrix of N. A. Boyden, deceased, hereby states in open court, and by her signature hereto directs the record to be entered and made, that she both individually and officially withdraws all and every further objection to the judgment of *Judge Lyon* of 8 December 1911, and the other orders and judgments subsequent thereto made in this cause, and hereby assents to them as fully in all respects as though they had been made and signed

in Surry County during the sitting of the court, and further consents and hereby agrees in open court that his Honor, *Judge Cline*, may sign a confirmatory order and judgment approving, affirming, sustaining and validating in all respects all and everything done or directed to be done in the judgments and orders heretofore made as aforesaid, regardless of the date and place at which they were made and signed.

This statement is duly executed by the said C. V. S. Boyden, as witness her signature hereto and acknowledged before the clerk of this court.

C. V. S. BOYDEN.

NORTH CAROLINA—Surry County.

I, J. A. Jackson, clerk of the Superior Court of Surry County, do hereby certify that C. V. S. Boyden personally appeared before me this day and acknowledged the due execution of the foregoing instrument for the purposes therein expressed. Let the instrument, with this certificate, be registered.

Witness my hand and official seal, this 2d September 1915.

J. A. JACKSON.

Judge Adams rendered judgment upon the facts above stated, as follows: "Upon consideration of the record and the affidavits filed on the hearing before me, I find that C. V. S. Boyden signed the paper-writing referred to without intimidation or coercion or duress, and that she signed the same freely and voluntarily. It is, therefore, ordered and adjudged that the motion of C. V. S. Boyden to set aside the judgment rendered by *Judge Cline* in the Superior Court of Surry County be and the same is hereby denied, and that plaintiffs recover of C. V. S. Boyden their cost of this action to be taxed by the clerk."

C. V. S. Boyden excepted to this judgment and appealed.

Manning & Kitchin and Lindsay Petterson for plaintiffs. (372)
R. W. Winston for defendant.

WALKER, J., after stating the case: The defendant excepts to the judgment upon the grounds that she was deprived of the benefit of our decision in this case at a former term (167 N.C. 320), and that the presiding judge did not consider the fact that the judgment of August Term, 1913, reversed that decision. We do not perceive how either objection is possibly tenable or has any merits. Judge Adams gave her the full benefit of our former decision, by which she was only entitled to have it ascertained by the Superior Court whether she had in fact assented to the judgment rendered by Judge Lyon. It was alleged that she had waived the objection to Judge Lyon's judgment, which ob-

jection was that she had not consented thereto. Judge Cline investigated this matter after our opinion had been certified down, and found that she had waived all objection to the judgment by withdrawing her motion to set it aside and agreeing expressly that Judge Lyon's judgment rendered in December, 1911, should be declared valid and binding upon her and all other parties, and also the other judgments signed subsequent thereto. That this was done when she was personally present in court and represented by counsel by a paper-writing signed and acknowledged by her, and it was thereupon declared and decreed by the court without any objection, but with her consent, that the judgment signed by Judge Lyon, as well as that afterwards signed by Judge Cooke, and all subsequent judgments rendered and all orders made in this cause should be likewise binding on all the parties. From this judgment no exceptions were taken or appeal entered.

After this was done, C. V. S. Boyden, at October Term, 1916, made this motion before Judge Stacy to set aside the judgment of Judge Cline upon the ground that she did not assent thereto, and that the paper-writing purporting to give her consent to it was obtained by coercion, intimidation and duress. Upon a full and exceedingly fair hearing, Judge Adams has decided this motion against her, after considering all the facts, and we concur with him that both the judgment of Judge Lyon and that of Judge Cline are valid. That she waived all objection to the Lyon judgment, and that there was no duress or undue influence brought to bear upon her in order to secure her consent to the Cline judgment, but the same was freely and voluntarily given without any fear or compulsion. An option or choice between two fair alternative proposals may have been mistaken for coercion, but we do not so regard it. There was no advantage taken of her, but she was left to exercise her judgment and discretion without any dictation, but her own free will and pleasure. She has been treated with perfect
(373) fairness and consideration and must abide the result, as she had no ground for relief in law or equity.

As the judge has found the facts, we are bound by his findings, as we have often held, there being evidence which supports them. *Matthews v. Fry*, 143 N.C. 384; *Harris v. Smith*, 144 N.C. 439; *Williamson v. Bitting*, 159 N.C. 321; *Drainage District v. Parks*, 170 N.C. 435; *In re Inheritance Tax*, 172 N.C. 170. The question is essentially one of fact, and therefore has been substantially closed by the judge's findings. *Meadows v. Wharton*, 147 N.C. 180; *Perry v. Perry*, *ibid.*, 367. All of the objections must be overruled.

Affirmed.

Cited: Lumber Company v. Finance Company, 204 N.C. 287.

R. P. TAYLOR AND WIFE, BETTIE R. TAYLOR, ET AL. v. J. F. MEADOWS ET AL.

(Filed 10 April, 1918.)

1. Boundaries—Corners—Parol Evidence—Trials—Questions for Jury.

Where in an action to recover lands the controversy depends upon the location of the beginning corner given in a deed as "at a planted stone on" a designated street "about six feet southeast of a large red oak," with conflicting evidence as to its location with reference to that of the red oak, plaintiff contending and offering evidence that it was eleven feet from the street and defendant that it was on the street, the exclusion of defendant's evidence tending to show his use and occupation of the *locus in quo*, building, fencing, and cutting trees thereon, in plaintiff's view without objection, that plaintiff's contention would run the disputed line through buildings, etc., is reversible error.

2. Same—Questions of Law.

Where parol evidence as to the location of a certain controlling corner given in a deed does not contradict the written instrument, and its admission is otherwise competent, the question as to what is the corner is one of law and as to where it is located is one of fact for the determination of the jury under conflicting evidence and proper instructions in an action to recover the land.

CIVIL ACTION, tried before *Connor, J.*, at November Term, 1917, of GRANVILLE.

The plaintiffs sued for the recovery of a parcel of land in the city of Oxford 30 feet wide by 161 1-3 feet long, as shown on the map used at the trial in the court below, and in this Court at the hearing of the case.

It appears from the record that there was a sharp dispute between the parties as to the beginning corner of the larger lot, of which the *locus in quo* is alleged by the defendant to be part. The deed under which the defendants claim describes it as being "at a (374) planted stone on Williamsboro Street about six feet southeast of a large red oak, the southeast corner, thence S. 59 W. 135 feet to a planted stone, thence N. 15½ W. 161 1-3 feet to a planted stone, thence N. 59 E. 135 feet to a planted stone, thence S. 15½ E. 161 1-3 feet to the beginning, containing one-half acre." The plaintiffs contended that this tract had for its beginning corner a point 6 feet from a standing red oak, but 11 feet from Williamsboro Street; while defendants claimed that it is where the deed described it to be, that is *on the street*, near a red oak, the stump of which is there, and which they say was identified, and that if this is the true beginning corner, and the other calls of the deed are followed, the boundaries will include the land in dispute, while if the calls are run from the point

claimed by the plaintiffs to be the true beginning corner, the deeds of defendants do not embrace the said land. There was much evidence, *pro* and *con*, as to whether the true beginning corner was at the one or the other place, for example, the surveyor testified that if the lines are run, as claimed by the plaintiffs, the first line cuts off seven feet of the prizehouse from its southeast corner, and runs through the center of its front, and the beginning corner will not be on the street, but eleven feet from it. There was no deed, and no evidence, to show that the beginning corner was so indisputably located as to exclude parol evidence of facts and circumstances to prove where it is, for there was fair ground for controversy as to where it is, under the rule that what is a corner or line is a question of law, and where it is a question of fact.

The defendants, in this state of the evidence, proposed to prove that from 1883 until his death in 1911, J. M. Currin, under whom they claimed, and, since that time to the commencement of this action, the defendants used the land in dispute, fenced it, built a stable on it, and cut down, removed and converted to their own use several large oak trees then standing upon it; that this was done near the front door of the Taylor residence, and in full view of the Taylors, and that they made no objection, nor did they protest against the same. This evidence was, at first, admitted, and afterwards, at plaintiffs' request, stricken out, and defendants excepted.

There was a verdict for the plaintiffs and judgment thereon, from which this appeal was taken by the defendants.

A. W. Graham & Son and R. W. Winston for plaintiffs.
Hicks & Stem, B. S. Royster, and T. T. Hicks for defendants.

WALKER, J., after stating the case: We think it was competent for the defendants to show that they held possession of the disputed land for many years, without objection from the Taylors, and, for (375) this purpose, to prove the facts and circumstances in regard to building the fence on the land, erecting a stable thereon, cutting down trees, valuable for shade, firewood, and so forth, and converting the same to their own use. There was fair ground for dispute as to the location of the beginning corner of the lot conveyed by the Taylor-Biggs-Currin deed, and, Where is that corner? is the principal question in the case, and it is not like the one decided in *Davidson v. Arledge*, 88 N.C. 326; *S. c.*, 97 N.C. 172. There the dividing line between two tracts was so fixed by the reference to city map, and with such certainty and definiteness that the evidence of a possession indicating a different line was held to be inadmissible, because it tended to con-

tradict the deed, and the only question was, Where were the lots designated on the city map "as Nos. 69, 70, 77, and 78, in Square No. 10, lying on Tryon and College Streets, and being the property on which said testator lived at the time of his death?" The difference in their legal aspects between that case and this one will appear from two of the headnotes, as follows:

"1. If the words simply designate the lots by number, the boundary, as circumscribed by actual use and occupation, is the one meant by the bargainor. But where they refer to the lots not only by number, but 'as known and designated in the plan' of the town, which plan contains a specific description thereof, it is the same as if that description were incorporated in the deed, and the latter must prevail; and it is incompetent to show by parol that the boundaries were intended to be different." *Davidson v. Arledge,* 88 N.C. 326.

"2. Where there is a dispute as to the dividing line between two adjoining tracts, the acts and admissions of the adjoining proprietors recognizing one line as the true one, are evidence of its location when the line is unfixed and uncertain, but where it is well ascertained such acts and admissions are not competent evidence either to change the line or to estop the party from setting up the true line." *Davidson v. Arledge,* 97 N.C. 172.

That is not precisely our case, for there is nothing in the deed of Biggs to Currin, that so certainly designates this lot as to exclude parol evidence, but, in one respect, the cases are alike, for it was the duty of the judge to tell the jury what, in law, are the corners and lines of the deed, and for the jury to decide where they are. He would say to them that the beginning corner of the lot is that described in the deed, *viz.*, "At a planted stone on Williamsboro Street, about six feet southeast from a large red oak," and that wherever they found this corner to be, whether at red A, as designated on the map, or at A, would be, in law, the beginning corner. But this requires the jury to pass upon the important question of fact as to where is this corner, designated as the beginning; and in doing so, they must consider the deeds and any relevant facts or circumstances which will enable them (376) to make discovery of the true corner, after searching for it in the light of the evidence. Where is the point described in the deed as on the street about six feet southeast of the big red oak, was purely a question of fact, and in solving it the jury had the right to inquire whether the stump was that of the red oak mentioned in the deed, and if so, to consider the distance and direction from it to the corner as claimed by the defendants, and also to consider the fact that the deed fixes the corner on the street and not away from the street, and also what was said about the stone and the post, and the fence and

trees; the building of the stable, and the fact as testified by the surveyor, that the line as claimed by the plaintiffs would cut off one end of the prize-house to the depth of seven feet and pass through the middle of the front of that house. Why are these not pertinent facts? They could also consider the declaration of any of the plaintiffs as to the true line, which was against his interest. *Roe v. Journegan,* at this term. This would not be changing a fixed and ascertained line, but merely determining by proof where the line is, if its true location is disputed, as it is here.

We said at the last term, in *Wiggins v. Rogers,* 94 S.E. Rep. 685: "Plaintiff proposed to show that the line had been run some years before the time of the trial by Posey Hyde, and that the respective owners had recognized it as the line of division between them for many years. This evidence was excluded by the court, but we think it was competent, not to change the boundaries of the land (*Davidson v. Arledge,* 97 N.C. 172; *S. c.,* 88 N.C. 326), or, in other words, to show that the parties had orally agreed upon a line different from the true line, but as some evidence to prove where was the true line. *Haddock v. Leary,* 148 N.C. 378; *Barfield v. Hill,* 163 N.C. 262, 267. It was also relevant to show character and extent of the possession of the parties. Following this rule, as stated in these cases, we must hold that there was error in excluding the evidence. We do not think the evidence was irrelevant, as claimed by the defendant. It may not prove very much, but it proves something which the jury should consider in this very close question as to boundary. The conduct of the parties with respect to a certain line, as being the dividing line between their lands, is surely some proof of its true location."

It was held in *Barfield v. Hill,* 163 N.C. 262: "Evidence that a certain boundary line in dispute in an action to recover lands had been surveyed by one under whom the plaintiff deraigned his title, and that those claiming under him had never thereafter claimed beyond this line, is competent evidence in behalf of the defendant, when it tends to establish his claim," citing *Haddock v. Leary,* 148 N.C. 379.

(377) The building of a fence and house on the land, and the other acts of which proof was offered, were trespasses and likely to meet with strenuous objection from any one claiming to own the land, but not so if defendants had the right to so use the land.

If it was settled where the lines are, no one of them could be changed by mere parol evidence, and not even by an oral agreement or understanding, but here the location of the line is in doubt, and the object is to find out where the line is, and oral evidence of the acts and conduct of the parties is admissible. *Haddock v. Leary, supra.*

In *Hanstein v. Ferrell,* 149 N.C. 240, evidence of a nature similar to that in this case, though not as strong, was held to be competent for the purpose of determining where a divisional line was, and the Court said: "We are of opinion that this is proper evidence to be submitted to the jury on the question of location, tending, as it does, to show, on the part of the owners and occupants of these lots, recognition of this adopted line and acquiescence in it as the true divisional line between them. The doctrine by which this testimony is held to be relevant to the inquiry is thus stated in 5 Cyc., p. 940: 'Recognition of and acquiescence in a line as the true boundary line of one's land, not induced by mistake, and continued through a considerable period of time, affords strong, if not conclusive, evidence that the line so recognized is the true line.' And, while such recognition and acquiescence may not, as a rule, justify a departure from the true dividing line when otherwise clearly defined and established, the authorities cited fully justify this statement of the doctrine as applied to the facts presented on this appeal." Citing *Davidson v. Arledge,* 97 N.C. 172; *M. E. Society v. Akers,* 167 Mass. 560. It seems to us that the *Hanstein* case is decisive of the question we are discussing.

Plaintiffs' counsel have called our attention to certain evidence in regard to the width of this lot on the street, and the location of an alley ten feet wide in the rear, and also to their contention that Currin had sold all of his land except the Prize-House lot, as showing conclusively that the lot in question could not be located as contended by the defendants, as it would be much wider than represented on the map (168 feet instead of 135 feet). But these are all matters for the jury to consider. The defendants say that the map shows that if you start at "A prime," which they contend is the true beginning corner and run with the calls of their deed, the lot will be 135 feet wide and embrace the land in dispute.

The defendants state in their brief: "If all the testimony as to the location of the fence and the rock at its end and the 35 years acquiescence by the Taylor family in the cutting of trees, building of stables, fencing the 30 feet of land, was admissible, and the deed, fence, and rock, his Honor left in the record, then the corner *on the* (378) *street 61 feet southeast of the prize-house* was 30 feet east of the corner of the lot Taylor conveyed to Biggs and Biggs to Currin." This shows their contention. This is not a conclusive case for the Taylors, as argued for the plaintiffs, but is one for the jury, and the learned judge so regarded it, as will appear from his charge. The evidence leaves the issue as to title and right of possession in grave doubt, and this doubt must be settled by the jury.

The defendants excepted to this instruction: "If, however, you shall find by the greater weight of the evidence that this land in controversy is included within the boundaries of the land conveyed to Mrs. Taylor by Mr. Crews, then you should answer the issue 'Yes,' and in that event you need not further consider the claim of the other parties plaintiff." His Honor afterwards charged as to the defendants' contention and instructed the jury how to answer the issues if they found that the line is where the defendants contend it is, but the instruction to which this exception was taken and quoted above, considered by itself, and without proper reference to the defendant's contention, and their finding as to it, was calculated to mislead the jury, as it was not then properly qualified, and the other instruction was so widely separated from it. But we do not find it necessary to consider whether we should grant a new trial on this account, as the error already explained is sufficient for that purpose.

We conclude that there was error in rejecting evidence.

New trial.

Cited: Sc., 182 N.C. 266; Sc., 186 N.C. 353; *Woodard v. Harrell,* 191 N.C. 198; *Power Co. v. Taylor,* 194 N.C. 233; *Daniel v. Power Co.,* 204 N.C. 278.

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(379)

A. W. AVERY, EXECUTOR OF A. C. AVERY v. C. M. PALMER AND C. C. PERRY.

(Filed 10 April, 1918.)

1. Nonsuit—Evidence—Trials.

On a motion for nonsuit, consideration may be given only to facts and legitimate inference therefrom which tends to support the plaintiff's claim.

2. Contracts—Breach—Negligence.

Negligence as a constituent part of an actionable wrong is the failure to exercise proper care in the performance of some legal duty which defendant owes the plaintiff growing out of the circumstances in which they are placed, proper care being that degree of care which a prudent man should use under like circumstances and charged with a like duty. *Ramsbottom v. R. R.,* 138 N.C. 38, cited and approved.

3. Same—Legal Duty—Implied Liability.

While it is not usual that the legal duty referred to is involved in the ordinary adjustments for breaches of contract, a contract may and not

infrequently does create the circumstances from which the added duty will arise, and at times the duty is superimposed by the law on the contract relation, as in the case of contracts on the part of public service corporations made in the ordinary exercise and performance of their chartered obligations. *Cashwell v. Bottling Works*, 174 N.C. 324; *Dail v. Taylor*, 157 N.C. 284; *Peanut Co., v. R. R.*, 155 N.C. 148, cited and applied.

4. Contracts—Negligence—Legal Duty—Damages—Evidence—Trials.

The plaintiff's intestate, a farmer, owned a roughly constructed two-wheel cart, without body, the pieces on each side continuing to form the shafts, with rounds across, forming a framework for the load, and applying to the defendant to haul a tombstone to be erected five miles in the country, was informed by him that his cart was insufficient and that he get another, whereupon the intestate insisted that it was and asked the defendant "What do you think the stone weighs?" to which the defendant replied, from the information that he had, 1,650 pounds. There was evidence tending to show that it weighed approximately 2,350 pounds. The agreement was made and the stone accordingly loaded on the cart under the intestate's sole direction, without chain or other device to hold the stone in place over the axle. In going over the end of a bridge across the road, when there was a drop about two or three inches, the stone fell forward on the intestate, breaking the shafts of the cart and killing him. *Held*, not sufficient evidence of a breach of a legal duty owed by the defendant to the intestate to be submitted to the jury on the question of actionable negligence, in an action brought by his executor to recover damages for his wrongful death.

5. Same—Principal and Agent.

Where a dealer in tombstones has shipped one of them to his agent for delivery, properly crated in pursuance to his contract, and the latter has contracted with plaintiff's intestate to haul it to its destination some five miles in the country, and while thus being hauled, the stone falls forward and kills the intestate without default or breach of legal duty on the part of the agent, falling within the course and scope of his agency, no breach of a legal duty has been sufficiently shown as to the principal to take the case to the jury upon the issue of his actionable negligence for the death of the intestate. *Brown v. Foundary Co.*, 170 N.C. 38; *Dail v. Taylor*, 151 N.C. 284; *Cashwell v. Bottling Works*, 174 N.C. 324; *Peanut Co. v. R. R.*, 153 N.C. 148, cited and distinguished.

6. Contracts—Negligence—Evidence—False Statements—Fraud.

Where the defendant has agreed with plaintiff's intestate to haul a tombstone some five miles in the country to its destination, and the intestate was killed by the tombstone falling upon him en route, evidence that the defendant had told the intestate that the latter's cart was insecure for the purpose but had yielded to the intestate's insistence that it was, and had given the weight of the stone as 1,650 pounds, from the best information he had, when it weighed approximately 2,350, and each one had the same knowledge and opportunity to estimate the weight: *Held* insufficient evidence that the defendant induced the intestate to undertake the hauling by false and fraudulent statements.

(380) CIVIL ACTION, tried before *Calvert, J.*, and a jury at November Term, 1917, of CRAVEN.

This action was to recover damages for alleged negligence on the part of defendants, causing the death of plaintiff's intestate.

There were also allegations in the complaint that plaintiff's intestate's death was caused by the false and fraudulent representation on the part of said C. C. Perry as agent of defendant as to weight of a certain tombstone which the intestate undertook to haul and, in doing so, came to his death.

Defendants answered, denying liability. On motion made in apt time, there was judgment of nonsuit and plaintiff excepted and appealed.

D. L. Ward and Guion & Guion for plaintiff.
R. L. Smith, T. D. Warren, and Moore & Dunn for defendants.

HOKE, J. There was evidence on the part of plaintiff tending to show that in November, 1916, C. C. Perry, as agent for his codefendant Palmer, had sold to one E. D. Avery a tombstone for his wife and same had been shipped by railroad to Cove City, N. C., to be thence carried and erected at Asbury Church, about five miles distant from the station; that the shipment, consisting of the headstone with base, a footstone and coping, also of stone, to enclose the grave, had been placed on the platform, and this coping proved or estimated to be about half of the entire weight, had been hauled to the church on the Saturday before by another person; that on the day in question the intestate, who owned a farm in and near Cove City, was there on business with his cart and, learning that the stone was to be hauled, applied to do the work, and the offer was accepted by Perry, who was there in charge, the cart not then being present. This cart, an ordinary one-horse vehicle, having an iron axle with two regular cart wheels with iron tires and superstructure, two shafts of hewn cypress, 5 by 6 inches in size and 13 feet long, eight feet of which was for the body under which the shafts were connected by rings inserted at intervals in bored holes and with uprights also in the shafts. The remaining five feet was for the mule and which was hitched to the first rung. That when intestate drove up to the station platform with his mule and cart, defendant Perry said to him, "That cart is not going to hold that stone," and intestate replied: "How much do you think it weighs?" and Perry replied "1,650 pounds," and said: "There is a round out in front of your cart; you had better get a wagon to haul it in." That intestate replied that his mule hauled that much

guano and would haul it all right, and, being advised by (381) some one to get some timbers 2 by 4 for an additional strength to the bed of the cart, intestate did so. The cart was loaded under his supervision and started on the way. About 2½ miles from Cove City the road crossed a bridge over a creek which had some rise in the approach and at the further end there was a drop from the bridge to the road of 2 or 3 inches. The mule pulled the load up the rise and over the bridge, and as the cart went off the bridge, intestate jumped up on the shafts next the mule, and there being no chain or other contrivance to hold the stone steady in its place over the axle, it slipped forward some inches, broke both shafts, sliding down on intestate and crushed him so that he soon thereafter died.

There were facts in evidence tending to show that the stones loaded by intestate weighed 2,350 pounds, which with the crate would probably run it to 2,500 pounds, and that the cart, if correctly loaded, would have hauled safely as much as 2,000 pounds, but not as much as 3,000; that Perry had not seen the stone till it came to the station; that the weight of the entire shipment was 3,000, raised by the railroad to something over 3,100, as shipping weight, and this included the coping, which was something near one-half of the whole shipment; that the stone was sold by weight and the design of this stone called for a weight of 1,650 pounds, and the data in Perry's possession all tended to show that 1,650 pounds was the true weight or very near it; that intestate was a farmer about 32 years of age, owning property and doing the ordinary work of a farmer in lifting and hauling things of weight that came to hand in the course of the work, and that he had also worked some in the lumbering business. There was also evidence tending to show that in the loading of the stone into the cart, which was done under intestate's supervision, there were, as stated, no chains or other arrangement by which the weight could be held in its proper place over the axle, and that the break was caused by reason of the stone slipping forward on the shafts chiefly at the drop from the bridge to the dirt road.

On perusal of this record, and in full recognition of the accepted principle that, on a motion for nonsuit, consideration may be given only to facts and legitimate inferences therefrom which tend to support plaintiff's position, we are of opinion that, in this testimony, in no aspect of it, can a recovery be sustained by plaintiff either for a negligent or intentional wrong.

In *Ramsbottom v. R. R.*, 138 N.C. 38, negligence, as a constituent part of an actionable wrong, was said to exist when there had been "a failure to exercise proper care in the performance of some legal duty which defendant owed to plaintiffs under the circumstances in which

they were placed, proper care being that degree of care which a prudent man should use under like circumstances and charged with a like duty."

(382) It is not usual that the legal duty referred to is involved in the ordinary adjustments for breaches of a contract, though a contract may create the conditions out of which the added duty will arise, as shown in the case of *Dail v. Taylor,* 151 N.C. 284, an action by a vendee of a lot of Coca-Cola against the vendor and manufacturers for physical injuries caused by an explosion of one of the bottles. Inasmuch as it appeared that some serious injury was likely to follow unless due care was used in bottling this preparation, it was held that, in the absence of any specific warranty to that effect, the vendor and manufacturer was required to use such care, and, for a breach of duty in this respect and which was the proximate cause of the injury, an action would properly lie. A like ruling has been recently made in *Cashwell v. Bottling Works,* 174 N.C. 324. Again, this form of liability is at times superimposed by the law in certain kinds of contracts, as in case of contracts of carriage with public service companies, where, for reasons of public policy, a strict performance of the stipulated duties are required, as instanced in *Pickett v. R. R.,* 153 N.C. 148, particularly the concurring opinion of *Associate Justice Allen.*

Construing the record in view of these principles, so far as defendant Palmer was concerned, he did nothing personally in the matter except to ship the stones properly crated pursuant to his contract and it is not contended that he is in any way responsible, except in so far as it may arise from the conduct of his codefendant Perry at the time and within the course and scope of his agency, and as to the latter, as heretofore stated, we see nothing in this transaction which shows or tends to show any negligent breach of duty on his part.

This is not a case of master and servant within the technical and usual meaning of the term, where certain recognized duties exist by reason of the relationship, as in *Brown v. Foundry Co.,* 170 N.C. 38, but the men were dealing at arm's length with the subject matter of the agreement before them and equally open to the observation of both. All the evidence, both of plaintiff and defendants, tends to show that Perry had not seen these stones till he saw them on the station platform, where it had been placed by the consignee and purchaser and, according to plaintiff's own testimony, the only statement he made about the weight was in the effort to dissuade the intestate from the use of the cart, which did not appear to him to be sufficiently strong or secure for the purpose, and though he seems to have been mistaken in his estimate, for it was evidently given only as an estimate; "What

do you think it weighs?" was the question asked by deceased, it was a true statement according to all the data that he had, both the shipping weight and the design and the price, based upon weight, all tending to show that 1,650 pounds or more was the correct weight.

And there was nothing concealed or withheld or probably (383) threatening in the making of such a contract, assuredly none that was not equally open to both. As heretofore stated, the stone was there to show for itself. The question of its weight was well within the intestate's intelligence and experience; by the terms of the contract, he was to have it loaded and did supervise and direct the loading of it himself, and on the facts presented, we are clearly of opinion that an action predicated upon a negligent breach of duty cannot be sustained against either of defendants.

It was alleged in the complaint and urged on the argument that defendants could be held liable by reason of false and fraudulent statements on the part of the agent Perry, but, as shown by the evidence and the testimony in behalf of plaintiff, his statements were correct, according to all the data that Perry had and were made, not with a view of enticing the deceased into the contract but in the endeavor to prevent him from undertaking the work without getting another vehicle.

There is, therefore, no element of deceit or fraud in the transaction, and on the facts in evidence the judgment of nonsuit must be affirmed.

Affirmed.

P. V. BOONE v. JAMES LEE AND ESTHER LEE.

(Filed 17 April, 1918)

1. Trusts and Trustees—Parol Trusts—Degree of Proof.

Evidence to engraft a parol trust on lands purporting in the deed to have been conveyed in fee simple absolute must be clear, strong and convincing, differing in degree from that required to set aside a deed for fraud; and a charge by the court that it may be established by the preponderance of the evidence is reversible error.

2. Same—Fraud.

The degree of proof to engraft a parol trust on land appearing from the deed to have been conveyed in fee simple absolute is not affected whether the trust sought to be established is a constructive trust arising out of fraud or to the contrary, or partakes of the nature of each.

3. Trusts and Trustees—Purchase Price—Assignor of Trusts—Trustee's Profits—Fraud.

The assignee of lands held in trust to convey upon payment of the purchase price who takes "upon the same terms and conditions" as his assignor, stands in the same relation thereto as the former trustee, and may receive the payments provided for without thereby being deemed to act in fraud of the trust estate by making a personal profit therefrom.

(384) CIVIL ACTION, tried before *Harding, J.*, and a jury at November Term, 1917, of GUILFORD.

The jury returned the following verdict:

1. Did the plaintiff purchase land from A. J. Whittemore upon an agreement to hold same for the defendant upon the same terms and conditions as it was held by A. J. Whittemore? Answer: "Yes."

2. Has the defendant failed to comply with his contract with A. J. Whittemore in that he failed to pay $5 per month on the purchase price, as per the terms of said contract, prior to the making of the deed from Whittemore to Boone? Answer: "Yes."

3. What amount, if any, did defendant pay to Whittemore on his contract to purchase the land in controversy? Answer: "$32.30."

4. What amount, if any, did the plaintiff pay Whittemore for the land? Answer: "$250."

And it being admitted that on the date of deed from Whittemore to plaintiff $267.70 was the balance due from defendants to Whittemore, with interest thereon from 1 February 1915.

The court adjudged that upon payment by defendants to the plaintiff of the $250 due by the latter to Whittemore, with interest thereon from 1 November 1916, the plaintiff should convey the land in question to the defendants. Plaintiff excepted and appealed. The other exception is stated in the opinion.

Charles A. Hines and Thomas C. Hoyle for plaintiff.
R. C. Strudwick for defendants.

WALKER, J., after stating the case: It appears in the case that the presiding judge charged the jury, upon the first issue as to the parol trust, that the burden of establishing the trust was on the defendants, who had alleged its existence, but that it was only necessary that they should do so by the greater weight of the testimony. This was error, as the rule is, in such case, that the jury must be satisfied of the trust by evidence clear, strong, and convincing. *Lehew v. Hewett,* 138 N.C. 6; *Glenn v. Glenn,* 169 N.C. 729.

It is not like a case in which a party seeks to set aside a deed or other instrument for fraud or undue influence, where a preponderance

of the evidence is sufficient to establish the fraud. The distinction is stated in *Harding v. Long,* 103 N.C. 1; *Ely v. Early,* 94 N.C. 1; and more recently in *Cedar Works v. Lumber Co.,* 168 N.C. 391; *Lamm v. Lamm,* 163 N.C. 71; *Avery v. Stewart,* 136 N.C. 426; *Lamb v. Perry,* 169 N.C. 436; *Glenn v. Glenn, supra; Ray v. Patterson,* 170 N.C. 226; *Potato Co. v. Jeannette,* 174 N.C. 236; *McLaurin v. Williams,* at this term.

The case of *Glenn v. Glenn, supra,* is strikingly illustrative (385) of the rule as applicable to the facts of our case. It was there said: "Where a defendant holds under a deed formally conveying to him the legal title to real property and a claimant is seeking to correct a mistake in the instrument or annex a condition to it or engraft a trust upon it, he is required to make out his claim by clear, strong and convincing proof (*Cedar Works v. Lumber Co.,* 168 N.C. 391; *Ely v. Early,* 94 N.C. 1), a position held to prevail in case of formal written instruments conveying personalty (*White v. Carroll,* 147 N.C. 334), and to written official certificates of officers given and made in the course of duty. *Lumber Co. v. Leonard,* 145 N.C. 339.

"And in further application of the principle, it has been also held that 'When the testimony is sufficient to carry the case to the jury, as on an ordinary issue, the judge can only lay this down as a proper rule to guide the jury in their deliberations, and it is for them to determine whether, in a given case, the testimony meets the requirements of this rule as to the degree of proof.' *Gray v. Jenkins,* 151 N.C. 80 and 82, citing *Cutherbertson v. Morgan,* 149 N.C. 72, and *Lehew v. Hewett,* 138 N.C. 6. It is also fully recognized here that this rule as to the quantum of proof does not obtain in suits to set aside deeds or other written instruments conveying property for lack of mental capacity or for fraud or undue influence, or because made with intent to defraud creditors, etc., plaintiff in such cases being required to establish his allegations by the greater weight of the testimony. The distinction is very fully and satisfactorily discussed by *Associate Justice Avery* in *Harding v. Long,* 103 N.C. 1, a case that has been repeatedly cited in approval of the principle. *Hodges v. Wilson,* 165 N.C. 323-333; *Lamm v. Lamm,* 163 N.C. 71; *Culbreth v. Hall,* 159 N.C. 588-591; *Odom v. Clark,* 146 N.C. 544-549, etc.

"From the facts in evidence as they now appear, the defendant has the legal title to the property in controversy, formally conveyed to him by written deed pursuant to foreclosure, and the purpose of the action is to engraft a trust upon his title in favor of plaintiffs, children and heirs at law of Mrs. Glenn, deceased. The case, in our opinion, comes under the principle sustained in *Ely v. Early, supra,* and

that line of cases, and plaintiffs are required to establish their allegations by clear, strong, and convincing proof."

The learned counsel for the defendants suggested in the argument before us that the rule did not apply here, as this trust, if it existed at all, arises from fraud, or is a trust *ex malificio*. But this can make no difference. The rule as to the quantum or intensity of the proof does not depend upon the particular nature of the trust, but is founded upon the theory that the written instrument speaks the truth
(386) and contains the final expression of the agreement between the parties. Whoever, therefore, seeks to show that it does not, should be required to do so by a degree of proof greater than a mere preponderance. It, therefore, becomes immaterial whether this is a constructive trust arising out of fraud, or, in the absence of fraud, or is an express trust created by direct fiduciary words, or partakes somewhat of the nature of both.

"Another instance," says Mr. Bispham (evidently referring to a written contract) "of a constructive trust in the absence of fraud is where a binding contract is made for the sale of real estate. In such a case, before the conveyance is executed, equity treats the vendor as a trustee of the land for the benefit of the vendee, and the latter as a trustee of the purchase money for the benefit of the former. This doctrine is properly a branch of the subject of specific performance, and will be treated of under that head." Bispham Pr. of Equity (9 Ed.), 34.

In one aspect of our case, this is a parol express trust, not enforcible, under the statute of frauds, but as it is a solemn declaration of one party that if the legal estate is conveyed to him he will hold it in trust for another, it would be fraudulent and unconscionable for him to acquire the legal title by this engagement to hold it for another, and not comply with his promise, and therefore, equity will enforce the trust, as the statute of frauds does not apply to such cases on account of the fraud, and the trust created thereby. *Avery v. Stewart*, 136 N.C. 426, 435, 436; *Sykes v. Boone*, 132 N.C. 199.

As to the other question, it is possible that it may not be presented again; however, we will state that as this plaintiff, under the trust and as found by the jury, would hold the land for the defendants "upon the same terms and conditions as it was held by A. J. Whittemore," it would seem that defendants would be required to pay to him the amount due to Whittemore. If there had been no deed to plaintiff, defendants would have to pay Whittemore the balance of the debt, and as plaintiff holds the land "upon the same terms and conditions" as Whittemore held it, and he simply takes Whittemore's place, he is entitled to receive what was owing to Whittemore, his assignor.

The amount to be paid is virtually designated in the agreement, and it is not a case where a trustee is using the property held by him to make a profit out of it for himself, as urged in the argument.

There must be a new trial because of the error in the charge of the court.

New trial.

Cited: McFarland v. Harrington, 178 N.C. 192; *Long v. Guaranty Co.,* 178 N.C. 506; *Ricks v. Brooks,* 179 N.C. 207; *Lefkowitz v. Silver,* 182 N.C. 349; *Cunningham v. Long,* 186 N.C. 532; *Gillespie v. Gillespie,* 187 N.C. 41; *Minton v. Lumber Co.,* 210 N.C. 425; *O'Briant v. Lee,* 212 N.C. 802; *Wolfe v. Land Bank,* 219 N.C. 317; *Taylor v. Addington,* 222 N.C. 396; *McCorkle v. Beatty,* 225 N.C. 181; *Carlisle v. Carlisle,* 225 N.C. 465.

(387)

J. R. CAFFEY v. OAK FURNITURE COMPANY.

(Filed 17 April, 1918.)

1. Contracts, Written—Compensation—Commission — Traveling Salesman—Territory—Mail Orders—Subagents.

Defendant contracted in writing with the plaintiff that the latter closely cover a defined territory for the sale of products manufactured by the former; send in a list of the "customers" visited as well as sold, for which he was to receive a certain per cent commission on "all orders received, accepted and shipped by us": *Held,* the writing contemplated the payment of the specified commission on all orders "received, accepted and shipped" by the plaintiff within the territory during the life of the contract, and did not confine them to the orders that the plaintiff had taken in person.

2. Appeal and Error—Contracts, Written—Evidence—Legal Construction.

The admission of parol evidence to explain a written contract of employment for the sale of merchandise upon a commission basis of compensation is not reversible error when it tends to sustain the interpretation correctly placed on the written instrument in the Superior Court as a matter of law.

CIVIL ACTION, tried before *Harding, J.,* and a jury at November Term, 1917, of GUILFORD.

The action was brought to recover damages for a breach of the following contract:

"This contract made and entered into this the 15th day of March, 1916, by and between J. R. Caffey, of Greensboro, N. C., and the Oak Furniture Company, of North Wilkesboro, N. C.:

"Witnesseth, That J. R. Caffey agrees to travel and sell the line of furniture manufactured by the Oak Furniture Company in North Carolina and South Carolina from now until 1 June 1916. The Oak Furniture Company agrees to pay his traveling expenses not to exceed $100 per month and also 4 per cent on all orders received, accepted and shipped by us during this period of time. The said J. R. Caffey agrees further to travel and work the territory above mentioned closely from 1 June 1916 to 1 January 1917, on a commission basis of 10 per cent on all orders received, accepted and shipped by us. The said J. R. Caffey agrees to furnish us a list of his expenses from this date to 1 June 1916, and also a list of customers called on. This report to be furnished weekly, and after 1st June, when he travels on his own expenses on a commission basis, he is not to furnish a list of expenses, but is to furnish a list of customers called on, together with the one sold.

"This contract signed by J. R. Caffey and J. H. Johnson for the Oak Furniture Company, each retaining a copy." (Signature of parties here.)

(388) Plaintiff canvassed the two States under this contract and received commissions on all orders which he, the plaintiff, personally secured, and defendants also paid him for the orders which were taken by his sub-agents, but refused to allow the plaintiff commissions on orders which were sent in to the defendant by customers doing business within plaintiff's territory by mail; that is to say, refused to allow plaintiff any commissions on what is known as "mail orders." The defendant also refused to allow plaintiff commissions on goods which were sold within his territory by other agents whom defendant put into the territory without his consent.

The case states that the judge intimated at the close of the testimony he would charge the jury that under the contract plaintiff would be entitled to recover 10 per cent on all orders in the territory named which were received, accepted and shipped by the defendant during the life of the contract. Defendant excepted. The charge was not sent up with the record. We only have the evidence, verdict of the jury, and judgment of the court. The jury returned the following verdict:

1. What is the amount in dollars and cents of the orders sent in by R. B. Strickland to the defendant and accepted by the defendant from 1 June 1916, to 1 January 1917, and actually shipped out by the dedefendant? Answer: "$8,660.96" (by consent).

2. What is the amount of all other orders received and accepted by defendant from customers from North Carolina and South Carolina from 1 June 1916 to 1 January 1917, and actually shipped out by the defendant? Answer: "$8,660.96" (by consent).

Judgment was entered in favor of the plaintiff for $1,116.39, and defendant appealed.

S. B. Adams and Brooks, Sapp & Kelly for plaintiff.
Justice & Broadhurst and O. C. Cox for defendant.

WALKER, J., after stating the case: We are of opinion that the presiding judge placed the right construction on the contract, and that, if it can be explained, there is evidence, both oral and documentary, which tends strongly to sustain the ruling. It will be observed that the contract is very broad in its language, as it says that plaintiff shall receive "10 per cent as commissions on all orders received, accepted and shipped by us." He had been assigned certain territory which was to be his, and canvassed or "drummed" by him, and the clause above quoted could mean only that the commissions would be paid "on all orders received and accepted" from that territory and shipped by defendant. It does not say that the commissions will be paid only on orders received from Caffey personally, or returned by him, but on all orders received; and this means from the territory, (389) whether sent in by him or not. And there was a reason for this, as shown by the contract, for he was to send in a statement not only of customers who bought goods on orders, but "a list of customers called on" by him, whether or not they bought goods. The defendant will hardly contend that they intended to avail themselves of these services so as to get a list of persons "called on" without paying for them. It was contemplated that plaintiff should make a general "and close" canvass of the territory, "travel and work the same," and introduce the goods to the trade, selling such as he could, and get his commissions on all orders received from that territory which were accepted and shipped by defendant.

The case of Strickland was excepted by the court from the instruction because plaintiff admitted that he had agreed that if Strickland would not cover his route he would allow him 6 per cent out of his commission, Strickland to give plaintiff "his routing," so that they would not conflict. Under a contract similar to this one, the Court of Appeals of New York, in *Taylor v. Enoch Morgan's Sons Co.*, 124 N.Y. 184, allowed commissions according to the rule herein stated by the judge. It appeared in that case that the defendant company entered into a written contract with the plaintiff, by which the latter

agreed to travel over a certain route, which was termed in the contract "his route," at least six times a year, representing and selling defendant's goods and selling no other goods to conflict with them. Defendant agreed to pay him for his services a commission on all orders accepted from bona fide purchasers, the commission on new trade to be double that allowed on the regular trade. Plaintiff entered upon his duties under the agreement and continued to discharge them until the agreement was terminated. In an action to recover commissions unpaid, it appeared that some of the orders accepted by the defendant came directly to it from the persons making them and some were taken by other employees of the company, also that orders were received from responsible parties which were not accepted by defendant. The referee allowed plaintiff commissions on all accepted orders made by parties on the line of his route, with certain exceptions specified in the contract, and also upon such unaccepted orders. *Held*, no error that the commissions were not limited to orders obtained and received by plaintiff, and that defendant had no right arbitrarily and without cause to reject orders from *bona fide* purchasers.

It will be noted that in the *Taylor* case the contention on the part of the defendant was, as it is here, that the traveling salesman was entitled only to commissions on orders taken by him and forwarded to the company, who was the defendant. This view of the contract was rejected by that Court, and in the course of the opinion it was said by *Justice Haight:* "On the part of the defendant, it was claimed
(390) that he was only entitled to commissions on orders taken by him and forwarded to the company. It will be observed that under the provisions of the contract the plaintiff was required to travel over his route in the three States named at least six times per year and represent and sell the defendant's goods, he paying his own expenses. His entire reward for the services rendered was in the commissions which the defendant agreed to pay him. He had for many years been engaged in a similar business for Colgate & Co., had a line of acquaintances and customers, and it became his duty to use his best endeavors to extend the defendant's trade, introducing its soaps, sapolio, and other goods to the dealers with whom he should be acquainted. He was to be paid commission 'upon *all* orders accepted by from bona fide purchasers.' This language is broad and sufficient to support the contention of the respondent. Had it been the intention of the defendant to limit his commissions to orders obtained and received from him, apt words clearly expressing that intent would doubtless have been used."

The Court further said of the features common to the two cases: "The plaintiff could hardly be expected to drum up customers at his

own expense without receiving any benefit from sales made to such. The wording of the contract is such as to lead us to conclude that the interpretation adopted by the referee expressed the intention of the parties, and that the same should be approved. We do not understand the provisions of the contract to be so ambiguous as to make oral testimony necessary in order to explain its meaning, and we quite agree with the general term that all of the evidence taken upon this branch of the case might have been properly excluded; but we do not see how harm has resulted to the defendant, for without the evidence we should be compelled to reach the same conclusion in reference to the meaning of the contract."

The last expression referred to evidence introduced by both parties to explain the meaning of the contract. The two cases are almost literally alike, and are certainly so substantially and for all practical purposes. In that case, as in this, there had been a previous contract and settlement under it, as will appear from this language: "After serving the defendant nine months under this agreement a controversy arose and the employment thereunder was terminated. A settlement, however, was agreed upon and the contract under consideration executed. It is in the form of a letter addressed to the plaintiff by the secretary of the defendant, with the acceptance of the plaintiff written thereunder." The clause fixing the amount of the commission was as follows: "We agree to pay you a commission upon all orders accepted from bona fide purchasers."

If anything, the language of our contract is stronger in favor of plaintiff's contention in this case than is that just quoted, and which was held by the Court as fully sufficient to sustain the contention of the plaintiff in that case that he was entitled to re- (391) ceive commissions on all goods sold in the territory to bona fide purchasers; and whether the purchasers were made in good faith is not involved in this case.

If we are at liberty to analyze and apply the oral and documentary evidence, we are of the opinion that a fair and reasonable construction of it would sustain the plaintiff's contention, especially the documentary proof. The plaintiff testifies directly and positively that the company agreed with him, through Mr. Johnson, that he should have the exclusive right to the territory and appoint subagents, they to receive 6 per cent and he 4 per cent of the commissions, and further, that he should have commissions on all mail orders.

"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 prepa-

ration, so as to add to 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." Kerr on F. & M., pp. 412 and 413; *Potato Co. v. Jeanette*, 174 N.C. 242. It is also true that parol evidence is not admissible to contradict, vary or change a written contract. *Moffitt v. Maness*, 102 N.C. 457; *Farguhar Co. v. Hardware Co.*, 174 N.C. 369, and cases cited.

We need not, therefore, consider the oral testimony, which was properly disregarded by the court.

No error.

W. G. JEROME v. JAMES SETZER AND WIFE, VIOLA SETZER,

(Filed 17 April, 1918.)

1. Ejectment—Landlord and Tenant—Justice of the Peace—Jurisdiction—Proof.

While a justice of the peace has no jurisdiction in ejectment, though the technical relation of landlord and tenant exists, if it appears that the defendant, tenant in possession, has acquired or holds an interest in the property itself, either under an executory contract of sale or otherwise under circumstances giving him a right to call for an accounting and an adjustment of the equities between the parties upon which the title may depend, the bare averment of the pleadings that such conditions exist is not sufficient to deprive the justice's court of its jurisdiction, but such must be made to appear from the evidence or admissions of the parties.

2. Landlord and Tenant—Lease—Option—Acceptance—Contract.

A contract for the lease of lands giving the lessee the privilege to buy within a certain specified time upon a partial payment on the purchase price of so much cash and the balance according to stated terms is a lease with an option to purchase, which option must be exercised within the time stated and in accordance with its terms, and creates no interest in the property itself unless and until such is accepted accordingly or sufficiently waived by the optionee.

3. Justices of the Peace—Jurisdiction—Ejectment—Landlord and Tenant—Equity—Option—Acceptance.

Where it appears in an action of ejectment that the plaintiff had leased lands to the defendant, and under a writing containing an option to purchase on certain terms within a stated time, and the option, if exercised at all, had been done so thereafter, about a week in this case, the defendant has no such interest or equity in the lands as will deprive the Justice's court of its jurisdiction.

CLARK, C. J., concurring.

JEROME *v.* SETZER.

SUMMARY PROCEEDINGS in ejectment under the Landlord and (392) Tenant Act, heard on appeal from a justice's court before *Shaw, J.*, and a jury at January Term, 1918, of FORSYTH.

At the close of plaintiff's evidence, on motion, the action was dismissed, his Honor being of opinion that on plaintiff's own showing the title to real estate was involved and the justice's court was without jurisdiction to hear and decide the cause.

Plaintiff having duly excepted, appealed.

Manly, Hendren & Womble and D. H. Blair for plaintiff.
L. M. Swink and F. S. Hutchins for defendant.

HOKE, J. It is settled by repeated adjudications in this State that though the relationship between the parties be technically that of landlord and tenant, the proceedings of summary ejectment instituted before a justice of the peace will not lie if it also appears that the defendant tenant in possession has acquired and holds an interest in the property itself, either under an executory contract of sale or otherwise and under circumstances giving him a right to call for an accounting and an adjustment of equities between the parties upon which the title may depend. *McLaurin v. McIntyre,* 167 N.C. 350; *Hauser v. Morrison,* 146 N.C. 248; *Parker v. Allen,* 84 N.C. 466.

The principle is very well stated in the first headnote to *Hauser v. Morrison, supra,* as follows: "Summary proceedings in ejectment given by the Landlord and Tenant Act (Revisal, sec. 2001) are restricted to the cases expressly specified therein; and when on the trial it is made to appear that the relation existing is that of mortgagor and mortgagee giving a right to account, or vendor and vendee requiring an adjustment of equities, a justice's court has no jurisdiction, and the proceedings should be dismissed."

It is also held in numerous cases that the principle does not (393) arise for the protection of a defendant from the bare averment in the pleadings that the conditions exist, but they must be made to appear from the evidence or admission of the parties. *Pasterfield v. Sawyer,* 132 N.C. 258; *McDonald v. Ingram,* 124 N.C. 272; *Hahn v. Guilford & Latham,* 87 N.C. 172. And further, that the findings of the lower court on this question will be upheld if there is legal evidence to support it. *Parker v. Allen, supra.*

Considering the record in view of these principles, it appears in the present case that in 1916 defendants James Setzer and his wife, Viola, held a house and lot in Forsyth County containing one-sixteenth of an acre, subject to a mortgage to the Winston Building and Loan Association; that defendant having failed to make the payments to said

company, the mortgage was duly foreclosed by sale, pursuant to its terms, and plaintiff, at the instance of W. T. Wilson, esq., an attorney who was acting for defendants in the matter, bought in the property and took a deed for same at $1,120, and with a view to helping defendants to a purchase of the lot, on 9th August, entered into a written contract of lease to be in force till 9th December following, at the rate of $3 per week, payable on Saturday of each week. In said instrument plaintiff further stipulated that, at the request of said James Setzer and wife, on or before said 9th December, he would sell and convey said property to them for $1,200 on terms of $50 in cash and the remainder of $1,150 to be evidenced and secured by note and mortgage on the property, etc.

The contract contained further stipulations as follows: "It is further understood and agreed that the said sale is to be made at the option of the said James Setzer and wife, Viola Setzer, their heirs and assigns, to be exercised on or before the said 9th December 1916. And it is further understood and agreed that if the said James Setzer and wife, Viola Setzer, their heirs and assigns, shall not demand of me (the said W. G. Jerome)the deed herein provided for on or before the said 9th December 1916, then this agreement is to be null and void, and party of the first part shall be at liberty to dispose of the said land to any other person, or to use same as he may desire in the same manner as if this contract had not been made; but otherwise this contract is to remain in full force and effect. . . ."

And further: "In consideration of the execution of this lease and option of purchase, parties of the second part hereby release and relinquish any and all rights which they have heretofore in this land by reason of their prior purchase of same, save those rights herein set out, and all claims to said land which they might at present have, save as herein set out, and all controversy as to the title to said land, as far as they are concerned or interested, save as herein set out."

(394) It appeared further from the oral evidence that defendant was in the habit of paying the rent that he paid to this attorney, Mr. W. T. Wilson, who would in turn pay the same to plaintiff; that this continued, the defendant paying at least three months of the rent and on Saturday, 9 December, the defendant paid W. T. Wilson the sum of five dollars, three of which was to be applied to the rent and two dollars on the bargain, and that some time the following week, after the 9th, defendants paid said W. T. Wilson forty-odd dollars on the price and between the 9th and the trial had paid said Wilson as much as fifty dollars in all. This attorney testified that he had no arrangement with Jerome, plaintiff, that he would collect this money for him, and no authority from him to receive it for him, but had

with Mr. Setzer, that the latter was to bring the money to witness and he would turn it over. True, the witness testifies in the first part of his statement that he represented both parties in trying to get the matter settled, but this was evidently restricted to getting the parties together and inducing Jerome to buy, but, in reference to collecting the rent, etc., he states very clearly that he was acting for Setzer throughout, and further, that he did not notify Jerome on 9 December or before that, that Setzer and wife had elected to buy the property or that they had made any payment thereon, but, at some time in the following week, he "got Jerome into his office and tendered him the fifty dollars or told him he had it for him, and Jerome replied that he would not then receive the fifty dollars, but desired possession of the property."

On the material question in dispute Jerome, plaintiff, testified as follows: "James Setzer had paid, I think, three months rent altogether. He was behind on the 9th of December a little more than a month's rent, or a month's rent, and on the 19th day of December he was behind a month, and from the 9th to the 19th. James Setzer nor any one in his behalf prior to the 9th day of December did not tender me $50 or any other amount to be applied on this contract prior or after that date, neither he nor any one else. I was in Mr. Wilson's office a few days after the 9th day of December, and he said he had $40, if I would accept he would turn it over, but he didn't tender me $50 on it. This was about a week after the 9th of December, about the 15th, I think. I don't remember the exact date, but I know it was several days after the 9th."

On careful perusal of the instrument in question and of the testimony relevant to its correct interpretation, we are of opinion that, so far as any agreement to convey is concerned, the contract was only an option to buy, in which time is generally of the essence and which created no interest in the property itself unless and until there was acceptance according to its terms within the specified time or a recognition of such estate and interest by the conduct of the parties and in (395) waiver of the stipulations.

On this subject, the principle apposite is stated correctly, we think, in the recent case of *Carolina Timber Co. v. Wells*, 171 N.C. 262-264, as follows: "The cases on this 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 RI. 390; *Bostwick v. Hess*, 80 Ill. 138. Our own decisions are in general approval of these principles," citing *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 in *Winders v. Kenan, supra*, it is held, among other things: "When in consideration of a certain sum of money the owner of lands agrees to convey them within a named period upon the payment of an agreed purchase price, the writing is unilateral, an offer to give another the right to buy, an option, and not a contract to sell, which does not bind the one accepting its conditions to purchase the lands, and he is required to exercise his rights thereunder within the specified time, and perform the conditions imposed as to payment, in accordance with the terms of the writing.

"Where an option for a sale of lands has been accepted, which provides for the payment of the purchase price as a condition precedent, it is the duty of the purchaser to pay in accordance with its terms, and a mere notice of his intention to buy is insufficient.

"Unilateral contracts or options for the sale of lands are to be construed more strictly in favor of the maker, and the time of its performance by the one holding the option is of the essence of the contract, and the conditions imposed must be performed by him in order to convert the right to buy into a contract of sale."

And applying these principles to the facts of the present record, we are of opinion, further, that since the foreclosure the defendants have never acquired or held any interest in the property itself, but only held an option to purchase, which they lost by an entire failure to comply within the time and that the ordinary incidents of a contract between landlord and tenant, on which the latter is estopped to question the former's title, should prevail, and the justice had jurisdiction to hear and decide the cause.

(396) In the authorities cited by defendants, the tenant, in addition to his rights as lessee, had acquired and held an interest in the property itself, giving him the right to an account and adjustment of equities between them, either by the terms of the agreement or by recognition of the landlord in waiver of his rights, the case presented in *Hauser v. Morrison, supra*. But in the present instance, as stated, no such interest has been made to appear in any aspect of the evidence, and the relationship between the parties is one of ordinary lease between landlord and tenant, and where the time of the lessee has expired by the terms of the agreement. See *Burwell v. Cooper's Coop. Co.* 172 N.C. 79. With every disposition to sympathize with the efforts of the

defendants to procure a home of their own, we think we are justified in saying, and the facts of the record disclose, that the defendants seem to have entered on an undertaking that has proved too much for them. They failed to make their payments to the building and loan companies, which we know are indulgent as far as permissible, and properly so. They have failed to comply with the option given by the plaintiff, who was endeavoring to help them. Where they procured the $50 which they claim to have tendered, but after the time specified, does not appear, but there is no likelihood that further indulgence would be of real benefit to them, and, in any event, we are of opinion, and so hold, that plaintiff is entitled to have his contract enforced in its integrity and on the testimony, if believed, there should be a verdict for plaintiff.

Reversed.

CLARK, C. J., concurs in the decision, but is further of the opinion:

1. That even if an equity had developed in the justice's court it would not have ousted the jurisdiction. The Constitution, Art. 4, sec. 1, is as follows: "*Abolishes distinction between actions at law and suits in equity feigned issues.* The distinctions between actions at law and suits in equity and the forms of all such actions and suits shall be abolished."

Same article, sec. 27, prescribes: "*Jurisdiction of justices of the peace.* The several justices of the peace shall have jurisdiction, under such regulations as the General Assembly shall prescribe, of civil actions founded on contract, wherein the sum demanded shall not exceed two hundred dollars and wherein the title to real estate shall not be in controversy, and of all criminal matters arising in their counties where the punishment cannot exceed a fine of fifty dollars or imprisonment for thirty days. And the General Assembly may give to justices of the peace jurisdiction of other civil actions wherein the value of the property in controversy does not exceed fifty dollars," with a further provision that in all actions, civil or criminal, "the party against whom judgment is rendered may appeal to the Superior Court."

It is clear, therefore, that the distinction formerly existing (397) between law and equity (which was purely incidental, arising from equitable doctrines being brought into the law by progressive judges like *Lord Nottingham* and others against the protest of the more conservative occupants of the bench who deemed this distinction an indispensable law of nature) was absolutely destroyed as a matter of jurisdiction by the above provision in our Constitution. This distinction could thereafter obtain as little in the court of justices of the peace as in any other court. There is no intimation whatever that

the jurisdiction of a justice of the peace is restricted to matters formerly cognizable on the law side or is ousted whenever an equitable element arises in the controversy. After the adoption of the Constitution of 1868, the bench being still occupied, necessarily, by judges who had been thoroughly indoctrinated with the idea that the distinction between law and equity was something inherent in the Constitution of the Universe, there were decisions which still upheld this distinction in actions brought before the clerk and before a justice of the peace, notwithstanding the explicit and unmistakable declaration of the Constitution. But we who can read the Constitution with clearer eyes, because without the prepossessions natural to those who studied law under the old system, should correct and not repeat their errors. Most especially is it true as to constitutional matters that the Constitution itself should be our guide, and not erroneous decisions, lest we bring upon ourselves the scriptural condemnation that we "make the Word of none effect by our traditions." Matt. 15:6; Mark 7:13. It is true that a justice of the peace cannot issue an injunction, and neither can this Court. But this is not because neither court has equitable jurisdiction, but because the statute has not given to either authority to issue this remedial writ as a matter of ordinary litigation.

2. If the title to land arises in an action before a justice of the peace under the Constitution the magistrate has no jurisdiction. If the justice holds that the title to land is in issue he must dismiss the action (Revisal, 1423), but the justice must hold whether it does or not, and the Constitution gives the right of appeal in either event. When the case gets into the Superior Court on such appeal, the whole spirit of the Constitution and of our statutes based thereon is that, being then in a court of general jurisdiction, the appeal will not be dismissed and the parties required to go out by one door of the courthouse to immediately come back in by another into the same courtroom, for the court being seized of jurisdiction will proceed to try the cause on its merits. This has been expressly provided by statute where a cause has been brought before the clerk, but on appeal it appears that he had no jurisdiction. In such case, the court will proceed to try the cause (Revisal, 614, and cases cited thereunder in Pell's Revisal), and even when the (398) proceedings before the clerk were a nullity (*In re Anderson*, 132 N.C. 243) and the judge can make amendments to give jurisdiction in that court. *Ewbank v. Turner*, 134 N.C. 81. The same is true as to appeals from a justice of the peace in criminal actions.

There is nothing in the Constitution which indicates that this rule does not apply to appeals in civil cases from a justice. It has been held that the proper course in all appeals to the Superior Court, independent

of any statute, is not to dismiss in that court, but to make the proper amendments and proceed. This principle was held by *Smith, C. J.*, for the Court in *McMillan v. Reeves*, 102 N.C. 559, citing *West v. Kittrell*, 8 N.C. 493, and *Boing v. R. R.*, 87 N.C. 360. There have been decisions since to the contrary, but not without objection thereto being made. See concurring opinions in *Unitype v. Ashcraft*, 155 N.C. 71; *Wilson v. Ins. Co., ib.*, 176-178, and cases there cited; *Cheese Co. v. Pipkin, ib.*, 401; *S. v. McAden*, 162 N.C. 578; *McIver v. R. R.*, 163 N.C. 546, and dissenting opinion in *McLaurin v. McIntyre*, 167 N.C. 355, 356.

Cited: Hahn v. Fletcher, 189 N.C. 732; *Supply Co. v. Davis*, 194 N.C. 330; *Fertilizer Company v. Bowen*, 204 N.C. 377; *Harwell v. Rohrabacker*, 243 N.C. 258.

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(399)

ARMOUR FERTILIZER WORKS v. W. H. AIKEN.

(Filed 17 April, 1918.)

1. Contract—Vendor and Purchaser—Express Warranty—Implied Warranty.

Subject to a few recognized exceptions, an express warranty in an executed contract of sale will exclude one that is ordinarily implied where the two are of the same general nature or refer to the same or closely related subjects or qualities in the thing sold.

2. Fertilizers—Vendor and Purchaser—Contracts—Express Warranty—Analysis—Crops—Damages.

An express warranty in the written contract of sale of commercial fertilizers guaranteeing a specified analysis, but not as to the result on the crops in which it is to be used, will protect the manufacturer or seller from the warranty ordinarily implied, that the fertilizer is fitted for the contemplated purpose.

3. Same—Pleadings—Demurrer.

Where the maker of notes given for commercial fertilizer therein waives all claims, damages and penalties in case of deficiency, except claim for the actual commercial value of deficiency when ascertained and determined by the State Chemist from samples taken in the presence of the seller or his authorized representative, the stipulation as to the waiver is a reasonable and valid one and excludes any and all evidence as to the effect of the fertilizer upon the crops upon the question of damages; and where there is no allegation in the pleading that the specified method has been employed, a demurrer is good.

4. Same—Statutes—Waiver.

Chapter 143, Laws of 1917, repealing sections 3945-3956 of the Revisal, provides adequate and sufficient means and facilities for the analysis of fertilizers by the State Chemist, under conditions safegurading both the seller and buyer thereof, and provides that no suit shall be brought for damages resulting in their use except after chemical analysis showing deficiency of ingredients, etc., with further provision allowing either party to make further agreement for their reasonable and lawful protection: *Held*, a waiver by the purchaser of any demand for damages, except such as may be ascertained in the manner specified in the statute, is valid and enforcible under the present law.

5. Courts—Jurisdiction—Municipal Courts—Superior Courts—Pleadings—Demurrer.

A counterclaim, strictly as such, and not by way of defense, may not be set up in excess of the jurisdiction amount of a municipal court in which the action is properly brought; and a demurrer in the Superior Court on appeal which has only derivative jurisdiction is good.

CIVIL ACTION, heard on appeal from the City Court of Raleigh and on demurrer of plaintiff to defendant's counterclaim and further defense before *Lyon, J.*, at October Term, 1917, of WAKE.

The action was instituted in the City Court and was to recover the amount of a promissory note for $458.04, bearing date 1 May, 1916, and due on or before 1 October, 1916. After the direct promise to pay the amount of said note and interest, the same proceeded as follows:

The consideration of this note is:

100 sacks 8-3-2 . . . . . .sacks.....
40 sacks cotton-seed meal, 7½ cents, ...sacks .....
3 sacks nitrate of soda, 18 cents . .....sacks .....

I hereby acknowledge I have recived and used the above fertilizer without any guarantee on the part of Armour Fertilizer Works, or its agents, as to results from its use, and which have been inspected, tagged and branded under and in accordance with the laws of this State; and I hereby waive all claims, damages, and penalties in case of deficiency, except claim for the actual commercial value of deficiency when, and only when, ascertained and determined by the State Chemist from samples taken in the presence of seller, or seller's authorized representative, from fertilizers for which this note is given.

Witness my hand and seal the day and year above written.

W. H. AIKEN (SEAL)

Plaintiff in his verified complaint alleged the execution of the note in form as stated, and that no part of same had been paid though repeatedly demanded.

(400) Defendant answered, admitting execution of the note, and that

no part of same had been paid, and by way of counterclaim and further defense made averment as follows:

For a further defense, the defendant therefore, answering the complaint of the plaintiff, alleges:

"1. That defendant bought from plaintiff 100 sacks of 8-3-2 fertilizer, 40 sacks of cottonseed meal, and 3 sacks of nitrate of soda; that he agreed to pay for said fertilizer the sum of $355, for said cottonseed meal the sum of $79, and for the nitrate of soda the sum of $24.04."

Defendant admits that the cottonseed meal and the nitrate of soda was up to the guaranteed standard, but he alleges that the 100 sacks of fertilizer purchased by him from the plaintiff was utterly worthless; that defendant applied said 100 sacks of fertilizer to his crops in a liberal manner and cultivated said crops in a careful and husband-like manner, but that his crops received absolutely no benefit from said fertilizer.

"2. That by reason of the said fertilizer being worthless and of no account, defendant was damaged in the sum of $855, which amount of $855 defendant specifically pleads as an offset and counter to plaintiff's cause of action. Wherefore defendant demands judgment in the sum of $500, with interest from ..... day of ..... until paid, and the costs of the action to be taxed by the clerk."

Plaintiff demurred to said answer:

"1. For that the further defense alleged was not open to defendant by reason of the express stipulations of the note.

"2: That the City Court of Raleigh had no jurisdiction of the amount of damages as set up and claimed by defendant, to wit, $845."

There was judgment in City Court against defendant for the amount of the note and, on appeal, this judgment was affirmed, the court being of opinion that the demurrer of plaintiff should be sustained on both positions.

Joseph B. Cheshire, Jr., for plaintiff
W. H. Lyon, Jr., for defendant.

HOKE, J.,after stating the facts: It is the accepted position here and elsewhere that, subject to a few recognized exceptions, an express warranty in an executed contract of sale will exclude one that is ordinarily implied where the two are of the same general nature or refer to the same or closely related subjects or qualities in the thing sold. *Guano Co. v. Live Stock Co.,* 168 N.C. 443; *Piano Co. v. Kennedy,* 152 N.C. 196; *DeWitt v. DeBerry et al.,* 134 U.S. 306, and see an instructive editorial note on the subject in 33 L.R.A. (N.S.), 501, case of *Loxtercamp v.*

Lincker Implement Co., 147 Iowa 29. And the principle has been
(401) approved and applied in well considered cases to sales of commercial fertilizers wherein it was held that an express warranty guaranteeing a specified analysis, but "not as to results on the crops," would protect the manufacturer or vendor from damages claimed for loss or diminution of crops, because the goods were not fitted for the purpose for which they were bought, this being a warranty ordinarily implied on such contracts. *Carter v. McGill*, 171 N.C. 775; S. *c.*, 168 N.C. 507; *Guano Co. v. Live Stock Co., supra; Germofort v. Cathcart*, 104 S.C. 125; *Allen v. Young*, 62 Ga. 617.

In the North Carolina cases just cited, of *Carter v. McGill*, both opinions written by *Associate Justice Walker*, it was held that, while on a warranty of that kind the vendor was protected from any claim for damages arising from loss of crops, etc., the condition of the crops tending to show that the fertilizer had been of no benefit to them, was admissible when the same was sufficiently definite and specific to be of reasonable aid to the jury in reaching a correct conclusion on the chemical analysis as it was guaranteed by the contract, approving in that respect the general principle applied in *Morgan v. Tomlinson*, 166 N.C. 557, a case however, where an express warranty of fertilizer was established by the verdict.

In this contract it will be noted that the stipulations in protection of the vendor go much beyond those appearing in the cases just referred to, the provision being:

"I hereby acknowledge I have received and used the above fertilizer, without any guarantee on the part of Armour Fertilizer Works or its agents as to results from its use, and which have been inspected, tagged and branded under and in accordance with the laws of this State; and I hereby waive all claims, damages and penalties in case of deficiency, except claim for the actual commercial value of deficiency when, and only when, ascertained and determined by the State Chemist from samples taken in the presence of seller or seller's authorized representative, from fertilizers for which this note is given."

In its terms and purpose it is broad enough to exclude and does exclude any and all evidence as to the effect of the fertilizer on the crops, the agreement being as shown that the purchaser waives all claims except those for the "commercial value of the deficiency" from the stipulated standard, and this only "when ascertained and determined by the State Chemist from samples taken from the fertilizers sold and in the presence of the seller or his authorized agent." We are of opinion that such a stipulation is in every way a reasonable one, well calculated to promote and insure fair and safe dealing in this important matter

and not only not opposed to any public policy prevailing with us, but the same is in accord with direct suggestion of this Court in *Carter v. McGill, supra,* and fully recognized and approved in (402) our latest legislation on the subject Laws 1917, ch. 143.

The statute in question, repealing sections 3945 to 3956 of Revisal, inclusive, makes elaborate and minute provision with the view of insuring a correct analysis of these important commodities and in protection both of the manufacturer and vendor and of the purchaser and consumer; directs the employment of sufficient chemist and assistants; provides for an analysis at the instance of the purchaser or by its own agents when necessary; provides, further, that samples for the purpose shall be taken always in the presence of the agent, seller or dealer or some representative of the manufacturers or if none of these can be present or if they refuse to act, then in the presence of two disinterested witnesses, etc. That no suit for damages shall be brought for results in use except after chemical analysis showing deficiency of ingredients unless the dealer has been selling goods that are outlawed by the statute or has offered for sale during the season dishonest or fraudulent goods.

Have thus dealt very fully with the subject, recognizing as sound the principle of selecting the samples in the presence of the manufacturer or dealer, section 7 of the act concludes with the proviso that "nothing in this act shall impair the right of contract," showing the clear intent and purpose of the Legislature to allow to either party the privilege of making further stipulations in reasonable protection of their interests and in accord with established principles of law. In *McLawhorn v. Fertilizer Works,* 158 N.C. 274, opinion by the *Chief Justice,* decided intimation is given that this is the true public policy and the correct interpretation of our former statute on the subject and undoubtedly it should prevail under the present law.

We must all recognize that in these sales of commercial fertilizers, among the most important of our economic life, some such provision as this is essential and necessary to the proper protection of the manufacturer and dealer on the one side and purchaser and consumer on the other, and required to enable them to have any correct estimate of the pecuniary value of such contracts, and the defendant, under a valid agreement, having waived his right to any and all claims for damages except for deficiency in ingredients and then only when such deficiency is ascertained in a specified way, and there being no allegation or claim that the required measures were taken to have a fair analysis made, we must hold that no valid defense has been alleged and, on that ground, the demurrer of plaintiff has been properly sustained.

As to the second ground, the counterclaim, being for $845, is beyond the jurisdiction of the City Court and that of the Superior Court being

only derivative, the damages alleged could not be properly insisted on strictly as a counterclaim.

(403) It is allowable, however, to set up and establish the same by way of defense to a smaller demand, for the reason and to the extent set forth in *Cheese Co. v. Pipkin,* 155 N.C. 394, and other cases.

As the demurrer is sustained on the principal ground that the answer, as stated, sets up no valid defense to plaintiff's demand, the judgment of the court below must be affirmed.

Affirmed.

Cited: Fertilizing Co. v. Thomas, 181 N.C. 281; *Ward v. Liddell,* 182 N.C. 224; *Jones v. Guano Company,* 183 N.C. 339; *Pearsall v. Eakins,* 184 N.C. 294; *Perry v. Perry,* 190 N.C. 126; *Swift and Company v. Aydlett,* 192 N.C. 338.

B. E. EVERHART ET AL. V. M. A. ADDERTON ET AL.

(Filed 17 April, 1918.)

1. Mortgages—Tenants in Common—Division of Lands — Foreclosure—Rights of Mortgagee—Rights of Purchaser.

Where a mortgagee sells lands under the power contained in the mortgage given by tenants in common, without suggestion of fraud or irregularity, the fact that subsequent to the execution of the mortgage and before the sale, the mortgagors severed the cotenancy by dividing the lands, in no wise affects the rights of the mortgagee to his lien upon the whole land or that of the purchaser to receive his deed upon paying the amount of his bid.

2. Mortgages—Foreclosure—Sales for Cash—Payment—Rights of Mortgagors.

Where according to the terms of the mortgage the lands have been advertised and sold for cash, the fact that the mortgagee did not require the purchaser to pay his bid for 19 days cannot, alone, advantage the mortgagor in his endeavor to set aside the sale.

3. Mortgages—Foreclosure—Auctioneer — Memorandum — Contracts — Rights of Purchaser.

The purchaser at a sale under foreclosure under the power conferred in a mortgage of lands may enforce the contract and demand his deed upon payment of his bid, after the auctioneer has signed the memorandum thereof.

4. Mortgages—Foreclosure—Purchaser—Mortgages.

The principle forbidding a mortgagee to buy in the lands subject to his mortgage has no application to a mortgagor's becoming the purchaser at

the sale, in the former instance the mortgage remaining notwithstanding the sales thereunder.

5. Tenants in Common—Severance of Title—Mortgages—Foreclosure—Purchaser.

Where tenants in common mortgage lands and thereafter divide them among themselves, at a foreclosure sale thereafter made by the mortgagee, under the power contained in the instrument, either of them may bid in the property, the relationship of tenants in common having been severed, and hold for himself the title thus acquired and the principle that a tenant in common holds an acquired title for the benefit of all has no application.

6. Tenants in Common—Mortgages—Purchasers—Husband and Wife.

Semble, a wife of a tenant in common who has joined in their mortgage to convey her contingent right of dower may become the purchaser at the foreclosure sale under the power of sale therein contained.

APPEAL from *Harding, J.*, at November Term 1917 of DAVID- (404) SON.

By consent the facts were found by the judge. Frank C. Clemmons and George Foster were tenants in common of the lands described, and in June, 1909, executed to M. A. Adderton a mortgage thereon to secure the sum of $300, their wives joining in the conveyance. The mortgage was duly registered and default having been made, the land was duly advertised and sold on 5 March, 1917, under the power of sale, when Fannie Foster, wife of said George Foster, was declared the highest bidder in the sum of $450, by the auctioneer, who gave a memorandum in writing thereof. On 31 June, 1910, after the note became due, the mortgagors, Foster and Clemmons, divided the lands among themselves equally, each assuming payment of one-half the debt, but each agreement was without the knowledge or consent of the mortgagee.

On 23 March, 1917, Frank C. Clemmons conveyed his half interest in the land to B. E. Everhart and on same day said Everhart and Clemmons tendered to the mortgagee one-half the amount due on the note secured by the mortgage and one-half the cost of the sale, which was declined by the said Adderton and on the next day they commenced this action and filed a complaint to compel the defendant mortgagee to accept such tender and to redeem the mortgage and cancel the same of record. On the same day after the summons was issued and the complaint filed, Fannie Foster tendered M. A. Adderton, the mortgagee, the sum of $450, the purchase price of the land which she had bid off at the mortgage sale on 5 March, and demanded of the mortgagee to make a deed to her as such purchaser, which tender was declined. She and others claiming an interest were made parties to this action.

The court further finds that at the time of the tender by Fannie Foster of the purchase money she was and has been at all times since said date ready, able, and willing to pay the purchase price and accept the deed from the mortgagee. And that the same was true as to B. E. Everhart and his tender of one-half the indebtedness, and that M. A. Adderton is willing, ready, and able to make a deed as directed by the court either to Fannie Foster as purchaser of the whole tract or to B. E. Everhart for his one-half of said tract.

The court, upon these findings, adjudged that mortgagee receive from the defendant Fannie Foster the sum of $450, the amount of her
(405) bid at the foreclosure sale and as mortgagee execute to her a conveyance of the entire tract of land described in the mortgage as sold at the foreclosure sale and out of the proceeds pay first the expenses of said sale, then the note secured by the mortgage and the remainder, if any, to the mortgagors.

Walser & Walser for Fannie Foster.
Raper & Raper for plaintiffs.

CLARK, C.J. The mortgage was regularly executed and covered the entire tract of land and upon default the sale was duly advertised and Fannie Foster was the last and highest bidder. There is no allegation, suggestion, or finding that there was any fraud, oppression, or irregularity as to the execution and registration of the mortgage or in the advertisement and sale. At the time of the execution of the mortgage the plaintiffs Frank Clemmons and George Foster were cotenants. The fact that subsequent to the execution of the mortgage, and before the sale, they served the cotenancy in no wise affected the rights of the mortgagee, who had a lien upon the entire undivided tract and legally exercised the power of sale as to the whole tract. The plaintiff Clemmons having sold his half interest in the land to Everhart, has no interest in this action. The plaintiff Everhart having bought Clemmons' interest, after the sale acquired nothing except Clemmons' right to receive one-half the proceeds of the sale, if any, after payment of the costs of the sale and the mortgage debt.

The defendant Adderton, mortgagee, could not be compelled to accept one-half the mortgage note and release the one-half the land which had been assigned to Clemmons in the partition between him and Foster. Fannie Foster, having bought the entire tract of land, could not be required to accept one-half the land on payment of one-half of the bid.

There is no equity shown to set aside the sale duly made under the power in the mortgage, and the court properly adjudged that the mort-

gagee should accept payment of the bid and execute title to the purchaser for the entire tract. The delay of payment for 19 days after the sale is not *per se* a forfeiture of her rights by the purchaser. It is not alleged or shown that the mortgagee demanded payment of said bid or that payment was refused. The right of the purchaser to enforce the contract was complete when the property was knocked off to the bidder and the auctioneer signed the memorandum. *Dickerson v. Simmons,* 141 N.C. 325; 27 Cyc. 1486.

It is true that the terms of sale in the mortgage was for cash, but the advertisement and sale, it seems, were made in strict conformity with such terms. 27 Cyc. 1481 (7). It was no deviation that the mortgagee did not require the cash to be paid over till 19 days (406) has elapsed. If any damage had resulted from such delay, the mortgagee could have refused to execute title. But no opposition is made by the mortgagee in this case, nor is any refusal to comply on the part of the purchaser shown.

This is not the case of a mortgagee buying at his own sale. In such case, the mortgagor being in the power of the mortgagee, the mortgage remains a mortgage notwithstanding the sale.

In *McLawhorn v. Harris,* 156 N.C., 107, it is said that destroying the unity of possession of cotenants in common will dissolve the tenancy and thereafter a former tenant in common may acquire the entire property. In this case the tenancy in common having been dissolved before the sale, there was no reason why Foster, himself, one of the former cotenants, might not have bought at this sale. Indeed, though a cotenant who buys in an outstanding title or lien upon the common property must hold it for the common benefit, he may become the purchaser at the sale of land to pay debts and hold the entire tract in his own right for the sale destroys the cotenancy. *Jackson v. Beard,* 148 N.C. 29.

Where one tenant in common has caused the sale by his failure to pay his share of the debt, he is not allowed to buy and hold for his own benefit because of the opportunity for fraud. *Reed v. Buchanan,* 61 W. Va. 552, cited in *McLawhorn v. Harris, supra.* But in this case none of the debt was paid and the entire property having been sold under the mortgage, there is no reason why either tenant in common could not have bought the entire property, more especially as the unity of possession had been dissolved. *Sutton v. Jenkins,* 147 N.C. 16; 17 A. & E. 711.

In this case, moreover, the purchaser was not a tenant in common, but merely the wife of one of them, and had joined in the mortgage

simply to release her contingent right of dower.

Affirmed.

Cited: Ruark v. Harper, 178 N.C. 253; *Gentry v. Gentry,* 187 N.C. 31; *Kelly v. Davis,* 211 N.C. 7; *Sutton v. Kank,* 211 N.C. 449; *Hatcher v. Allen,* 220 N.C. 410.

R. A. CANTER v. S. S. CHILTON.

(Filed 17 April, 1918.)

1. Boundaries—Evidence—Declarations.

Declarations as to definite markings of the corners of lands in controversy, made by one without interest, since deceased and before the controversy arose and sufficiently remote, are competent evidence.

2. Limitation of Actions—Color—Adverse Possession—Title—State.

Evidence of necessary adverse possession and location of lands under color for thirty years is sufficient to take title out of the State; as, also, in this case, a grant from the State.

3. Limitation of Actions—Adverse Possession—Partition—Color—Boundaries—Judgments—Deeds and Conveyances.

An entry upon and taking possession of lands under a judgment in partition proceedings constitute color of title, but it is necessary, in an action to recover the lands, for the party thus claiming, to introduce in evidence the petition, or a description of the land thus entered; and where he has failed to do so and introduces a later and sufficient deed to show color, his adverse possession will only be considered from the later period.

4. Limitation of Actions—Adverse Possession—Color.

Where the only disputed question in an action to recover lands is the dividing line between two adjoining owners, depending upon the location of a controverted corner, the question of adverse possession under color does not arise.

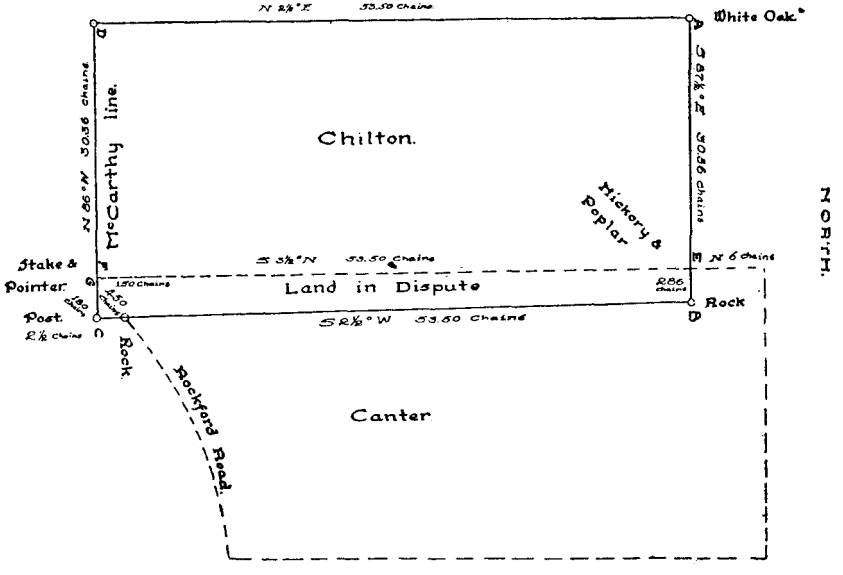
(407) CIVIL ACTION to recover a tract of land, tried before *Harding, J.*, at April Term 1917 of SURRY.

From verdict and judgment for plaintiff the defendant appeals.

Manning & Kitchin, S. P. Graves, and J. H. Folger for plaintiff.
W. L. Reece and A. E. Holton for defendant.

BROWN, J. The *locus in quo* is a small tract of land embraced by the letters G-E-B-C on map. The plaintiff owns the land on east

known as Besson lands and defendant the lands known as the McKinney lands on the west. The plaintiff claims that the true division line is the dotted line G to E, and defendant claims it is the solid line C to B.



The defendant excepts to the testimony of witness Wall, who (408) testified to the declarations of Louis Key and Enoch Johnson to the effect that the hickory and poplar marked the corner of the Beeson land. The witness testified that Key and Johnson were dead and that the poplar was Louis Key's and the McKinney corner. It appears that the declarants had no interest in the land and that their declarations were made long before this controversy arose in 1911. The witness further testified that he saw Enoch Johnson point out the poplar and that he said it was the corner of the Beeson land and Key's and McKinney's corner.

The evidence is clearly competent under numerous rulings of this Court. *Halstead v. Mullen,* 93 N.C. 252; *Sullivan v. Blount,* 165 N.C. 7.

The motion to nonsuit was properly overruled.

There is evidence tending to prove that the plaintiff and those under whom he claims have been in actual possession of the land described in the complaint under color of title for more than thirty years. The evidence of their possession is full and consists of unequivocal acts of ownership testified to by witnesses Hill and Wall.

This is sufficient evidence to prove title out of the State, although the introduction of the Shoeber grant does that. In our opinion there is evidence sufficient to show that it covers the land claimed by plaintiff.

The defendant excepts to the following instruction: "The plaintiff contends that if you take the defendant's own evidence, he began to clear it in 1903, and that he did not get his deed until 1905, and that acts of possession that he performed and the dominion or possession that he exercised over the land prior to the date of this deed in 1905; that he was there under nobody; that he was not there under color of title, but that his color of title began in him when he got his deed and the court charges you that this is true; that his color of title began when he got his deed."

This instruction is correct so far as it applies to the evidence in this case. It is familiar law that color of title is given by descents cast and by judgments and decrees, as well as by deeds and other proper writings 1 Cyc. 1083, 1100. An entry under partition proceedings constitutes good color. *Smith v. Tew,* 127 N.C. 299; *Bynum v. Thompson,* 25 N.C. 579. So an entry upon and taking possession of land under a judicial decree is good color and this is generally true, although the decree is irregular or even void. 1 Cyc. 1100, and notes.

The defendant claims title to the McKinney land under a sale for partition made in 1902 and confirmed in 1903. The deed by the commissioners to Chilton was executed 6 March, 1905. The defendant entered October, 1903. The defendant's color would begin to take effect at time of his entry and possession but for the fact that the pe-
(409) tition is not in evidence and the order of sale and confirmation contains no description of any land.

There is nothing in the record purporting to describe any land claimed by defendant except the deed of 1905. While a judicial sale and the proceedings authorizing it are color of title, it must be shown that they cover and include the land upon which the entry is made by such authority. An instrument in order to operate as color of title to the claimant thereunder must sufficiently describe the land intended to be conveyed. 1 Cyc. 1085.

The judge was, therefore, correct in his instruction, because no paper of any kind antecedent to the deed containing any description of the land had been introduced by defendant. *Barker v. R. R.,* 125 N.C. 596; 1 R.C.L. 713.

The fact is the question of color of title does not arise upon the facts of this case so far as defendant is concerned. In any view of the evidence, if believed, the plaintiff has shown title to the Canter or Beeson

lands. The defendant claims nothing more than the adjoining tract, known as the McKinney land. The only controversy arises out of the location of the dividing line between the two tracts.

The real dispute was as to the proper location of the hickory and poplar corner, the defendant claiming that the corner was on the bank of the branch. The land actually in dispute is that land embraced in the boundary between the corner as claimed by the plaintiffs and the corner as claimed by the defendant.

The jury appeared to have settled the matter by adopting the plaintiff's contention.

Upon a review of the record we find

No error.

Cited: Crocker v. Vann, 192 N.C. 430; *Trust Company v. Parker,* 235 N.C. 333; *Johnson v. McLamb,* 247 N.C. 538.

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(410)

MRS. BETTIE A. PHILLIPS v. J. A. GILES, ADMINISTRATOR OF MARY J. RICHMOND.

(Filed 24 April, 1918.)

1. Limitation of Actions—New Promise—Statutes.

Revisal, sec. 371, does not change the character or quality of the acknowledgment or new promise theretofore required to repel the bar of the statute of limitations in an action on contract, except that the new promise should be "in some writing signed by the party to be charged."

2. Same—Implication of Law—Promise to Pay.

In order to revive a debt which is barred by the statute of limitations, there must be an express unconditional promise to pay the same in writing or a written definite and unqualified acknowledgment of the debt as a subsisting obligation, signed by the debtor, etc., and from which the law will imply a promise to pay.

3. Same—Implication Repelled.

Where the debtor has, by a signed written instrument, unqualifiedly and definitely acknowledged the debt as his subsisting obligation, the law will imply a promise to pay it, and it is sufficient to repel the bar of the statute of limitations unless there is something in the writing to repel such implication.

4. Same.

A paper-writing signed by a parent certifying that she owes her daughter a sum of money, in a stated amount, for moneys she had borrowed

from her at various times, and stating the daughter was to have a certain sum of money from her estate, giving her reasons, is sufficiently definite to imply a promise to pay the amount of the debt, and as a new promise, to repel the bar of the statute of limitations.

5. Instructions—Intimation of Opinion—Ultimate Facts.

As to whether a fact is sufficiently proven by the evidence is within the province of the jury to determine, and upon which the court may not intimate an opinion, Revisal, sec. 535; and this inhibition extends not only to the ultimate facts, but to all the essential inferences of fact arising from the testimony upon which the ultimate facts necessarily depend.

6. Same—Limitation of Actions—New Promise—Wiring—Signature.

Where an acknowledgment of a debt contained in a writing purporting to have been signed by the debtor, is relied upon to repel the bar of the statute of limitations as a new promise to pay, in an action thereon, and there is evidence that the signature was in the handwriting of the deceased debtor, the question as to whether the debtor signed it was an inference of fact for the jury to determine upon the evidence, and a charge by the court that the jury find the issue in the affirmative if they found the facts to be as testified is an expression of opinion on the ultimate fact to be proved, prohibited by statute, and constitutes reversible error. Revisal, sec. 535.

CIVIL ACTION, tried before *W. A. Devin, J.*, and a jury at January Term 1918 of DURHAM.

The action, instituted apparently in 1917, was to recover the sum of $283.95, for money loaned by plaintiffs to defendant's intestate.

There was allegation with evidence on part of plaintiff tending to show that, in the years 1905-1908, and 1910, plaintiff loaned to intestate, who was her mother, different sums aggregating the amount in question, and in the fall of 1916, not long before intestate's death, she executed a paper-writing, acknowledging said indebtedness in terms as follows:

"Sept. 18, 1916: This is to certify that I, Mary J. Richmond, owe my daughter, Bettie M. Phillips, $283.95 (two hundred and eighty-
three dollars and ninety-five cents) for borrowed money at
(411) different times. And Bettie is to have $500 (five hundred dol-
lars) out of my estate as a gift at my death, as the rest of the children has had something and Bettie nothing. Willie L. Richmond and Johnnie D. Richmond each got land. And Mary Fannie Chambers got a $1,000 (thousand dollars), $500 (five hundred) as a gift and $500 (five hundred) to take care of me as long as I live.

"This I witness my hand and seal.

(Signed) MARY J. RICHMOND."

That some time after intestate's death and defendant's qualification

as executor, plaintiff presented her claim and payment having been refused, plaintiff instituted the present suit.

There was a denial of indebtedness and of execution of paper-writing on the part of defendant and also plea of the statue of limitations.

Plaintiff presented the paper-writing and offered evidence tending to show that the signature was in the handwriting of her mother, the intestate. T. B. Peirce, a witness, cashier of a bank in Durham, qualified as an expert in the handwriting of intestate, testified that such signature was in her handwriting. On cross examination he admitted there were some minor differences, but adhered to his opinion that the signature was in the handwriting of intestate, and plaintiff herself testified that such signature was in the handwriting of the intestate.

It was insisted for defendant that the paper-writing in question was not sufficient to repel the bar of the statue of limitations otherwise existent against plaintiff's claim, and for that reason moved for judgment of nonsuit. Motion overruled and defendant excepted.

The cause was submitted to the jury, who rendered verdict as follows:

1. Is the signature to the paper-writing, dated 18 September 1916, Exhibit 2, offered in evidence by the plaintiff, that of defendant's intestate, Mary J. Richmond? Answer: "Yes".

2. What amount, if any, is plaintiff entitled to recover of the defendant? Answer: "$283.95 and interest."

The court charged the jury and defendant made exceptions as follows:

"Upon the view of law which the court takes in this case, two issues are submitted to you:

"1. Is the signature to the paper-writing dated 18 September, 1916 (Exhibit No. 2), offered by plaintiff that of defendant's intestate. Mary J. Richmond? (a) The court charges you if you find the facts to be as testified to by the witnesses, you will answer that issue 'Yes,' the evidence being that the signature is that of Mary J. Richmond. If you so find by your direction and with your consent I will write that answer for, 'Yes.' " (b)

To the foregoing part of his Honor's charge between the letters (a) and (b) the defendant excepted and assigns the same as error.

"2. What amount is plaintiff entitled to recover of defendant? (412) (c) If you find the facts to be as testified you will answer the second issue $283.95. If you so find, by your direction and with your consent I will write the figures $283.95 for you." (d)

To the foregoing part of his Honor's charge between the letters (c) and (d) the defendant excepted and assigns the same as error.

Judgment on the verdict and defendant excepted and appealed, assigning for error the ruling of the court as to the paper-writing being sufficient to repel the bar of the statute of limitations, the errors noted to the charge.

Bryant & Brogden for plaintiff.
W. G. Bramham for defendant.

HOKE, J. Our statue on the question of preventing the bar of the statue of limitations by reason of a new promise, Revisal, sec. 371, is in terms as follows:

"No acknowledgment or promise shall be received as evidence of a new or continuing contract, from which the statue 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."

Authority on the subject is to the effect that it was not the meaning of this law in its terms or purpose to make any change in the character or quality of the acknowledgment or promise heretofore required to repel the bar of the statue except that the same should be "in some writing signed by the party to be charged." Apart from this requirement, therefore, our decisions both before and since are apposite to the true interpretation of the law.

This position was fully recognized in the recent case of *Shoe Store Co. v. Wiseman,* 174 N.C. 716, and in that and many other well considered cases on the subject, it is held that, in order to revive a debt which is barred by the statute, there should be an express unconditional promise to pay the same or that there should be a definite, unqualified acknowledgment of the debt as a subsisting obligation and from which the law will imply a promise to pay. *Royster & Co. v. Farrel and Wife,* 115 N.C. 306; *Taylor v. Miller,* 113 N.C. 340; *Faison v. Bowden,* 72 N.C. 405; *Moore v. Hyman,* 35 N.C. 272; *Smith v. Leeper,* 32 N.C. 86.

In *Faison v. Bowden, supra,* it is held: "The new promise necessary to repel the bar of the statute of limitations 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
(413) amount of the debt can be ascertained. Or there must be an acknowledgment of a present subsisting debt, equally definite and certain, from which a promise to pay such debt may be implied."

And in *Smith v. Leeper,* 32 N.C. 86, the true principle applicable is stated as follows: "To repel the statue of limitations, a promise to

pay must be proven, either express or implied. (2) The law will imply a promise when there is an acknowledgment of a subsisting debt, unless there be something to rebut the implication."

The same position has been approved in the decisions of the Supreme Court of the United States dealing with the question. Thus, in *Shepherd v. Thompson,* 122 U.S. at 235, *Associate Justice Gray,* delivering the opinion said: "But in order to continue or to revive the cause of action, after it would otherwise have been barred by the statue, there must be either an express promise of the debtor to pay that debt *or else* an express acknowledgment of the debt, from which his promise to pay it may be inferred. A mere acknowledgment, though in writing, of the debt as having once existed, is not sufficient to raise an implication of such a new promise. To have this effect, there must be a distinct and unequivocal acknowledgment of the debt so still subsisting as a personal obligation of the debtor."

It is the principle very generally prevailing on the subject and would seem to be required with us by the phraseology of the statue itself, which clearly recognizes that either a promise to pay or acknowledgment of the debt as an existent obligation will suffice, unless there is something to qualify the express promise or to repel that which the law would imply from the definite acknowledgment of the debt as a subsisting obligation.

In the cases cited and relied upon by defendant, chiefly *Wells v. Hill,* 118 N.C. 900, and *Helm Co., v. Griffin,* 112 N.C. 356, the headnotes and some expressions in the opinions give countenance to the proposition that, in such cases, there should be both an acknowledgment and a direct promise to pay, but a careful examination of the facts will disclose that in the latter, there was no acknowledgment of any debt as a subsisting obligation, but only that the defendant had formerly owed the plaintiff and the language of the instrument gave clear indication that no promise to renew the obligation or pay the same was intended. And in *Wells v. Hill, supra,* while there may have been an acknowledgment of the debt, the promise to pay was indefinite and conditional and the entire correspondence, the basis of the claim for a renewal, showed that there was no intent on the part of the promisor to recognize the debt as a subsisting obligation or to make an unconditional promise to pay.

On the facts presented, therefore, both of those cases were well decided and neither, when properly interpreted, is opposed to the position that it will suffice to repel the bar when there is a (414) direct promise to pay the debt, written and signed by the party to be charged or a definite acknowledgment of the debt as a subsisting

obligation and nothing in the writing to qualify or repel the promise that the law will imply from such an acknowledgment. And, in the present case, we fully concur in his Honor's view that the paper-writing contains a definite acknowledgment of the debt and, on its face, gives clear indication that it was intended as a renewal of the obligation as required by the statue.

While we approve the ruling of his Honor in the respect suggested, we are of opinion that there must be a new trial of the cause by reason of an erroneous instruction on the issues submitted. It is the fixed principle in our system of procedure, both by statue and approved precedent, that a judge in charging a jury shall not give an opinion whether a fact is fully or sufficiently proven, "such matter being the true office and province of the jury." Revisal, sec. 535. And it has been held with us in many well considered cases that the inhibition extends not only to the ultimate facts, but to all the essential inferences of fact arising from the testimony and upon which the ultimate facts necessarily depend. This principle, recognized by the Court in *Bank v. Pugh,* 8 N.C. 198, has been again and again approved in our cases. *Forsyth v. Oil Mill,* 167 N.C. 179; *State v. R. R.,* 149 N.C. 508-512; *State v. Daniels,* 134 N.C. 671. In the *Forsyth* case, the correct principle is stated by *Brown, J.,* as follows: "The converse of the rule is true and for a stronger reason a verdict can never be directed in favor of a plaintiff when there is any evidence from which the jury may find contrary to the plaintiff's contention or where there is evidence that will justify an inference to the contrary of such contention."

And in *State v. R. R., supra,* the Court said: "When there is conflict in the evidence on any essential feature of the charge (here an indictment), or when, though there be no such conflict, more than one inference of fact is permissable, and any one of these make for defendant's innocence, the question for such guilt or innocence is for the jury, and not for the court."

In the case presented the witness Peirce and the plaintiff herself, by the proper and legal interpetation of her evidence, gave it as their opinion that the signature to the paper-writing in controversy was in the handwriting of the intestate. The ultimate fact was whether she signed it or not. The evidence, consisting of these opinions, is relevant and permits the conclusion that intestate signed the paper, but on the record this was an inference of fact which the jury might or might not deduce from the testimony and which they should be allowed to determine without expression of opinion from the judge. For this error there must be a new trial of the cause, and it is so ordered.

New trial.

Cited: Irvin v. Harris, 182 N.C. 655; *Tucker v. Ashcraft,* 189 N.C. 547; *Smith v. Gordon,* 204 N.C. 698; *Fertilizer Co., v. Hardee,* 211 N.C. 656; *Trust Co., v. Lumber Co.,* 221 N.C. 94, 95; *Haines v. Clark,* 230 N.C. 752; *McGowan v. Beach,* 242 N.C. 77.

(415)

THE COMMERCIAL NATIONAL BANK OF RALEIGH v. THE SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 24 April, 1918.)

1. **Carriers of Goods—Principal and Agent—Bills of Lading—Purchasers for Value—Receipt of Goods—Defenses.**

A common carrier is not bound by a bill of lading issued by its agent unless the goods be actually received for shipment, and the principal is not estopped thereby from showing by parol that no goods were in fact received, although the bill has been transferred to a *bona fide* holder for value.

2. **Pleadings—Demurrer—Carrier of Goods—Bills of Lading—Receipt of Goods.**

Where a bank sues a carrier to recover on a bill of lading attached to a draft it had discounted, and the complaint alleges that the draft had been returned unpaid, that the plaintiff was informed and believed that the carrier did not receive the goods: *Held,* a demurrer was good.

3. **Carriers of Goods—Bills of Lading—Negotiable Instruments—Statutes.**

A bill of lading issued by the agent of the carrier is in the nature of a receipt, susceptible of explanation or contradiction, and is not negotiable in the ordinary application of the word to commercial paper; as to the effect on its negotiability by chapter 415, Laws of 1916, 39 W. S. Stat. at Large, part 1, p. 138, *Quaere?*

BROWN, J., did not sit or take part in the decision of this case.

CIVIL ACTION, heard on demurrer to complaint, before *Stacy, J.,* at January Term, 1918, of WAKE.

The complaint alleged, in effect: "That it purchased for value, and is the owner of, certain bills of lading issued by the defendant company, through its local freight office in the city of Raleigh, which were made to the Raleigh Grain and Milling Company and endorsed to the order of plaintiff, on which bills of lading drafts were attached, drawn by said Raleigh Grain and Milling Company on the consignees, payable to plaintiff, which drafts plaintiffs discounted at their face value."

Then follows itemized statement of drafts and bills, giving names of consignees, etc., and aggregating $5,091.30.

"That said drafts were returned 'not paid,' with the information that no goods had been received by the consignees, and that plaintiffs is informed and believes that the defendant, the railroad company, did not receive the goods as represented by the bills of lading and no shipments were made on account thereof, and that the Ralcigh Grain and Milling Company was totally insolvent."

Defendant demurs because it appears from the complaint that the goods, as represented by the bills of lading attached to the complaint, were not actually received by defendant, and defendant is not bound thereby, although they have been transferred to a bona fide
(416) holder for value, and that the copy of the form of bill annexed to complaint contains the notation, "Shipper's load and count," etc.

There was judgment sustaining the demurrer, and plaintiff excepted and appealed.

S. Brown Shepherd for plaintiff.
Murray Allen for defendant.

HOKE, J. In *Williams, Black & Co. v. R. R.*, 93 N.C. 42, it was held that "A common carrier is not bound by a bill of lading issued by its agent unless the goods be actually received for shipment and the principal is not estopped thereby from showing 'by parol that no goods were in fact received, although the bill has been transferred to a bona fide holder for value.' "

This decision, fully approved in the more recent case of *Peele v. R. R.*, 149 N.C. 390, has since been the accepted and unquestioned law of the State and to our minds the ruling is in accord with right reason and sustained by the decided weight of authority in other jurisdictions. *Mo. R. R. v. McFaden*, 154 U.S. 155; *Pollard v. Vinton*, 105 U.S. 7; *Ray & Ray v. Northern Pacific R. R.*, 6 L.R.A. (N.S.), 302; *Baltimore R. R. v. Wilkins*, 44 Md. 11; *National Bank of Commerce v. R. R.*, 44 Minn. 224.

The position and the principles upon which it may be properly made to rest are very impressively stated by *Mitchell, J.*, in the *Minnesota* case, *supra*, as follows: "The reasoning by which this doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; that it is not within the scope of the authority of the shipping

agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that his real and apparent authority, *i.e.*, the power with which his principal has clothed him in the character in which he is held out to the world . . . is the same, viz., to give bills of lading for goods received for transportation; and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that if the authority of an agent is known to be open for exercise only in a certain event or upon the happening of a certain contingency, or the (417) performance of a certain condition, the occurrence of the event, or the happening of the contingency, or the performance of the condition must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority. An examination of the authorities also shows that they apply the same principle whether the bill of lading was issued fraudulently and collusively, or merely by mistake."

And further in the opinion, while recognizing the force of the opposing position, going so far as to say that if the question was *res integra*, it might be allowed to prevail the learned judge gives the practical suggestions in support of the court's decision as follows:

"But, on the other hand, it may be said that carriers are not in the business of issuing and dealing in bills of lading in the same sense in which bankers issue and deal in bills of exchange; that their business is transporting property; and that if the statements in the receipt part of bills of lading issued by any of their numerous station or local agents are to be held conclusive upon them, although false, it would open so wide a door for fraud and collusion that the disastrous consequences to the carrier would far outweigh the inconvenience resulting to the commercial world from the opposite rule. It is also to be admitted that it requires some temerity to attack either the policy or the soundness of a rule which seems to have stood the test of experience, which has been approved by so many eminent courts, and under which the most successful commercial nation in the world has developed and conducted her vast commerce ever since the inception of carriers' bills of lading." Suggestions that to our minds embody the weightier reason.

It is argued for the plaintiff that as a recent Federal statute, chapter 415, Laws 1916, 39 U.S. Stat. at Large, part 1, p. 538, makes these bills of lading negotiable, the question of public policy involved in these

cases and so far as the Federal decisions are concerned, is no longer of weight.

On a cursory examination of the statute in question, there is doubt if the law does or was intended to make bills of lading negotiable in the full sense of the term, that is, to the extent that ordinary commercial paper is so. *Nat. Bank v. R. R., supra*, and see an interesting article on this subject in *Michigan Law Review* for April, 1918, p. 402. But if this be conceded, the fact that such a law was deemed necessary to bring about a change and that Congress considered the subject with its attendant results of such perplexity and importance as to require a statute of 45 sections to deal with it adequately and safely, makes rather against the plaintiff's position as to what the law now is, for ours is only the *jus dicere* and leads to the conclusion also that, if any change is found desirable, it should be by the law-making body,
(418) where all the practical suggestions that are presented in such a problem may be fully discussed and determined.

As now advised, we must adhere to our former decision and the judgment for defendant is affirmed.

Affirmed.

Cited: Riff v. R. R., 189 N.C. 588.

R. W. McLEAN ET AL. v. D. A. McDONALD ET AL.

(Filed 24 April, 1918.)

1. Appeal and Error—Motions—Docket and Dismiss—Appellee's Laches.

Where the appellant has failed to docket his appeal as required by Rule 5 of the Supreme Court, the right of the appellee to dismiss under Rule 17 must be exercised before the appellant has complied with the rule, and if appellee's motion is made thereafter his right to dismiss at that term is barred by his own laches.

2. Same—Printing—Record—Briefs.

Where the appellee has lost his right to docket and dismiss the appellant's case at the first term of the Supreme Court next ensuing that of the trial, and the appeal goes over to the next term of the Court, a motion by appellee at this term to dismiss for failure to print the record or file printed briefs is premature.

3. Appeal and Error—Motions—Docket and Dismiss—Appellee's Laches—Assignment of Error.

Where an appeal goes over to the next term of the Supreme Court for failure of appellee to docket and move to dismiss it in time, a motion to

dismiss for appellant's failure to comply with Rule 19 (2) in not properly grouping and numbering his assignments of error, is premature.

APPEAL by plaintiffs from *Long, J.*, at September Term 1917 of MOORE.

Plaintiffs not represented in this Court.
H. F. Seawell for defendants.

CLARK, C. J. The appellee moves to dismiss the appeal upon the following grounds:

1. That the transcript was not docketed "seven days before entering upon the call of the docket of the district to which it belongs," as required by Rules 5, 7, and 17 of this Court.

2. "The assignments of error are not grouped and separately numbered, immediately before or after the signature to the case on appeal, or elsewhere in the transcript, as required by Rule 19 (2)."

3. The appellant failed to "file brief by 12 o'clock, noon, on (419) Tuesday of the week proceeding the call of the district to which the cause belongs," as required by Rule 34.

This case was tried at September Term 1917 of Moore, and if not docketed at our last term (as it might have been), it was required under the rule to be docketed at this term, being the first term of this Court beginning after the trial below. Rules 5 and 17 require that, in order to be heard at this term, the appeal must be docketed "seven days before entering upon the call of the docket of the district to which it belongs." Rule 17 provides that if not docketed by that time at this term the appellee may file a certificate in the form required by that rule, and have the appeal dismissed. But there is the further provision in Rule 5: "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."

In *Tripplett v. Foster,* 113 N.C. 389, it is held, "A motion to docket and dismiss an appeal made at the first term after the trial below will not be entertained when the appellant brings up and dockets his transcript at that term before the motion to dismiss." This case itself cites precedents and the citations thereto are set out in the Annotated Edition. The authorities to this effect are reviewed and reaffirmed in *Benedict v. Jones,* 131 N.C. 473, and cases cited thereto in the Annotated Edition. In that case it is said: "Of course if the appeal is not docketed till after the termination of the next ensuing term (after the trial), it will be dismissed. *Burrell v. Hughes,* 120 N.C. 277; *S. v. James,* 108 N.

C. 792. The laches of the appellee in not moving to dismiss under Rule 17, as soon as he might, will not authorize the appellant to docket after that term." The motion of the appellee to discuss under Rule 17 must, therefore be denied. It was the appellee's fault that he did not docket and move to discuss under Rule 17 before the appellant docketed the transcript at this term. *Gupton v. Sledge,* 161 N.C. 214, citing *Benedict v. Jones,* 131 N.C. 473, and *Laney v. Mackey,* 144 N.C. 630.

In *Gupton v. Sledge,* the Court says: "The case thus being docketed, though too late for hearing at this term, a motion to dismiss for failure to print the record and file printed brief cannot avail, as these things are required to be done at the time required before the call for hearing at the next term." This disposes of the third ground of the appellee's motion to dismiss.

For the same reason we cannot now consider the other ground of his motion that "the assignments of error are not grouped and separately numbered in the transcript on appeal in accordance with Rule 19 (2)." That is a matter which will come up when the case is regularly reached for argument. At present it is continued under Rule 5, and is not
(420) before us. It may be that if there is a defect to this effect, the appellant may take steps to cure the same by a *certiorari* or otherwise before the case is reached for argument at next term.

Motion denied.

IN RE WILL OF AUGUSTA CHISMAN.

(Filed 24 April, 1918.)

1. Wills—Execution—Burden of Proof.

Upon the issue of *devisavit vel non* raised by caveat and tried in Superior Court, the burden of proof is on the propounder to establish the formal execution of the will.

2. Wills—Affidavits—Solemn Form—Evidence, Corroborative—Evidence, Substantive.

The affidavits of witnesses to a will probated in common form before the clerk may not be used as substantive evidence on the trial of the issue of *devisavit vel non* in the Superior Court, and is only admitted therein in corroboration of the testimony of such witnesses; and where it is not in corroboration, but such witnesses have testified that they did not know the mental capacity of the testator at the time, the affidavits to the contrary are inadmissible.

3. Wills—Evidence—Deceased Persons — Conversations — Witnesses — Interest.

Testimony of a principal beneficiary under a will being tried in solemn form, upon caveat filed, that the testator told her she was "willing" her her property, and that she, the testatrix, had changed a former will, etc., is incompetent as a conversation with a deceased person, under Revisal, sec. 1631, by one interested in the result of the action, and directly tending to establish mental capacity and lack of undue influence. *Rakestraw v. Pratt*, 160 N.C. 437, cited and distinguished.

APPEAL by William Wade Chisman, Mary Carr Williamson, and H. H. Williamson, caveators, from an issue of *devisavit vel non*, tried before *Harding, J.*, at Fall Term 1917 of STOKES, upon the following issue:

Is the paper-writing propounded for probate and every part thereof the last will and testament of Mrs. Augusta Chisman? Answer: "Yes."

From the judgment rendered caveators appealed.

Louis M. Swink and J. E. Alexander for propounders.
N. O. Petree, C. O. McMichael, and B. B. Jones for caveators.

BROWN, J. After the two witnesses to the will, Franklin and Young, had been examined, the propounders offered their affidavits taken before the clerk when the will was probated in common (421) form. These were admitted as corroborative evidence.

The probate of a will in common form is an *ex parte* proceeding, and no one interested is before the clerk except the propounders and witnesses. When an issue of *devisarit vel non is* raised by caveat, it is tried in the Superior Court in term by a jury. Upon such trial the propounder carries the burden of proof to establish the formal execution of the will. This he must do by proving the will *per testes* in solemn form. He must call the subscribing witnesses or by accounting for their absence resort to the next best competent evidence obtainable. *In re Hedgepeth*, 150 N.C. 151. The proceedings in common form before the clerk are *ex parte*, and not binding on the caveators, who were not parties. The affidavits of the witnesses are not substantive evidence, except in certain cases provided by the statute.

After the witnesses for the will have been sworn and examined, their affidavits are competent evidence only to corroborate them and the affidavits of Franklin and Young were so offered. The objection that the affidavits did not tend to corroborate the witnesses should have been sustained.

It was the mental capacity of the testatrix, as well as undue influence, that was in issue. Upon their examination as witnesses when sub-

ject to cross-examination, both witnesses testified that they did not know what her mental condition was and could not testify to it. In their affidavits taken by the clerk in the usual formula, the witnesses deposed that "Mrs. Augusta Chisman was of sound mind and memory."

The affidavits did not corroborate the witnesses and not being corroborative, they should have been excluded. As presented to the jury, they had the force and effect of substantive evidence as to her mental condition. Evidence competent solely as corroborative must tend to corroborate, otherwise it should be excluded.

Upon the trial Mrs. Martha Hanes, the principal beneficiary under the will, was offered as a witness by the propounders. She was asked this question:

"What do you know about the preparation of this will, if anything?

"Objection by caveators. Overruled. Exception by caveators.

"A. She told me she had made her will willing me her property; that she had changed the first will leaving my sister out, and that she copied this from the first will so that she would know that it was written correctly."

The objection should have been sustained, as the witness was a beneficiary and directly interested in the result of the proceeding.

As long ago as 1879 it was held that the propounders and caveators to a contested will are *parties* to the proceeding within the spirit
(422) and meaning of section 343, Code, now Revisal, sec. 1631, which excludes the testimony of parties in certain cases. *Pepper v. Broughton*, 80 N.C. 251.

It is true that this Court has held in *McLeary v. Norment*, 84 N.C. 235, and more recently in *Rakestraw v. Pratt*, 160 N.C. 437, that "In an action to set aside a deed or will on the ground of mental incapacity of the maker or testator at the time of its execution, it is competent for a witness, after testifying as to his opinion, that the maker or testator was mentally incompetent at the time of the execution of the deed or will, to further testify as to such communications or conversations he had had with him upon which his opinion was founded; and as to such the provisions of Revisal, sec. 1631, prohibiting evidence of transactions with a deceased person do not apply."

This case, however, does not come within the scope of those precedents.

The evidence of the witness tended directly to establish the will and to prove that it was the free and voluntary act of the testatrix and also to contradict the charge of undue influence alleged by the caveators and submitted to the jury under the issue.

It is held that a witness, devisee under a will executed in January, is not competent upon a trial of an issue of *devisavit vel non,* to speak of conversations with testator tending to impeach a will executed in May thereafter. *Hathaway v. Hathaway,* 91 N.C. 139.

Again it is held that it was not competent to prove by a witness caveator, interested in the result, declaration of testator offered for the purpose of showing undue influence. *Lineberger v. Lineberger,* 143 N.C. 229.

The conversation with the testatrix testified to by the witness was not a casual conversation upon some indifferent subject, admitted in evidence as a basis for forming an opinion upon the sanity of the testatrix, but the declarations constitute very vital evidence tending to establish the will and to rebut the charge of undue influence. Such declaration may not be proven by a witness interested in the result of the action. *Bunn v. Todd,* 107 N.C. 266.

New trial.

Cited: Bissett v. Bailey, 176 N.C. 45; *In re Lowe,* 180 N.C. 149; *In re Hinton,* 180 N.C. 211; *In re Southerland,* 188 N.C. 328; *In re Mann,* 192 N.C. 250; *In re will of Brown,* 194 N.C. 595; *Mills v. Mills,* 195 N.C. 598; *In re will of Brown,* 203 N.C. 349; *Wells v. Odum,* 205 N.C. 111; *In re will of Rowland,* 206 N.C. 457; *In re will of Plott,* 211 N.C. 452; *Bailey v. McLain,* 215 N.C. 161; *In re will of West* 227 N.C. 211; *In re will of Puett,* 229 N.C. 14; *In re will of Etheridge,* 231 N.C. 503; *Brissie v. Craig,* 232 N.C. 704; *In re will of Morrow,* 234 N.C. 368, 369; *In re will of Bartlett,* 235 N.C. 491; *In re will of Crawford,* 246 N.C. 324.

(423)

C. C. TAYLOR v. CITY OF GREENSBORO.

(Filed 24 April, 1918.)

1. Municipalities—Cities and Towns—Charter—Amendments — Ballots—Elections—Schools—Taxation.

Upon a referendum by valid town ordinance to ascertain by ballot the will of the voters upon the question of an amendment to the charter to create a school board and increase the minimum rate of taxation for school purposes, the result in favor of the amendment will not be declared void because the ballots were small rectangular papers of two kinds, upon one being printed "For the proposed amendment to the city charter," and upon the other "Against the proposed amendment to the city charter,"

the regulation in the existing charter as to the kind of ballot to be used being directory only.

2. Municipal Corporations—Cities and Towns—Election — Voting Places —Booths.

Where it is admitted that no voter had been interfered with or prevented from voting a free ballot at a municipal election to change the charter, it becomes immaterial that no place had been provided with booths in which the voters could retire to prepare their ballots.

3. Municipal Corporations—Cities and Towns—Charter—Amendments—Education—Taxation—Coordinate Government.

An amendment by referendum made to a city charter under ordinance passed in pursuance of chapter 136, Public Laws 1917, and of the recent constitutional amendments creating a board of education with power to ascertain and certify the necessary amount of a tax necessary to maintain the schools to be levied by the town commissioners, does not create a separate and unrelated corporation, but a coordinate branch of the city government under the express and valid legislative power conferred.

4. Constituitonal Law—Municipal Corporations — Eminent Domain—Schools Taxation.

The question as to the constitutionality of such parts of chapter 136, Public Laws 1917, as confer upon municipalities the right to pass ordinances conferring the power of eminent domain, does not invalidate an ordinance or arise in its construction, referring to the voters the question of amending its charter by creating a board of education and authorizing the raising of a minimum tax levy for the maintenance of its schools, or affect it.

5. Municipal Corporations—Cities and Towns—Charter—Amendments—Ballots—Elections.

Where the question of amending a city charter in several respects are, under a valid ordinance, submitted to its voters upon ballots expressing the choice of the voter as either for or against the amendment, the forms of the ballots are sufficient. *Bank v. Winston*, 158 N.C. 512, cited and distinguished. *Semble*, the method of submitting the question is regulated by the Legislature and not restricted by the Constitution.

(424) APPEAL by plaintiff from *Adams, J.*, at March Term 1918 of GUILFORD.

This is an action brought by the plaintiff, a citizen and taxpayer of the city of Greensboro, for the purpose of having an election declared void. The election was held upon a referendum submitting to the voters a ordinance passed by the board of commissioners of said city for the creation of a school board and increasing the maximum rate of taxation for school purposes from 30 cents to 50 cents.

The case was heard in the Superior Court of Guilford County by *Adams, J.*, upon complaint; answer, and facts agreed. The judge rendered the following judgment and opinion.

"This cause is heard on an agreed statement of facts.

"The plaintiff asks that the election referred to in the pleadings be declared void, and that the defendants be enjoined from exercising any right or power which the election purports to confer. He bases his prayer for judgment upon the allegations in paragraphs 11, 13, 14, and 15 of the complaint.

"1. The plaintiff claims that the ballots cast were not of the prescribed form. It is agreed that the ballots were small rectangular pieces of paper of two kinds; that upon one were only the words, 'For the proposed amendment to city charter,' and upon the other only the words, 'Against the proposed amendment to city charter'; that the resolution providing for the election was adopted after six days from the date it was introduced, and was published once a week for four weeks in two daily newspapers in the city; that the number of registered and qualified voters was 791; the number of voters cast for the amendment 414, and against the amendment 58—leaving 319 of those qualified not voting. There is no suggestion in the facts agreed that the voters did not comprehend the purpose and scope of the proposed amendment. The clause 'stating the nature of the proposed ordinance' (Charter, sec. 29 B) is directory, even if it be conceded that the nature of the proposed ordinance is not stated in the ballot. The form of the ballot in my opinion does not vitiate the election.

"2. The plaintiff insists that the election is void because the board of commissioners failed to provide a place in which the voter might prepare his ballot in secret. It is admitted that no booth was provided, and that persons who were not election officials or officials of the city were permitted to stand within a few feet of the ballot box. This question becomes academic upon the express admission that no person was interfered with in voting or prevented from casting a free ballot.

"3. The plaintiff contends that the board of education is not lawfully constituted, and that the attempt to vest in this board the powers of a body politic is *ultra vires*. He argues that the election of the board of education of commissioners is the creation by the (425) municipality of a distinct corporation which has no power to levy a tax or to condemn land. Chapter 136, Public Laws 1917, was enacted pursuant to the admendments of Article 8 of the Constitution. While the board of education may say what tax within the prescribed limits is necessary to maintain the schools, the tax is to be levied by the board of commissioners; and while it is made the duty of the board of commissioners to levy the tax certified by the board of education, the latter, in contemplation of the act of 1917, is not a separate and unrelated corporation, but a coordinate branch of the city government

which, under the express legislative power conferred, is authorized to ascertain and certify the rate of taxation necessary to the maintenance of the city schools.

"As to the right of eminent domain. The General Assembly usually confers this power. But the act of 1917 specially provides that the legislative power of the governing body of a city may be exercised as provided by an ordinance or a rule adopted by it. The correct interpretation of this law would probably lead to the conclusion that the board of education is empowered to condemn land by virtue of the ordinance adopted in the exercise of legislative authority, but a decision of the question is not necessary for this reason: It is not alleged in the complaint nor does it appear in the facts agreed that the board of education has undertaken to condemn the plaintiff's property or to exercise the right of eminent domain. It would be vain to declare the election illegal upon the possibility of a contingency that may never occur. The same principle applies to the plaintiff's argument concerning the diversion of school taxes. Until such diversion is attempted the judgment of the court would be premature.

"4. The plaintiff alleges that in the election two district and unrelated propositions were combined and voted for on a single ballot, to wit, the creation of the board of education and the increase of the maximum tax rate. He contends that the election for this reason is invalid. In my opinion the objection is not fatal to the election.

"The facts in the case of *Winston v. Bank,* on which the plaintiff relies, are distinguishable. Moreover, in that case it is held that the method of voting on the proposition of municipal indebtedness under ordinary conditions is for the Legislature. But the very purpose and effect of the act of 1917 are to confer upon municipal corporations legislative powers which may be exercised as prescribed by an ordinance of the municipality. In the exercise of its legislative power the city adopted an ordinance prescribing the form of the ballot and regulating the machinery of the election, and thereby respected the legal principle stated in the case on which the plaintiff relies. It will be observed that the proposed increase in the tax was adopted with the approval
(426) of a majority of the qualified voters, and not by a mere majority of the votes cast. Upon the pleadings and the facts agreed, it is ordered and adjudged that plaintiff take nothing by his action and the defendants go without day and recover costs."

From the judgment plaintiff appeals.

R. D. Douglas and Brooks, Sapp & Kelly for plaintiff.
Charles A. Hines and R. C. Strudwick for defendant.

BROWN, J. For the reasons so clearly stated by the learned judge of the Superior Court, we are of opinion his judgment should be affirmed.

The case of *Bank v. Winston,* 158 N.C. 512, presented a very different question from the one involved in this case. In that case it is held: "When a popular vote is required to authorize or validate a municipal indebtedness, the proposition should be single, and when the question presented embodies two or more distinct and unrelated propositions, and the voter is only afforded an opportunity to express his preference or decision on a single ballot, and on the question as an entirety, the election as a rule is invalid and, on objection made, in apt time and in a proper way, may be disregarded and set aside."

It is also held that the method of submitting the matter to a vote of the people is not fixed by the Constitution, but is regulated by the Legislature.

There was only one proposition submitted to the voters of Greensboro, and that was to amend the city charter in two particulars. A proposition could be submitted to amend a section of a city charter in a dozen particulars, and yet it would be but one proposition and require but one ballot for or against the amendment. *Briggs v. Raleigh,* 166 N.C. 149; *Keith v. Lockhart,* 171 N.C. 451.

Affirmed.

Cited: Lazenby v. Commissioners, 186 N.C. 550; *Jameson v. Charlotte,* 239 N.C. 691.

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(427)

SOUTHERN CHEMICAL COMPANY v. J. C. BASS AND J. A. ADAMS.

(Filed 24 April, 1918.)

1. Attorney and Client—Judgment—Consent.

Where an action upon contract and also in tort for embezzlement is alleged, it is within the scope of the employment of the attorney for the defendant to consent to a judgment upon the contract alone, excluding that upon the tort.

2. Same—Partnership.

Where a member of defendant partnership consents that judgment be entered against the firm in open court, through their attorneys, the consent is that of a partner, rather than that of the attorney, and is binding upon the defendant firm.

3. Same—Burden of Proof.

Where consent judgment has been entered against a defendant partnership in open court, in the presence of a partner of the firm representing it, the burden of proof is on the other partner, absent at the time, to show the lack of authority of the attorneys to consent thereto, on his motion to set it aside upon that ground, the law presuming that such authority existed.

4. Judgment—Consent—Partnership—Motion to Set Aside—Laches.

A member of a partnership against which a consent judgment has been entered in open court, in his absence with the approval of another member of the firm, is charged with knowledge thereof, and his motion to set it aside will be barred by his laches in failing to act thereon, in this case for over seven years.

WALKER, J., concurring.

MOTION by defendants to set aside judgment, heard by *Shaw, J.*, at January Term 1918 of FORSYTH.

The court found the facts and rendered judgment as follows:

"1. That the defendants were personally served with process by the sheriff of Surry County and that they were represented in the litigation by Watson, Buxton & Watson as counsel, who filed answer in their behalf to the complaint of the plaintiff.

"2. That when the case was called for trial in the Superior Court of Forsyth County, C. B. Watson, of counsel for the defendants, in the presence of the defendant J. C. Bass stated in open court that if plaintiff would waive the charge of fraudulent misappropriation of the moneys and property of the plaintiff, as alleged in the complaint, that the defendants would agree to allow judgment to be entered for the amount of the debt as alleged in the complaint; that plaintiff accepted this proposition and judgment was entered as appears of record.

"2½. That defendant Adams was not present when judgment was taken, and there is no sufficient evidence that he agreed to same or had any notice that said judment had been taken until the fall of 1917. That the defendant Bass was the active manager of the defense and consented to said judgment, and in no view of the case was there any fraud in procuring said judgment. The court further finds that said debt has not been paid off and discharged before judgment was entered, as the court is satisfied from the high character and ability of counsel representing defendants that they would have permitted judgment upon a discharged debt to be taken against their client.

(428) "3. That the judgment as appears of record was prepared by C. B. Watson, of counsel for defendants, and was signed in open court by his honor Judge B. F. Long, who was the judge presiding at May Term 1910 of the Superior Court of Forsyth County.

"4. That said judgment in June, 1910, was transcripted and docketed in the Superior Court of Surry County, and that execution was issued thereon in July, 1910.

"5. That since the entry of said judgment and prior to the filing of the motion in this cause by the defendants both C. B. Watson and J. C. Buxton have died.

"6. That subsequent to the entry of this judgment and the transcripting of same to the Superior Court docket of Surry County all of the property and effects of the Southern Chemical Company, including this judgment, was purchased by the Virginia-Carolina Chemical Company without notice of any of the things alleged by the defendants in this motion, and this company is now the holder and owner of said judgment for value; that the Southern Chemical Company has been dissolved and its assets have been distributed amongst its stockholders and it is no longer in business.

"Upon the foregoing findings of fact, and upon motion of Louis M. Swink and Manly, Hendren & Womble, attorneys for the Virginia-Carolina Chemical Company, it is ordered and adjudged that this motion be dismissed and that the defendants be taxed with the costs by the clerk of this court."

The defendants appealed.

Louis M. Swink and Fred S. Hutchins for plaintiff.
Raymond G. Parker and T. W. Kallan for defendant.

BROWN, J. It follows as a matter of course that the judgment cannot be set aside as to defendant Bass, as he was present in court and personally consented to it.

We are also of opinion that the court properly refused to set it aside as to Adams.

1. Adams and Bass were copartners and had employed most reputable counsel to conduct their defense. The copartner Bass was entrusted by the firm with the management of the action. The complaint alleged a cause of action in contract, a simple indebtedness, and another cause of action in tort, embezzlement and willful misappropriation of plaintiff's property by the copartnership.

When the case was called for trial the counsel for defendants permitted judgment to be entered for the debt, the allegation of embezzlement having been withdrawn. The managing partner being present in court, consented to this.

It was well within the scope of counsel's authority to consent (429) to such a disposition of the case in their client's interest. Doubt-

less those experienced attorneys felt they could successfully meet the charge of embezzlement, but could not defeat the debt. *Hairston v. Garwood,* 123 N.C. 345.

But consenting to the judgment was not really the act of counsel, but that of the managing partner, who was present directing their action and that is binding on Adams.

2. The burden of proof was on Adams to satisfy the judge that he did not consent to the judgment, and he has failed to offer sufficient evidence.

The law presumes the attorneys had the necessary authority and the burden is on the party seeking to set aside a consent judgment to prove that no such authority existed. *Gardiner v. May,* 172 N.C. 192.

3. The defendants have been guilty of great laches in making their motion. The judgment was rendered in May, 1910. This summons was served personally on both partners. It is claimed by Adams that he did not know of the rendition of the judgment until 1917. He knew of the pendency of the action and that his partner was supervising and attending to its defense. He is guilty of laches in not inquring as to its disposition. He is charged with such knowledge as an inquiry would have disclosed. He cannot be permitted to wait nearly eight years and then say that he did not know that his suit had ended in a judgment against him. Besides as his partner was acting for the firm, he is charged with such knowledge as his partner had.

Affirmed.

WALKER, J., concurring: The conclusion of the Court is, in my opinion, correct, but the reference to *Hairston v. Garwood,* 123 N.C. 345, in the connection it is placed, may seem to go beyond what that case decides. There the defendant asked to set aside the judgment as being irregular and as taken on account of his excusable neglect. The presiding judge merely held that it was not irregular, and refused to set it aside, and that ruling was affirmed on appeal, but the learned justice who wrote the opinion of this Court said: "If the judgment had shown upon its face that it had been entered as the result of a compromise made by the *attorney,* and that the judgment had been entered by his consent, the question would be a very different one from the one presented by this record. That question is not beefore us, and we need not discuss it. On the subject, however, the case of *Moye v. Cogdell,* 69 N.C. at p. 95, may be read with interest." In *Moye v. Cogdell, supra,* the Court held as shown by the headnote, that "An attorney cannot compromise his client's case without special authority to do so, nor can he, without such authority, receive in pay-
(430) ment of a debt due his client anything except the legal currency

of the country or bills which pass as money at their par value by the common consent of the community. A subsequent ratification of the acts of the attorney is equivalent to a special authority previously granted to do those acts, but it must be the ratification of the client himself and not of his agent." See *Cox v. Bogden,* 167 N.C. 320; *Lance v. Russell,* 157 N.C. 448.

There is a presumption that an attorney has the requisite power to act where a judgment is taken against his client *(Gardner v. May,* 172 N.C. 192), for having the apparent authority, the law will not presume that he has committed a wrong and acted without the actual authority. We said in *Harrill v. R. R.,* 144 N.C. 543: "The counsel who signed the case agreed in behalf of the defendant was actually its attorney at the time, and representing it in this case at the term of the court when the case was settled. He had, apparently, all the authority necessary to act in the premises, and because he failed to observe special private instructions as to the manner of defending the suit is no reason in our opinion, under the circumstances of this case, why the judgment should be set aside, as he appeared to be clothed with general authority to act for the defendant. *Greenlee v. McDowell,* 39 N.C. 485; *Branch v. Walker,* 92 N.C. 89; *Beck v. Bellamy,* 93 N.C. 129; Weeks on Attorneys, sec. 222; *Rogers v. McKenzie,* 81 N.C. 164." And this authority to act for his client extends to and embraces all things done within the scope of his authority, as held in *Westhall v. Hoyle,* 141 N.C. 337. The presumption that he has acted within the limit of his authority will be indulged, even where he agrees to a compromise or settlement of his client's interests, in the absence of evidence to the contrary.

In this case there was previous consent by the clients to what was done. The firm was represented by one of the copartners, who was clothed with full power to act in the matter for the partnership and, of course, his consent, which was given to the attorneys, clothing the latter with the necessary authority to act, as they did, in agreeing to the judgment.

So that, however derived, the power existed, and the action of the attorneys was fully justified.

I am rather inclined to the opinion that in this case the attorneys were exercising their ordinary authority in the course of the litigation, and not surrendering, sacrificing, or even compromising any right of their client. It was a chance between evils, or the selection of chances, and they properly chose the lesser of the two in the one case, and the less hazardous of the two in the other, by eliminating the fraud, which was the dangerous element, and letting judgment go by default for the

debt, as it does not appear that their client had any real or
(431) meritorious defense to the cause of action for the same, and if he had, the attorneys do not seem to have been informed of it. They were merely serving their client by exercising their judgment and professional skill in his behalf and in furtherance of what they deemed to be his best interest, as was done in *Harrill v. R. R., supra.* It would seem that defendants have been tardy in asserting their claim. They were a long time finding out that they had been wronged, and were guilty of such laches as should bar their present application for relief.

Cited: Bizzell v. Equipment Co. 182 N.C. 101; *Board of Education v. Commissioners,* 192 N.C. 279; *Bank v. Penland,* 206 N.C. 324; *Deitz v. Bolch,* 209 N.C. 205; *Keen v. Parker,* 217 N.C. 389, 390; *Harrington v. Buchanan,* 222 N.C. 700.

A. D. DUMAS v. D. M. MORRISON ET AL., TRUSTEES OF PRESBYTERIAN CHURCH AT ROCKINGHAM.

(Filed 24 April, 1918.)

1. Reference—Exceptions—Evidence.

Exception to the referee's report in an action upon contract wherein defendant alleges plaintiff's breach and consequent damages, finding defendant was due plaintiff a certain sum, that under all the evidence the referee should have found that plaintiff breached the contract and was not entitled to recover any sum, is equivalent to an exception that the findings are contrary to the evidence, permitting the judge to review the entire case and make his own findings thereon.

2. Reference—Review—Courts.

The statutory authority given the judge of the Superior Court to "review" the report of a referee is broad in its scope, conferring power upon him to set aside or modify it in whole or in part, and his exercise of such authority may be independent and not confined to the exceptions taken, as is the case on an appeal to the Supreme Court.

3. Reference—Agreement to Review—Courts.

Where the parties to an action consent that the trial judge may pass upon the report of a referee out of term and "take the record, pass upon the whole case, and render judgment," etc., the agreement itself authorizes him to pass upon the whole case and make his independent findings from the evidence.

CIVIL ACTION, heard by *Long, J.,* at July Term 1917 of RICHMOND.

The plaintiff sued for the recovery of a balance alleged to be due on a contract between him and the defendants for the building of a church at Rockingham of which the defendants were trustees.

The case was referred, by consent of parties, and the referee made his report, to which exceptions were filed by defendants, and among them this one appears: "For that the referee finds that the defendants are due the plaintiff the sum of $908, whereas, under all the evidence he should have found the plaintiff had breached the contract and was not entitled to recover any sum from the defendants." (432) There are others of a like kind, which challenge the correctness of the referee's finding that the defendants are indebted to the plaintiff, and allege, on the contrary, that the defendants owe the plaintiff nothing and that his action should be dismissed.

The matter came on to be heard before *Judge Long* at July Term, 1917, when, as found by the judge, the following agreement was entered into by the parties on account of the lack of time and the consequent inability of the judge to hear the case:

"This action came on for hearing before the undersigned judge at July Term, 1917, of Richmond County, and was heard upon pleadings and the report of the referee and exceptions thereto, and the argument of counsel representing the plaintiff and all the defendants, and after the argument counsel on both sides agreed that the court might take the record *and pass upon the whole case,* and render judgment at any time thereafter when it was able to do so." (Italics ours.)

Judge Long, instead of passing on each exception, found the facts himself from the evidence and stated his conclusion of law. After going into the matter in some detail showing the several respects in which the plaintiff, as contractor, had failed to do his work properly, or to perform his contract according to plans and specifications, the judge makes the following findings of fact: "The damage done to the building by reason of plaintiff's failure and the material, labor, and expense incurred by the defendants in order to remedy the defects arising from plaintiff's failure, as heretofore found—in brief, all the damage suffered by the defendant for and on account of the breach of the contract by the plaintiff, and of his renunciation of his contract—is in excess of the amount sought to be recovered by the plaintiff of the defendants. The court does not make its findings more definite as to this amount because, in the view that it takes of the case at this time, it is confining itself to the question as to whether or not the plaintiff is entitled to recover of the defendants, the court finding that the plaintiff from time to time committed breaches of his contract and finally renounced it and put the defendants under compulsion to take the building in hand or otherwise suffer an entire loss of the building."

Judgment was rendered for the defendants, and plaintiff appealed.

John T. Bennett, W. R. Jones, and Robinson, Caudle & Pruette for plaintiff.

Fred W. Bynum for defendants.

WALKER, J., after stating the case: The real question in this case is whether the judge had power to set aside the findings or the (433) referee or the most of them, and find the facts anew from the evidence taken and reported by the referee. The plaintiff says that he could not do so, because there were no exceptions to the referee's findings which justified such a course. We do not so understand the record. The defendants filed eleven exceptions to the referee's report, and every one of them (save one which is to the form of the report) was taken to the findings of fact, and these ten of them are practically and substantially to the effect that the findings should have been such as to show that defendants had either paid all that was due or that the plaintiff, for other reasons, was not entitled to recover anything. They amounted, in other words, to a sweeping exception that the findings were contrary to the evidence, and this required the judge to revew the entire case, and if he disagreed with the referee to find the facts anew, and this he did.

It is not denied that the judge has the power to review and revise the report, but the contention is that he must restrict his rulings to the specific exceptions which have been taken by either party. If this be true, and the judge's power is not any broader than as stated by the plaintiff, we have shown that the exceptions are of such a nature and so comprehensive as to bring the case even within this restricted statement of the rule. The statute, however, gives a wider scope to the judge's power in dealing with the report of a referee. Revisal, sec. 524, provides that "the report of the referee shall be made to the clerk of the court in which the action is pending; either party, during the term or upon ten days' notice to the adverse party out of term, may move the judge to review such report, and set aside, modify or confirm the same in whole or in part, and no judgment shall be entered on any reference except by order of the judge."

It will be noted that the judge is authorized by that provision to review, set aside or modify the report, and this may be done as to each of these powers, in whole or in part. The general meaning of the word "review" is "to examine critically and deliberately," and its specific meaning is "to reconsider" or "to revise," and in its legal sense it means "to reexamine judicially." But he may "set aside" the report "or mod-

ify it," and this may be done, as we have seen, "in whole or in part." This power, as defined in the statue, is a very broad one.

The question has been decided by this Court upon facts so similar to those in this record that the two cases cannot be distinguished. In *Brackett v. Gilliam,* 125 N.C. 380, the present *Chief Justice* delivering the opinion, this Court said:

"The fourth exception, therefore, took the entire ruling of the referee, that the plaintiff could not recover, to the judge for review. The plaintiff could not bind the referee to the reason he gave for his conclusion while excepting to the conclusion. The exception being before the judge, he could overrule, modify, or affirm the action of (434) the referee. He could find the facts himself and affirm, as he did, the referee's conclusion, as stated in the fourth exception, though he reversed the reason given by the referee for such result. The power of the court over reference is very broad.

"As is said in the late case of *Cummings v. Swepson,* 124 N.C. 579: 'The court retains the case and its jurisdiction in every case of reference, with power to review and reverse the conclusions of law of the referee, and a discretion to modify and set aside the report, and his ruling in the latter respect is not reviewable unless it appears that such discretion has been abused.' "

The exception in that case involved the same question as we have here, whether the plaintiff could recover. It was, at least, tentamount to saving that the referee erred in holding that plaintiff could not recover, and it was so viewed by this Court. 125 N. C., 382. The exception here does not require construction to show what question is presented. It is an objection to the referee's report upon the ground that he found and decided that plaintiff could recover. This is plainly expressed, and not merely to be inferred from the exception, and it is repeated in all but one or two of the other exceptions. It was, in legal effect, the same as if the defendants had excepted because the findings of fact by the referee were not supported by the evidence, being contrary to its weight. *Jeffords v. Waterworks Co.,* 157 N.C. 10.

This Court has said that "when exceptions are taken to a referee's findings of fact and law, it is the duty of the judge to consider the evidence and give his own opinion and conclusion, both upon the facts and the law. He is not permitted to do this in a perfunctory way, but he must deliberate and decide as in other cases—use his own faculties in ascertaining the truth, and form his own judgment as to fact and law. This is required not only as a check upon the referee and a safeguard against any possible errors on his part, but because he cannot review the referee's findings in any other way. This point was presented

clearly and directly in *Miller v. Groome,* 109 N.C. 148, and it controls this case." *Thompson v. Smith,* 156 N.C. 345. See *Credle v. Ayers,* 126 N.C. 11; *Wallace v. Douglass,* 103 N.C. 19; *Miller v. Groome,* 109 N.C. 148.

It was held in *Highland v. Ice Co.,* 84 S.E. 252, that findings of fact by a referee, though entitled to weight, are not conclusive, and if not justified by the evidence may be disregarded, or set aside by the court and a decree entered according to its own view of the evidence. It must be remembered that a judge of the Superior Court in reviewing a referee's report is not confined to the question whether there is any evidence to support his findings of fact, but he may also decide (435) that while there is some such evidence, it does not preponderate in favor of the plaintiff, and thus find the facts contrary to those reported by the referee. The rule is otherwise in this Court, when a referee's report is under consideration. We do not review the Judge's findings, if there is any evidence to support them, and do not pass upon the weight of the evidence.

But *Judge Long* has found as a fact that the following express agreement was made by the parties as to his power to find the facts and decide the case, and he was thereby authorized (quoting the language of the agreement) "to take the record, *and pass upon the whole case,* and render judgment at any time thereafter he was able to do so." (Italics ours.) So that in any view taken of the matter, the judge had the power to examine and consider the evidence, find the facts, and state his conclusion of law upon which the judgment was entered. Apart from any other valid reason, which justified his course, the defendants' exceptions alone required him and, at least, authorized him to do so.

Affirmed.

Cited: Dorsey v. Mining Co., 177 N.C. 62; *Caldwell v. Robinson,* 179 N.C. 522; *London v. Commissioners,* 193 N.C. 102; *Wadford v. Gillette,* 193 N.C. 420; *Mills v. Realty Co.,* 194 N.C. 225; *Abbitt v. Gregory,* 201 N.C. 595; *Maxwell, Comr. of Revenue v. R. R.,* 208 N.C. 401; *Anderson v. McRae,* 211 N.C. 198; *Mineral Company v. Young,* 211 N.C. 389; *Dent v. Mica Co.,* 212 N.C. 242; *Macon v. Murray,* 231 N.C. 63; *Keith v. Silvia,* 236 N.C. 295.

ANDREW KRACHANAKE, JR., BY HIS NEXT FRIEND, ANDREW KRACHANAKE v. ACME MANFACTURING COMPANY.

(Filed 24 April, 1918.)

1. War—Citizens—Residents—Aliens—Enemy—Actions—Courts.

The right of one whose country is at war with the United States to sue in our State courts depends rather upon the place and character of his residence rather than upon his citizenship, and under the common law and the definition of his status as given by the declaration of war against Austria-Hungary by the President, and the "Trading with the Enemy Act," a citizen of that country residing here when the war was declared and since then may thereafter maintain his action in our courts, there being nothing to show he has done any unfriendly act or made any unfriendly utterance.

2. Same—Infants—Citizens—Residents—Next Friend.

A father bringing suit in our courts as the next friend of his seven-year-old child is not a party thereto in a legal sense; and when the parent of the child is an alien enemy, or a citizen of a country at war with the United States, and residing here, the citizenship of the child will be presumed to be that of the country of his birth, and the father may maintain the action in our courts as such next friend; and in case of recovery a guardian may be appointed and its use controlled in such manner as not to strengthen the hand of the enemy. *Semble*, the congressional registration act of alien enemies does not include those under 14 years of age.

3. Negligence—Evidence — Explosives — Children — Infants — Trials —Nonsuit.

Evidence in this case that defendant used blasting caps and explosives in its business, kept in an unenclosed and open and readily accessible house, exposed to view on a short pathway leading from a public road and near a village of from 100 to 150 people, and around which children were known to play, and that one of them, a lad of seven years, entered the open door of the unguarded house, took several of the caps from an open case without knowing of their nature or dangerous character, which exploded in his hand while he was exposing them to a fire at his home and injured him, is sufficient upon the issue of defendant's actionable negligence. *Barnett v. Cotton Mills*, 167 N.C. 580, cited and applied.

BROWN, J., dissenting; WALKER, J., concurring in the dissenting opinion.

APPEAL by defendant from *Devin, J.*, at the December Term 1917 of NEW HANOVER. (436)

This is an action to recover damages for personal injury caused as alleged, by the negligence of the defendant. The action is brought by Andrew Krachanake, Jr., a minor ten years of age, by his father, Andrew Krachanake, Sr., as his next friend.

The father is a native of Austria-Hungary. He left that country with his family fifteen years ago and has lived since then two years in Ohio, eight years in Canada, and five years in this State.

This country declared war against Austria-Hungary after the verdict was returned in the action, but before the judgment was signed.

The defendant contends that the action cannot be maintained because the plaintiffs are alien enemies. This objection was overruled and the defendant excepted.

The negligence alleged is in permitting dynamite caps or cartridges to be kept in unlocked boxes in an open house near a highway and easy of access to children and other people.

There was evidence tending to prove that the plaintiff, Andrew Krachanake, Jr., entered the house and took the caps therefrom and carried them to his home, and while standing before the fire with one of the caps in his hand, the cap exploded and caused the loss of two of his fingers and serious injury to one of his eyes.

The other facts necessary to an understanding of the case will appear in the opinion.

There was a motion for judgment of nonsuit, which was overruled, and the defendant excepted.

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

W. F. Jones and E. K. Bryan for plaintiff.

J. G. McCormick and Rountree & Davis for defendant.

(437) ALLEN, J. The first question presented by the appeal is as to the right of the plaintiff, a native of Austria-Hungary and resident in this State, to maintain an action in our courts as next friend to recover damages for personal injury to his infant son.

The plaintiff left Austria-Hungary fifteen years ago, and since then has lived two years in Ohio, eight years in Canada, and five years in this State.

There is neither allegation nor evidence that he has been guilty of any act or utterance unfriendly to the United States, and so far as the record discloses he is a quiet law-abiding laborer. He comes, however, within the classification of an alien enemy, because the country to which he owes allegiance is at war with the United States, and conceding that his son, who was seven years old at the time of his injury, stands in the same relation to this government as his father, which does not seem to be the American rule (12 Mod. Am. L., 143; case of *Carl Gundlich,* 12 Mod. Am. L., 698), can the action be maintained?

The question is new in this Court, but it has been considered so frequently and with such unanimity of opinion in England and America, and the conclusion reached has been so clearly recognized by the President in his proclamation after the declaration of war against Germany and Austria-Hungary, and by Congress in the "Trading with the Enemy Act," that but little is left for us to do except to give the result of our investigations.

The statement is often made by the law writers that an alien enemy cannot sue, and upon the ground that to permit a recovery would strengthen and add to the resources of the hostile government, and correspondingly weaken our government, but when reference is had to the facts, it is found that the principle predicated upon residence in the country at war with ours, and that it has no application to the alien enemy resident here, who may be interned and held as a prisoner of war without the right to apply for the writ of *habeas corpus*, and whose property may be taken into custody by the Government. See not to *Daimler Co. v. Continental Tire Co.*, Anno. Cases, 1917 C, 193, where the authorities are collected.

The test, therefore, of the right to sue, which has been universally adopted, is residence and not nationality, where the alien enemy is and not what he is.

This was substantially declared in 1697 in *Wells v. Williams*, 1 Lord Raym, 282, and was approved in 1813 in an opinion by *Chancellor Kent* in *Clarke v. Morey*, 10 Johns., 70, and in 1915 in an opinion by *Lord Reading*, Chief Justice of England, in *Porter v. Freudenberg* (1 K. B., 857), Anno. Cases, 1917 C, 215.

The learning upon the question will be found in these two (438) opinions, and in an interesting article in the *Yale Law Journal* of December, 1917, written by Mr. Picciotto of the Inner Temple, London, and in the notes to *Daimler Co. v. Continental Tire Co.*, Anno. Cases, 1917 C, 193.

In *Clarke v. Morey*, the plaintiff, a resident of New York, was a subject of Great Britain; war then existed between that country and the United States, and it was objected that the plaintiff could not prosecute his action in the courts of the State of New York, which is the case presented by this record.

Chancellor Kent said in answer to the objection: "The disability (to sue) is confined to these two cases: (1) Where the right sued for was acquired in actual hostility, as was the case of the ransom bill in *Anthon v. Fisher, Doug.*, 649, note; (2) Where the plaintiff, being an alien enemy, was resident in the enemy's country, such was the form of the plea in *George v. Powell* (Fortesc., 221), and in *Le Bret v. Papil-*

lon (4 East, 502); and such was the case with the persons in whose behalf and for whose benefit the suit was brought upon the policy, in *Brandon v. Nesbitt* (6 Term Rep., 23).

"It was considered in the Common Pleas at Westminister as a settled point *(Heath, J.,* and *Rooke, J.,* in *Sparenburgh v. Bannatyne,* 1 Bos. & Pull., 163) than an alien enemy under King's protection, even if he were a prisoner of war, might sue and be sued. This point had long before received a very solemn decision in the case of *Wells v. Williams* (1 Lord Raym., 282; 1 Lutw., 34; S. C., 1 Salk., 46). It was there decided that if the plaintiff came to England before the war, and continued to reside there by the license and under the protection of the King, he might maintain an action upon his personal contract; and that if even he came to England after the breaking out of the war and continued there under the same protection, he might sue upon his bond or contract; and that the distinction was between such an alien enemy and one *commorant* in his own country. The plea, in that case, averred that the plaintiff was not only born in France, under the allegiance of the French King, then being an enemy, but that he came to England without any safe conduct, and the plea was held bad on demurrer. It was considered that if the plaintiff came to England in time of peace and remained there quietly, it amounted to a license, and that if he came in time of war and continued without disturbance, a license would be intended. . . . In the case before us, we are to take it for granted (for the suit was commenced before the present war) that the plaintiff came to reside here before the war, and no letters of safe conduct were, therefore requisite, nor any license from the President. The license is implied by law and the usage of nations; if he came here since the war, a license is also implied, and the protection continues until the executive shall think proper to order the plaintiff out (439) of the United States; but no such order is stated or averred. ... Until such order, the law grants permission to the alien to remain, though his sovereign be at war with us. A lawful residence implies protection, and a capacity to sue and be sued. A contrary doctrine would be repugnant to sound policy, no less than to justice and humanity.

"The right to sue in such a case rests on still broader ground than that of a mere municipal provision, for it has been frequently held that the law of nations is part of the common law. By the law of nations, an alien who comes to reside in a foreign country, is entitled, so long as he conducts himself peaceably, to continue to reside there, under the public protection; and it requires the express will of the sovereign power to order him away. . . . We all recollect the enlightened and

humane provision of Magna Charta (c.30) on this subject, and in France the ordinance of Charles V., as early as 1370, was dictated with the same magnaimity; for it declared that in case of war, foreign merchants had nothing to fear, for they might depart freely with their effects, and if they happened to die in France their goods should descend to their heirs. (Henault's Abrege Chron., tom. 1, 338). So all the judges of England resolved, as early as the time of Henry VIII., that if an alien came to England before the declaration of war, neither his person nor his effects should be seized in consequence of it. (Bro., tit. Property, pl. 38, Jenk. Cent., 201, case 22.) And it has now become the sense and practice of nations, and may be regarded as the *public law of Europe* (the anomalous and awful case of the present violent power on the Continent excepted that the subjects of the enemy (without confining the rule to merchants), so long as they are permitted to remain in the country, are to be protected in their persons and property, and to be allowed to sue as well as to be sued."

Lord Reading, discussing the same question, says: "It is clear law that the test for this purpose is not nationality but the place of carrying on the business," and Mr. Picciotto: "In the Anglo-American system of law the test is now well settled; it is a test not of nationality but of residence or commercial domicile, not what a man is but where his business is."

Mr. Picciotto also refers to *Schaffenius v. Goldberg,* 1 K. B., 284, decided in 1916, and affirmed on appeal, in which it was held that an interned alien enemy could sue in the courts of England, *Younger, J.,* saying: "There has been a gradual and progressive modification in the rules of the old law in their restraint and discouragement of aliens. It is, as I have already indicated, not the nationality, but the residence and business domicile of the plaintiff that are now all important."

After the declaration of war against Austria-Hungary, the President issued his Proclamation No. 1417, similar to one is- (440) sued after war was declared against Germany, which after quoting the resolution declaring war and stating that he was acting under and by virtue of authority vested in him by the Constitution of the United States and sections 4067 *et seq.,* United States Revised Statutes, he declared as follows:

"I do hereby further proclaim and direct that the conduct to be observed on the part of the United States towards all natives, citizens, denizens, or subjects of Austria, being males of the age of fourteen years and upwards, who shall be within the United States and not actually naturalized, shall be as follows:

"All natives, citizens, denizens, or subjects of Austria-Hungary being males of fourteen years and upwards who shall be within the United States and not actually naturalized are enjoined to preserve the peace towards the United States and to refrain from crime against the public safety, and from violating the laws of the United States and of the States and Territories thereof, and to refrain from actual hostility or giving information, aid or comfort to the enemies of the United States, and to comply strictly with the regulations which are hereby, or which may be from time to time promulgated by the President, *and so long as they shall conduct themselves in accordance with law, they shall be undisturbed in the peaceful pursuit of their lives and occupations and be accorded the consideration due to all peaceful and law-abiding persons, except so far as restrictions may be necessary for their own protection and for the safety of the United States; and towards such persons as conduct themselves in accordance with law, all citizens of the United States are enjoined to preserve the peace and to treat them with all such friendliness as may be compatible with loyalty and allegiance to the United States.*" (Italics ours.)

One of the important acts of Congress growing out of the present war is what is known as "Trading with the Enemy Act," and it is therein provided that "The word 'enemy' as used herein shall be deemed to mean for the purpose of such trading and of this act: (a) Any individual, partnership, or other body of individuals of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory," etc., thereby clearly recognizing residence or doing business in *hostile territory* as the test of an alien enemy for the purpose of trading.

It appears, therefore, that under the common law, and in accordance with the spirit and declared purpose of the President in his proclamation, and by Congressional interpretation, the father, against whom nothing is urged except that he was born in Hungary, if the real plaintiff, would be entitled to maintain the action.

(441) The father is not, however, a party in the legal sense. He is an officer appointed by the court to protect the interest of his son, who is the real plaintiff *(Hockaday v. Lawrence,* 156 N.C. 322), and the son is ten years of age and was born in Canada, a province of Great Britain, with which we are in alliance, and while most of the European countries have adopted the rule that nationality follows parentage. "The United States and Great Britain follow the older territorial rule according to which nationality is primarily determined by the place of birth." 12 Mod. Am. L., 143.

In *United States v. Wong Kim Ark*, 169 U.S., 649, it was held that a Chinaman born in the United States of parents who were the subjects of the Emperor of China was an American citizen, and the Court says of the English rule, "The fundamental principle of the common law with regard to English nationality was birth with the allegiance."

In 1907 Carl Gundlich applied to Mr. Tower, Ambassador to Germany, for a passport for his minor son, upon the ground that he was an American citizen.

It appeared that the father and his wife came to the United States in 1886, and remained here one year and a half during which time the son was born, that the family returned to Germany in 1887, no one of them being naturalized, and had lived there since then, with no intention of returning to this country, and owning no property here.

The matter was referred to the acting Secretary of State, Mr. Bacon, who ruled that the son was a citizen of the United Sates, with the right to elect his nationality upon becoming twenty-one years of age. 12 Mod. Am. L., 698.

Again the proclamations of the President and the rules and regulations of the Attorney General under the act of Congress requiring alien enemies to register do not seem to include those under fourteen years of age, nor do the reasons which prevent alien enemies under certain conditions from resorting to our courts prevail in the case of the son, as the money received will be in charge of a guardian appointed by our courts, and cannot be removed from the State without the consent of the court, so that the danger of its being used to strengthen the hands of the enemy is entirely removed.

We have no doubt that the action can be maintained.

The second question relied on by the defendant is whether there was sufficient evidence of negligence to be submitted to the jury.

The evidence construing it most favorably for the plaintiff, which is the rule on motions for judgment of nonsuit, tends to prove the following facts:

1. That the defendant was engaged in the manufacture and sale of fertilizer in the town of Acme, North Carolina, and in its business it mined marl within the corporate limits for use in its (442) fertilizers; that the mine was located about one-fourth of a mile from the railroad station; that within a radius of two blocks of the mine of the town of Acme there lived 100 to 150 people, the nearest residence being about 75 yards from the mine; that one of the main roads in Acme ran within 75 or 100 yards of a small house where dynamite caps were stored by defendant, and at this point a road or path ran from this road to the house; that the house and machinery at the mine were visible from the thoroughfare.

2. At this mine blasting was carried on and dynamite and dynamite caps were used for blasting purposes.

3. That neither mine, house, nor blasting place was enclosed or fenced in.

4. That prior to the time of plaintiff's injury, children were seen playing around the mine and near the house.

5. That the path from the road led to the small house where the dynamite caps were kept.

6. That the door to the house had a hole cut in it, and a hook on the inside with which to fasten the door, and in order to open the same a person would run his hand into a pigeon hole, unfasten the hook and open the door.

7. That the door was not kept locked or nailed up.

8. That the plaintiff, then a boy seven years of age, having gone to school that day and there being none, started to Acme and arrived at the place where the path led to the house where the dynamite was kept; he walked down the path and looked in the door, which was open, and saw two boxes of dynamite caps—one of them being closed and the other open. He went into the house, took five of the caps and carried them home with him. Upon arriving home he went to the fire and was holding his hand to the fire, in which hand he held one of these caps, which exploded, blowing off two of his fingers and injuring his right eye.

9. That the plaintiff did not know the dangerous character of the cap, not having seen one before.

This brings the plaintiff's case within the principle of *Barnett v. Cotton Mills,* 167 N.C. 580, in which the authorities dealing with injuries to children by explosives are collected and from which we quote briefly as follows:

"In *Powers v. Harlow,* 53 Mich., 507, *Judge Cooley* says: 'Children, wherever they go, must be expected to act upon children's instincts and impulses, and others who are chargeable with a duty of care and caution towards them, must calculate accordingly. If they leave exposed to the observation of children anything which would be tempting to them, and which they in their inmature judgment might nat-
(443) urally suppose they were at liberty to handle or play with, they should expect that liberty to be taken.' In this case it was held that the defendant was guilty of negligence, when it appeared that defendant kept on his premises over which the injured person, a boy, was in the habit of passing, in an exposed place, certain dangerous explosives, which a boy discovered and exploded with serious injury to his person.

"In *Mattson v. Minnesota Ry. Co.*, 95 Minn, 477, *Justice Brown* says: 'There is nothing so attractive to young boys as articles of an explosive nature, and the greater the volume of sound that may be produced, the greater the attraction. As compared with ordinary turntable, dynamite is vastly more attractive. Young children are incapable of comprehending the dangers in handling or exploding the same, and their natural instincts urge them into experiments with it whenever it comes within their reach. The degree of care required of persons having the possession and control of dangerous explosives, such as firearms or dynamite, is of the highest. The utmost care must be exercised respecting the care and custody of such instrumentalities to guard against injury to others. The degree of care must be commensurate with the dangerous nature of the article, and greater and more exacting as respects young children.' . . . In *Olson v. Home Investment Co.*, 27 L. R. A. (N. S.), 884, it was held that the act of boys in stealing or attempting to explode dynamite negligently left unguarded in an unlocked shanty on a vacant city lot is not such an intervening cause of injury to one of them by an explosion as will, as a matter of law, relieve this owner from liability for the injury, if the boys might have been found from their age and knowledge of right and wrong to have been governed by unreasoning and natural impulses. . . . In *Brittingham v. Stadiem,* 151 N.C. 302, *Justice Manning* quotes with approval from *Mattson v. R. R., supra:* 'The degree of care required of persons having the possession and control of dangerous explosives, such as firearms and dynamite, is of the highest. The utmost caution must be used in their care and custody, to the end that harm may not come to others from coming in contact with them. The degree of care must be commensurate with the dangerous character of the article'; and the same case is cited by *Justice Brown in Wood v. McCabe,* 151 N.C. 458, in support of the proposition that 'All courts and writers agree that the degree of care required of persons using such instrumentalities as dynamite in their business is of the highest and what might be reasonable care in respect to grown persons of experience would be negligence as applied to youth and children. 7 A. & E., 411; *Mattson v. R. R.,* 111 Am. Sr., 487.' "

We have examined the other exceptions and find nothing justifying a new trial.

No error.

BROWN, J., dissenting: The defendant is a corporation en- (444) gaged in mining marl and for fertilizer purposes. On 15 February, 1915, the plaintiff, a child at that time seven years of age, entered

a small house, near the mines, in which defendant kept some dynamite caps stored for blasting purposes, and took some of them and carried them home with him. In handling them over a fire one exploded and injured his thumb and forefinger on his left hand so that they were amputated. The sight in one eye has been seriously and permanently impaired. The jury awarded damages in the sum of $7,000.

I think my brother *Allen* has demonstrated in a learned and interesting opinion the right of the plaintiff to sue in the courts of this State, but I am of opinion that upon all the evidence he is not entitled to recover.

The ground upon which a recovery is based is that defendant kept dynamite in a place easily accessible to children and where they were likely to be attracted by it.

I do not think the facts justify such conclusion. The plaintiff's evidence discloses that the dynamite caps were stored in a house prepared for the purpose and accessible to the mining operations. They were not scattered on the floor, but were contained in a tin box on a high shelf and beyond the reach of a child on the floor. There is no evidence that any children had been seen playing around the little house or that defendant knew that any had ever been there. There is evidence that children sometimes played around the mine. The plaintiff says he had never been to the house before. On the day he was hurt he was alone and took the footpath leading to the house and finding the door ajar went in. He climbed up on something so as to reach the upper shelf and took several of the dynamite caps out of the box and carried them off with him. There is no evidence that any child had ever been at the house or ever entered it before. The door had proper fastenings on it and there is no evidence that it was habitually left open. The fact that it was left open on this one occasion (by some workman probably) is insufficient in my judgment to charge the defendant with actionable negligence.

No child had ever been attracted to this house before, not even the plaintiff, and there was nothing going on there which would attract children and bring the case within the principle of the turntable or attractive nuisance cases. The caps were not left strewn around the house or on the floor or placed where children would be likely to get them. In order to get these caps plaintiff had to enter the door, climb up on something so as to reach a high shelf and then take them out of a tin box.

The plaintiff was a trespasser, and if he was *sui juris*, he may have been guilty of theft.

(445) I have examined carefully many cases in which this subject has been considered, notably *Briscoe v. Power Co.*, 148 N.C. 396,

and *Barnett v. Mills*, 167 N.C. 576, where most of the authorities are collected and reviewed, and I fail to find any case where liability has been adjudged upon a state of facts at all similar to these.

Those in which liability has been predicated are apparently founded upon an application of the principle laid down by *Lord Denman* in the old case of *Lynch v. Nurdin*, 1 Q.B., 29, quoted by *Lord MacNaghten* in *Cooke v. R. R.*, Appeal Cases (1909), 234 (a turntable case), as follows:

"If," says *Lord Denman*, "I am guilty of negligence in leaving anything dangerous in a place where I know it to be extremely probable that some other person will unjustifiably set it in motion to the injury of a third party, and if that injury should be so brought about, I presume that the sufferer might have redress by action against both or either of the two, but unquestionably against the first."

The principle of liability is very fairly and clearly stated in *Mattson v. R. R.*, 95 Minn., 477, 70 L. R. A., 503, as follows:

"The rule governing cases of this kind, stated in substance, is that one who maintains dangerous instrumentalities or appliances on his premises of character likely to attract children in play, or permits dangerous conditions to remain thereon with the knowledge that children are in the habit of resorting thereto for amusement, is liable to a child *non suit juris* who is injured therefrom, even though a trespasser. The rule is intended for the protection of children of tender years who, from immaturity are incapable of exercising a proper degree of care for their own protection."

This principle is applied in *Barnett v. Mills, supra*. In that case a boy eleven years old got a dynamite cap which had been carelessly left ungarded by the defendant in front of the postoffice in the town of Cliffside, where children were accustomed to play and were playing, and was injured by the explosion. Defendant was held liable. The opinion refers to the case of *Chambers v. Coal and Railroad Co.*, 30 So., 170 with apparent approval. In the *Chambers* case the powder house was alleged to be negligently located, but was, in fact, 150 yards from the road and near a path seldom traveled which is very similar to the case here, and defendant was held not to be liable.

The case of *Nicolosi v. Clark*, 1915 F (L.R.A.), 638, is an instructive one and very much in point. In that case the defendant was a street contractor and in the conduct of his work in excavating a sewer in one of the streets, open to the public, he kept a box used for storing tools and implements. This box was standing within three feet of the sidewalk. There was kept in that box a small box containing dynamite caps. Plaintiff, a small boy of ten years of age, passing (446) along the street, saw the open box, and being prompted by child-

ish curiosity, approached the box and took from the small box a dynamite cap, and while handling it it exploded and injured him. A demurrer to the action was sustained, and the Court said, on page 640:

"In the case at bar the plaintiff was clearly guilty of trespass, if not of peculation. If a boy of ten years of age is not chargeable with knowledge that he has no right to make free with the contents of a box placed such as this, manifestly a box belonging to other people and containing their goods, it can only be because that particular boy is of deficient intellect and understanding. But this is not alleged. Not being alleged, we hold it plain, as a proposition of law, that he was guilty of an unwarranted trespass, barring his right of recovery."

In *Fanning v. White*, 148 N.C. 541, this Court held that "To store dynamite being used for the legitimate purposes necessary for the construction of a railroad on its right of way, in a shanty with the door open and the window torn out, affording any person ample opportunity to see the danger, with the warning written or printed on the boxes, cannot violate any duty owing to a person going upon the premises without a license, either express or implied."

I will cite only a few of the many cases on the subject which I think support my views: *Furnace Co. v. Patterson*, 48 S.E., 166; *Travell v. Bannerman*, 174 N.C. 47; *O'Conner v. Bruckes* (Ga.), 43 S. E., 731; *Etheridge v. R. R.* (Ga.), 50 S. E., 1003; *Afflick v. Bates*, 79 Am. St., 801; *Hughes v. R. R.* (N. H.) 93, Am. St., 518.

In this last case the child was nine years of age and his recovery was denied upon the ground that he was a trespasser. *Slayton v. Fremont, E. & M. Valley R. R.*, 59 N. B., 510; *Carter v. C. & O. G. R. R.*, 19 S. C., 20, 45 Am. St. Rep., 145; *Ball v. Middlesborough Town & Dands* Co. (Ky.), 68 S. W., 6; *Perry v. Rochester Lime Co.* (N. Y.), 133 N. E., 529; *Horan v. Watertown*, 217 Mass., 184; *Nicolosi v. Clark* (Cal.), L. R. A., 1915, 638; *Finbeine v. Solomon*, 24 L. R. A. (N.S.), 1275.

It appears to me that the evidence in this case is lacking the most essential elements necessary to constitute liability. The element of allurement is lacking, for the mine was shut down and work had stopped. There was nothing apparent in the house calculated to entice the plaintiff to leave the path and go into it unless he went in to pilfer and to take what any boy seven years old of ordinary sense and morality must have known he had no right to take. He did not know that there was dynamite in there, for that was shut up in a tin box on an upper shelf and beyond his observation and reach from the floor.

(447) The element of probability (or, as *Lord Denman* puts it, "extreme probability") is entirely wanting. No human foresight

could be expected to anticipate that a normal seven-year-old boy would leave the path, go into the house, climb up to an upper shelf, and purloin dynamite caps out of a tin box and carry them off with him, for there is not a scintilla of evidence that a child had ever before entered the house or been about its door.

With the utmost deference for the opinion of my brethren, I am convinced that their judgment in this case imposes a liability beyond any ever pronounced by a Court before in this character of case, and that it inflicts a penalty upon this defendant unwarranted by law or justice.

Cited: Stephens v. Lumber Company, 186 N.C. 750; *Richardson v. Libes,* 188 N.C. 113; *Campbell v. Laundry,* 190 N.C. 653; *Stephens v. Lumber Co.* 191 N.C. 28; *Berger v. Stevens,* 197 N.C. 236; *Lawson v. Langley,* 211 N.C. 529; *Rabil v. Farris,* 213 N.C. 416; *Luttrell v. Mineral Co.,* 220 N.C. 790.

L. P. BURNS, EXECUTOR, ET AL. v. CARSON BURNS.

(Filed 1 May, 1918.)

1. Deeds and Conveyances—Mental Incapacity—Evidence—Court's Discretion—Appeal and Error.

Mental incapacity of a grantor to avoid his deed must exist at the time of its execution and may be shown by evidence thereof before and after that time, the question of remoteness of the time ordinarily being addressed to the discretion of the trial judge, which will not be disturbed on appeal when not abused.

2. Same—Mental Disease—Senile Dementia.

Evidence of the mental incapacity of a grantor to make a deed, that such existed before and after its execution, is especially admissible when there is evidence that it existed as a result of disease or the gradual decay of the mental faculties attending old age.

3. Appeal and Error—Record—Instructions—Presumptions.

The charge of the trial judge neither set out in the record nor excepted to is presumed to be correct on appeal.

4. Issues—Deeds and Conveyances—Mental Incapacity.

An issue which sets out the date of the deed with inquiry as to the grantor's sufficient mental capacity to execute the deed of that date, is sufficient in form and definiteness as to the time of such capacity, to sustain a judgment in plaintiff's favor.

CIVIL ACTION, tried before *Harding, J.,* at August Term, 1917, of GUILFORD, upon these issues:

1. Did Z. A. Burns, on 30 September, 1914, have sufficient mental capacity to execute the deed of that date which is in controversy in this action? Answer: "No."

(448) 2. Did Z. A. Burns on 28 October, 1914, have sufficient mental capacity to execute the deed of that date, which is in controversy in this action? Answer: "No."

From the judgment rendered defendants appealed.

W. P. Bynum, R. C. Strudwick, and W. P. Ragan for plaintiffs.

Wilson & Ferguson and Robertson, Barnhardt & Smith for defendants.

BROWN, J. Plaintiffs, children of Zimri Burns, seek to set aside two deeds executed by him to the defendants, who are also his children. The findings of the jury eliminate the ground of undue influence and the five assignments of error are confined to the issues relating to mental capacity. These are all directed to the rulings of the judge in receiving evidence of the condition of the grantor's mind before and after the date of the deeds and at periods of time alleged to be too remote.

The plaintiffs' evidence tends to prove that the date of execution of the deeds the grantor was some seventy-eight years old, that his second wife died in July, 1914, about three months before their execution; that his mental powers had begun to fail before this event and grew rapidly worse afterwards, and that he had three paralytic strokes. The plaintiffs offered evidence tending to prove that his mental powers began to fail some time before the deeds were made and continued to grow feeble with increasing years until in August, 1916, he was adjudged a lunatic, and died in April, 1917.

It must be admitted that plaintiff has offered much evidence tending to prove that the grantor was really suffering with what is called senile dementia, (a disease well known to the progressive in its character) before and at the time of the execution of the deeds and that it continued until his death.

The rule seems to be that where insanity or imbecility is claimed to exist as the result of disease or the gradual decay of mental faculties attending great age, evidence offered that the testator, before and after the execution of the instrument in question, had not sufficient capacity, is admissible. *Penny's Will,* 27 Minn., 280; Jones on Ev., sec. 482.

Although the maker's capacity is to be determined by his condition at the time he executed the instrument, evidence of mental condition before and after that date is generally admissible, depending largely upon the circumstances of each case. This is especially true in case of

a progressive or permament mental disease. 40 Cyc., 1028-1029 and notes.

The reason for this rule is well stated in *Dale's Appeal,* 57 Conn., 127:

"When the question is one of sanity or testamentry capacity at a given time, upon the presumption that the mind does not ordinarily pass suddenly and sharply from sanity or capacity into the opposite condition, nor from the latter into sanity or capacity, (449) but gradually and imperceptibly as day into night, the law permits the evidence to cover long spaces of time in either direction. Of course it weakens as time lengthens and in either direction at last ceases to be of any force. All this, however, is for the jury to determine under proper instructions from the court."

The authorities appear to be uniform in holding that where the issue is whether the instrument was obtained through undue influence or executed while the maker was mentally incompetent, the testimony necessarily is permitted to take a very wide range. The point of time to be looked to in determining the competency of the maker is the date when the instrument was executed, but the condition of his mind both before and after is proper to be considered in determining what his mental condition was when the instrument was executed. Jones on Ev., sec. 482; *Anderson v. Cramner,* 11 W. Va., 562; *Bannon v. Patrick,* 136 Ky., 571; *Sim v. Russell,* 90 Ia., 657; *Hamburger v. Rinkel,* 164 Mo., 407.

In this last case it is said: "Evidence of the condition of the mind of a testator before or after making a will is admitted, of course, for the sole purpose of shedding light upon his mental condition at the time of executing the will. And its probative force will be in proportion to its proximity in point of time to that date. This every sensible juror is capable of appreciating. It is difficult to say at what degree of remoteness such evidence should lose all probative value and become inadmissible. The trial court can generally best determine when the evidence is of a condition too remote to have any probative value."

It is also generally held that it is within the discretion of the trial court to determine the period of inquiry as to the mental condition of the testator and its ruling on this point will not be reversed unless it appears that the discretion is abused. *Dumangue v. Daniels,* 154 Mass., 483; *Howes v. Colburn,* 165 Mass., 385; *Hamburger v. Rinkel,* 164 Mo., 398.

The charge of the court is not in the record, as there was no exception to it. We assume, therefore, that he instructed the jury correctly as to the date when mental incapacity must exist in order to avoid the deed.

The form of the issue is such that the jury must have fully understood that to set aside the deeds the grantor's mind must have lacked the necessary capacity at the date they were executed.

In receiving evidence upon that issue, we fail to find any abuse of discretion upon the part of the judge and are of opinion he confined the evidence within very reasonable limits.

No error.

(450)

THE PITTSBURG STEEL COMPANY v. DAVIDSON HARDWARE COMPANY ET AL.

(Filed 1 May, 1918.)

1. Corporations—Insolvency—Officers—Trusts and Trustees—Preference—Distribution of Assets—Creditors.

Directors of corporations, especially when they are officers, and in active charge of the business, are considered to a certain extent as trustees in respect to their corporate management and business dealings with the corporate property, and in case of insolvency they will not be allowed to take advantage of their position to retain a preference for themselves at the expense of creditors or other shareholders, either in acquisition of rights or in relief from liabilities which they may have incurred either as principal or sureties.

2. Same—Accounting—Fraud.

Directors and officers of an insolvent corporation who are active in the management of its business, and some of whom have become personally liable for the payment of some of its debts, may not take advantage of this relationship with its business to acquire a preference over the other creditors without committing a legal wrong; and those participating therein and at times in negligent default may be held to an accounting to the extent that such misconduct has caused pecuniary damages to the other creditors, whether the same amounts to fraud or the breach of a fiduciary relationship.

3. Same—Sale of Assets—Vendor and Purchaser.

The president of an insolvent mercantile corporation was an endorser on one of its notes to a bank and also on another given to a different bank, of which he was president and shareholder. He and the secretary of the insolvent corporation, both directors and large owners of its shares, under authority conferred, sold its merchandise in bulk to another corporation and were given active charge of the disbursements of its assets among creditors. *Held*, it was a breach of the legal duty of both the president and secretary to pay the debts on which the former was liable in a greater proportion than the other debts of the concern, and to that extent they were both participants in the wrong and personally liable

to an accounting. The fact that the insolvent corporation was a going concern at the time of the transactions in the sense that it was still doing business, does not affect the application of the principle.

4. Same—Assumption of Debt—Substitution—Payment.

Where a corporation purchases the merchandise in bulk of another and insolvent corporation, and assumes the payment of an amount due by the latter to the bank with the consent of the bank, as part payment of the purchase price, and secures the debt thus due with a mortgage on its stock of good. *Held*, the effect of the transaction was to substitute the purchasing corporation as debtor to the bank in the place of the selling one, with the additional security of the deed in trust, and, as to the latter, amounted to a payment.

5. Same—Application of Assets—Negligence—Default.

The officers of an insolvent corporation who have unlawfully obtained a larger per cent over the other creditors in the distribution of its assets, and those officers thereof participating in such wrongful act, are not relieved of an accounting to the other creditors of the corporation by reason of their haivng sold its merchandise in bulk to another corporation which was paid partly in cash and partly by assuming an indebtedness to a bank, secured by a mortgage on its merchandise, it appearing that such officers have become shareholders and connected with the purchasing corporation, and the bank has consented to its assuming the debt, for if such officers or the creditor bank permitted the assets to be wasted or misapplied by their own neglect or default, it should not be visited on the selling corporation or its creditors.

CIVIL ACTION, tried before *Harding, J.*, and a jury at November Term, 1917, of DAVIDSON. (451)

The action was to recover of defendant Hardware Company the balance due on a debt for goods sold and delivered to said defendant company by plaintiff and chiefly to charge the individual defendants, Shemwell and Young, with a portion of said claim on the ground and to the extent that, being directors and officers in charge of defendant company's business, they had wrongfully diverted its assets for their own protection and benefit and to the prejudice of plaintiff's legal rights.

On denial of liability by said individual defendants, there was verdict for plaintiff to the amount against them for $377.04.

Judgment on the verdict and said defendants excepted and appealed.

C. L. Shuping and Walser & Walser for plaintiff.
Roper & Roper for Shemwell and Young, appellants.

HOKE, J., It is the recognized position with us that the directors of corporations, and more especially when, as officers, they are in the ac-

tive charge of the business, are to be considered to a certain extent as trustees in respect to their corporate management and their business dealings with the corporate property, and in case of insolvency they will not be allowed to take advantage of their position to obtain a preference for themselves at the expense of creditors or other shareholders, either in the acquisition of rights or in relief from liabilities which they may have incurred either as principal or sureties. *Wall v. Rothrock,* 171 N.C. 388; *Whitlock v. Alexander,* 160 N.C. 465, 479; *Pender v. Speight,* 159 N.C. 612; *McIver v. Hardware Co.,* 160 N.C. 478; *Graham v. Carr,* 130 N.C. 271; *Hill v. Lumber Co.,* 113 N.C. 173; *Townsend v. Williams,* 117 N.C. 330.

In the *Wall case, supra,* the general principle is well stated as follows: "But the directors, occupying a fiduciary relation, are not permitted to secure themselves against preexisting liabilities of the
(452) corporation upon which they are already bound, or for money they may have already loaned, when the corporation is in declining circumstances and verging on insolvency. They cannot be permitted to take advantage of their intimate knowledge of the corporation's affairs for their own benefit at the expensee of the general creditors."

And in *Pender v. Speight:* "It is the duty of the directors of a corporation, as trustees of its property for the benefit of its creditors and shareholders, to administer the trust for the mutual benefit of the parties interested, and for them to receive therein an advantage to themselves not common to all is a plain breach of the trust imposed."

And in illustration of the principle, it was held in *Graham v. Carr, supra,* "That a director of an insolvent corporation, being a surety for the payment of corporate debts, cannot apply the proceeds derived from a sale to him of corporate property to the payment of such debts." Again, in the second *Whitlock* case: "The directors were required to surrender a mortgage they had placed upon the corporate property and by means of which they had raised money to pay off corporate debts upon which they were sureties."

Whether the inhibition referred to is made to rest in strictness on the existence of a fiduciary relationship or on the ground of fraud, a position approved in some of the cases, Clark on Corporations, p. 608, it is very generally held in this country that a breach of duty in the respect suggested is properly considered a legal wrong, for which the officers participating and at times when in negligent default, may be held to an accounting to the extent that their misconduct has caused pecuniary damage to other creditors. *McIver v. Hardware Co., supra,*

In the present case, their is evidence on the part of plaintiff and construed in reference to the charge, the jury, in their verdict have established that the defendant corporation was a company doing hardware business in Lexington, N.C., having a paid up capital of $15,000 or more in which defendant Dermot Shemwell was president, one of the three directors, and stockholders to the amount of $4,500; that a second director, J. E. Foy, also held stock to the amount of $4,500, and the remainder of the said stock, to the amount of six or seven thousand dollars, was held by the third director, defendant B. C. Young, who was vice-president and secretary and treasurer of the company. That in May, 1913, finding they were in debt to various parties to an amount aggregating $30,000, the officers in charge, Shemwell and Young, under authority conferred, sold the stock of goods in bulk to a corporation known and styled the "Manning Hardware Company," for $21,000, of which $11,000 was paid in cash and the remainder was satisfied and paid by the Manning Company assuming the payment of $10,000 and giving a deed of trust on their entire stock to secure the same on a debt of $15,000 then owed by defendant company to the (453) Planter's National Bank of Richmond, Va., and on which the individual defendant Dermot Shemwell was an endorser. That this $21,000 paid together with the sum of $1,500 collected on the accounts and aggregating $22,500 constituted the assets of defendant company, justifying a payment pro rata among the creditors of 75 cents on the dollar. That all claims against the defendant corporation had been paid except the balance due the Planters Bank, amounting to $5,000, a debt of $2,500 to the First National Bank of Lexington, of which Shemwell was president and a large stockholder, and which note also he had endorsed, and the debt due plaintiff company, originally amounting to $859.92, reduced by payments since the sale to $592.04. That out of the $11,000 cash received as purchase price there was paid on the balance of $5,000, due the Planters' Bank $2,500, making a total payment on the entire claim of $14,000 of $12,500, or 83 1-3 cents on the dollar. That the debt due the First National Bank of Lexington was reduced by payments to $1,100, making the payment on the claim of $1,400 equivalent to 56 per cent, and on the debt due plaintiff there had been payment aggregating $267.88, equivalent to 31 per cent.

It further appeared that the individual defendants Dermot Shemwell and B. C. Young were at that time in active charge of the affairs of defendant company and took personal part in directing the distribution of the assets and making the payment as specified, and on these facts as accepted by the jury and under the principles heretofore stated, we think that equality among all the creditors was the correct rule of dis-

tribution, and said defendants, in active management and control of the assets of an insolvent corporation, commited a breach of legal duty in paying 83 1-3 per cent on a debt of $15,000 in which defendant Shemwell was already obligated as endorser, and they have been properly charged with the sum required to bring the payments on plaintiff's claim to an amount equaling 75 cents on the dollar, the dividend that the assets justified.

It is objected for the appellants that the corporation being a going concern had the right to prefer and pay any creditor that they might select, and as a general proposition that is true, but on the facts of the record, where these appellants, as stated, were in charge of the assets of an insolvent corporation, they had no right to take advantage of their position and apply these assets to their own relief and benefit, to the detriment and injury of the general creditors and their doing so, as stated, constitutes an actionable wrong for which they have been properly held to account.

It is further contended that while this may be true as to defendant Shemwell, who was an endorser, it may not hold as to defendant
(454) Young, who so far as appears received no pecuniary benefit. It is recognized as correct doctrine here and elsewhere that co-trustee is not always and necessarily chargeable with the default of a trustee unless, as in the case of coadministrators when they became so because of signing the same bond. Good faith and reasonable care and diligence is the usual and accepted rule of liability in such cases. *Fisher v. Fisher,* 170 N.C. 378; *In re Jones' Appeal,* 8 Watts & Sargent, 143, 64 (Pa.).

But in the present case both of these defendants were active participants in the wrong. Referring to the evidence of defendant B. C. Young, given by himself on the subject, he testified, among other things: "The stock was sold in bulk. I was one of the directors at the time. In the liquidation of the affairs of the Davidson Hardware Company, I assumed payment of the accounts, wrote most of the checks and verified correctness of accounts. The checks were submitted to Mr. Shemwell and sent out to various creditors. They were drawn on the order of the Davidson Hardware Company and issued by the authority of all of us."

On such facts both have been properly held liable. *Birmingham v. Wilcox,* 120 Cal., 467; 2 Beach on Trusts, sec. 643.

It is further urged for applicants that there was evidence tending to show the entire $10,000 assessed by the purchaser, was not in fact paid to the Planters' Bank, but only about $6,000, realized by a sale of the stock under the trustee some time after the purchase.

It might suffice in answer to this position to say that it seems to have been submitted by his Honor to the jury as one of defendant's contentions and repudiated by them and, in any event, it should not avail appellants on the record. It appears that goods to the value of $21,000, belonging to the hardware company, were sold and transferred to the purchaser, who assumed the payment of $10,000 to the Planters' Bank, evidently with the latter's consent, and a morgage or deed of trust executed on the entire stock being ample security for the claim. The effect of the transaction was, in our opinion, to substitute the Manning Hardware Company, with the additional security of the deed of trust, as the debtor instead of the hardware company, and, as to the latter, amounted to a payment of the remainder of the purchase money, for which the defendant should account.

It, furthermore, appearing that Young immediately went into the Manning Company, and Shemwell and Foy soon thereafter became stockholders therein, and if they or the creditor, the Planters' Bank, permitted their assets to be wasted or misapplied by their own neglect or default, it should in no way be visited on the hardware company or its creditors.

In our opinion, on the facts in evidence as accepted by the (455) jury and under the principles applicable, for the cause has been fairly tried and the liability of appellants correctly determined.

No error.

Cited: Besseliew v. Brown, 177 N.C. 67; *Caldwell v. Robinson,* 179 N.C. 523; *Bassett v. Cooperage Co.,* 188 N.C. 513; *Hospital v. Nicholson,* 190/121.

IN THE MATTER OF LEE CROOM.

(Filed 1 May, 1918.)

1. Habeas Corpus—Appeal and Error—Certiorari—Court's Discretion.

Appeal to the Supreme Court will not lie from the refusal of a Superior Court judge to discharge the defendant from custody in proceedings in *habeas corpus,* the remedy being by a petition for a writ of *certiorari* which is addressed to the sound discretion of the Supreme Court.

2. Habeas Corpus—Judgments—Collateral Attack—Statutes.

Where the petitioner in *habeas corpus* proceedings directed to a Superior Court judge has previously been convicted in that court of an offense

of which it had jurisdiction, and accordingly sentenced to imprisonment under a final order, the judgment imports verity and evidence to collaterally impeach it is incompetent, and the application to prosecute the writ will be denied. Revisal, sec. 1832.

3. Habeas Corpus—Certiorari.

A petition for *certiorari* in the Supreme Court will be denied in *habeas corpus* proceedings when it appears therefrom that the prisoner is not entitled to his discharge.

This is a petition for a *certiorari*, in lieu of an appeal, to review a judgment of *Lyon, J.*, on a writ of *habeas corpus*, refusing to discharge the defendant from custody.

The facts set forth in the petition are as follows:

1. At January Term, 1915, of the Superior Court of Pender, the petitioner, Lee Croom, entered a plea of guilty to an indictment charging him with an assault with a deadly weapon, and he was sentenced to a term of imprisonment of six months in jail and assigned to work on the public roads of Sampson County, capias to issue on 15 February, 1915.

2. The capias was issued on said judgment on 15 February, 1915, but the petitioner was not arrested thereunder.

3. That at March Term, 1917, of said Court, it being made to appear that the petitioner had served no part of his term of imprisonment, and was at large, another capias issued and the defendant was arrested and began his term of imprisonment.

(456) 4. That the petitioner thereupon sued out a writ of *habeas corpus* before *Bond, J.*, which was duly heard, but no order or judgment was rendered thereon although the petitioner was not required to begin serving his term.

5. That thereafter another capias was issued against the defendant and he was taken into custody, and he then applied for the writ of *habeas corpus* before *Lyon, J.*, who, after hearing the matter, refused to discharge the petitioner, holding that he was lawfully in custody under the judgment of January Term. 1915.

6. That the petitioner thereupon offered to appeal from the said judgment of *Judge Lyon*, but he was refused this right, upon the ground that his remedy to review his judgment was by *certiorari*, and thereupon this petition for *certiorari* has been filed in this Court.

McClammy and Burgwin for petitioner.

J. S. Manning, Attorney General, and R. H. Sykes, Assistant Attorney General, for the State.

ALLEN, J. His Honor held correctly that an appeal would not lie from his judgment refusing to discharge the defendant from custody *(In re Holley,* 154 N.C. 163), and the remedy, if any, is by a petition for a writ of *certiorari,* which is addressed to the sound discretion of the Court. *Ice Co. v. R. R.,* 125 N.C. 17.

If this was not the rule, the criminal law could not be administered, and it would be with difficulty that any judgment of imprisonment could be executed, as the writ of *habeas corpus* always issues when legally applied for, because the statue (Revisal sec. 1828) subjects a judge who refuses to entertain the petition to a penalty of $2,500, and if his judgement can be reviewed by appeal, or if the *certiorari* issues as of right, the sentence of imprisonment might be suspended indefinitely between the Superior and the Supreme Court.

We must then examine the petition for the *certiorari,* and when we do so find that the petitioner is in custody under a judgment of the Superior Court, which has never been performed, and which was regularly entered in a criminal action of which the court had jurisdiction, and that this judgment has not been set aside or modified.

The power to enter the judgment is not contested, and when this power is conceded, it follows that the petitioner was not entitled to be discharged, as the Revisal, sec. 1822, provides that application to prosecute the writ of *habeas corpus* shall be denied "2. Where persons are committed or detained by virtue to the final order, judgment, or decree of a competent tribunal of civil or criminal jurisdiction."

The judgment as entered upon the record imports verity and neither *Judge Bond* nor *Judge Lyon* had authority to hear evi- (457) dence in a collateral proceeding tending to impeach it, nor could they refuse to deal with it as valid and binding, and their action in the premises was controlled by this principle.

The practice upon petitions for the writ of *habeas corpus* is stated very clearly and accurately by *Justice Hoke* in the *Holley* case, in which he says, at p. 169: "It would produce inextricable confusion to permit one judge of equal and concurrent jurisdiction to question and interfere with the final judgments of another or to deal with such hearings on any other principle. And in determining this question of power the court is confined, as heretofore stated, to the record proper and the judgment itself. It is not permitted that the testimony or the rulings therein should be examined into, nor that matters fairly in the discretion of the presiding judge should be reviewed, or that judgments erroneous in the ordinary acceptation of the term should be questioned. The hearing is confined to the record and judgment, and relief may be afforded only when on the record itself the judgment is one

clearly and manifestly beyond the power of the court, a statement of the doctrine supported in numerous and authoritative decisions here and elsewhere. *Ex parte McCown,* 139 N.C. 95; *In re Schenck,* 74 N.C. 607; *In re Swan,* 150 U.S. 637; *In re Coy,* 127 N.C. 731."

The petition for the *certiorari* is, therefore, denied because it appears upon the face of the petition that the petitioner is not entitled to his discharge.

Petition denied.

Cited: *In re McCabe,* 183 N.C. 242; *S v. Yates,* 183 N.C. 755, 756, 757; *S v. Edwards,* 192 N.C. 322; *In re Bellamy,* 192 N.C. 673; *Hinnant v. Insurance Co.,* 204 N.C. 306; *In re Ogden,* 211 N.C. 103; *In re Adams,* 218 N.C. 381; *In re Steele,* 220 N.C. 687; *In re Thompson,* 228 N.C. 75.

ANNIE L. HEATH v. W. C. HEATH.

(Filed 1 May, 1918.)

Evidence — Wagering Contracts — Futures — Statutes — Pleadings — Counterclaims — Admissions — Burden of Proof — Trials.

The burden of proof is on the defendant to establish his counterclaim set up in an action against him upon his note; and where he has admitted his liability on his note, and the reply alleges that his counterclaim, if it existed, was based upon an illegal or wagering contract in futures, Revisal, sec. 1691, he must establish his counterclaim by his evidence upon the trial, and show that it was a lawful one; and where he fails to introduce evidence to that effect, it is proper for the court to disregard the counterclaim and direct a judgment upon the note.

APPEAL by defendant from *Harding, J.,* at February Civil Term, 1918, of UNION.

(458) This is an action on a note. At the conclusion of the evidence his Honor instructed the jury to answer the issue of indebtedness in favor of the plaintiff on the admissions of the parties, and the defendant excepted and from the judgment rendered upon the verdict appealed.

Thaddeus A. Adams and Stack & Parker for plaintiff.

T. D. Maness and J. C. M. Vann for defendant.

ALLEN, J. The plaintiff alleges in her complaint that she sold certain land to the defendant on 31 December, 1904, and that notes were exe-

cuted for the purchase money; that on 17 February, 1916, the consideration for the purchase of the land not being paid in full, the defendant executed and delivered to her his note, by which he promised to pay $2,356.50 on 1 November, 1916, reciting therein that the note was given for the balance due on the purchase money of the land, and that no part of said note had been paid.

The defendant filed an answer in which he admitted the purchase of the land for $4,500, and that he was also at that time indebted to the husband of the plaintiff in the sum of $1,200, making a total of $5,700; that he executed a promissory note or notes to the plaintiff or to her said husband for said amount, and that he had paid on the indebtedness $3,750. No other payments are alleged in the answer, and upon these admissions, when the interest from 1904 to 1916 is taken into consideration, the defendant owed as much or more than the amount for which the note sued on was executed.

The defendant, it is true, does not distinctly admit the execution of the note in the pleading, although he does say that he signed a note to the plaintiff on or about 7 February, 1916, of somewhat similar import to that set out in the complaint, but it is stated in the judgment that the defendant admitted the execution of the note in open court at the trial.

On these admissions of the parties, nothing else appearing, the plaintiff was entitled to judgment for the amount of the note.

The defendant, however, further alleges in his answer that the plaintiff was a member of the partnership of O. P. Heath & Co.; that this partnership was indebted to him in the sum of $7,084.53, and he asks that this amount be allowed him as a set-off in extinguishment of the claim of the plaintiff.

The plaintiff files a reply in which she denies that she was a member of the partnership of O. P. Heath & Co., and she also denies that the partnership was indebted to the defendant, and alleges that if any such indebtedness did exist it arose upon a gambling contract known ordinarily as a contract in "futures."

On the trial no evidence was introduced or tendered by the (459) defendant to prove that the indebtedness of O. P. Heath & Co. to the defendant, if it existed, was upon a legal contract, and was not a contract, for "futures."

In this condition of the pleadings, two causes of action were alleged. The plaintiff alleged a cause of action in the complaint against the defendant on the note, and the defendant alleged a cause of action in the answer against the plaintiff on the alleged indebtedness of O. P. Heath & Co. to the defendant, and on the last cause of action, the plaintiff was in reality a defendant.

If so, it being alleged in the reply, which was duly verified, that the claim against O. P. Heath & Co. arose out of a gambling contract, the Revisal, sec. 1691, is applicable, and as under that section the burden was upon the defendant to prove by proper evidence other than by written evidence that the contract relied on by the defendant to prove the indebtedness was a lawful one in its nature and purpose, and as the defendant failed to offer any such evidence, his Honor properly disregarded the cause of action set up in the answer.

The section of the Revisal referred to has been considered in several of our decisions, and it has been held without exception that when it alleged that a contract sued on is a gambling contract within the provisions of section 1689 of the Revisal, and the pleading is duly verified, that the burden is on the party seeking to recover upon the contract to prove that it is a lawful contract *(Holt v. Wellons,* 163 N.C. 129), and when the party upon whom the burden of proof rests offers no evidence, it is not erroneous to direct a verdict against him. *House v. Arnold,* 122 N.C. 220; *Hooker v. Worthington,* 134 N.C. 285.

It follows, therefore, as the cause of action alleged in the complaint was admitted, and as no evidence was offered to prove the legality of the contract out of which arose the cause of action alleged in the answer, that his Honor's instruction to the jury was in accordance with law.

No error.

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S. H. LEA v. SOUTHERN PUBLIC UTILITIES COMPANY AND CHARLOTTE ELECTRIC RAILWAY COMPANY.

(Filed 1 May, 1918.)

1. Negligence—Rule of the Prudent Man—Breach of Duty.

Negligence is the absence of that care which under the circumstances should be exercised as a duty to another under the rule of the ordinary prudent man.

2. Same—Railways—Instructions—Trials—Appeal and Error.

Where the evidence is conflicting as to whether the motorman on defendant's street car should have seen the plaintiff's danger in crossing the track in a buggy in front of the moving car in time to have slowed or stopped the car, and avoid the injury complained of, the defendant's liability does not solely depend upon whether its motorman should have

perceived the plaintiff's danger, under the rule, but also upon whether he then should have stopped it, under the existing circumstances, in time, by the exercise of ordinary care, to have prevented the injury; and an instruction that does not present this latter phase of negligence when it arises under the evidence is reversible error.

3. Negligence—Proximate Cause.

Negligence, to be actionable, must be the proximate cause of the injury complained of, or the cause that produced the result in continued sequence, without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the facts as they exisited. *Ramsbottom v. R. R.*, 38 N.C. 51, cited and applied.

4. Same—Instructions—Trials — Street Railways — Railroads — Appeal and Error.

Where the defendant's actionable negligence depends upon whether its motorman on its moving street car should have seen the plaintiff's danger in crossing its track in a buggy in time to have stopped the car and avoid the injury complained of, an instruction to answer the issue of negligence in the affirmative if the motorman should have seen the danger, under the rule of the prudent man, leaves out the question of proximate cause from the jury's consideration, and is reversible error.

5. Negligence—Proximate Cause—Burden of Proof—Trials.

The burden of proof is on the plaintiff to show that the injury complained of was the proximate cause of defendant's negligence, which is ordinarily a question for the jury.

6. Instructions—Negligence—Issues—Trials.

The issues in this case as to defendant's negligence and the last clear chance are *Held* to include an inquiry as to the proximate cause of the injury complained of and to require instruction thereon under the evidence.

7. Instructions—Negligence—Proximate Cause—Appeal and Error.

The error of the trial judge in his charge to the jury in failing to instruct upon the principle of the proximate cause of the defendant's negligence involved in an action for damage is not cured, in construing the charge as a whole by a definition of negligence and proximate cause stated in the beginning thereof, without explanation of the relation of the one to the other, and its application to the evidence.

CIVIL ACTION, tried before *Webb, J.*, and a jury at October Term, 1917, of MECKLENBURG.

This is an appeal by the defendants from a judgment rendered against them in the plaintiff's favor at the October Term, 1917, of the Superior Court of Mecklenburg County. The action arose (461) out of a collision between one of the defendant's street cars and the plaintiff's buggy, upon North Tryon Street, in the city of Charlotte, and was submitted to the jury upon issues which, with the answers thereto, were as follows:

1. Was the plaintiff injured by the negligence of the defendants, 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: "Yes."

3. Notwithstanding the negligence of the plaintiff, could the defendants, by the exercise of ordinary care, have prevented the injury? Answer: "Yes."

4. What amount of damages, if any, is the plaintiff entitled to recover of the defendants? Answer: "$1,250."

The plaintiff contended, and in his own behalf testified, that he drove his horse and buggy out of an alleyway adjoining the city hall straight across North Tryon Street, intending to go on the west side thereof, and turn to his left and go up the Square; that when his horse's head was within about 20 feet of the street car track he looked south and saw a car coming toward him about 100 or 125 feet away; that he was driving five or six miles an hour and thought he had time to get across the track ahead of the car; that when he first saw the car its speed was about fifteen miles an hour, and that it kept coming without checking its speed, probably getting a little faster, and that before he could clear the track with his buggy the left corner of the fender struck the rim of his left hind wheel that his horse took fright and either the jar or the jumping of the horse caused the traces to break and the horse to run away, the horse running down the street about 175 feet from the point of the collision, where, as the result of holding on to the lines after the harness had been broken, he was pulled over the dashboard, got his leg caught in the front wheel of the buggy and broken.

The defendant contended and its witnesses testified that at the time the car had just left the Square and was running very slowly, five or six miles an hour; that the plaintiff drove out of the alleyway and instead of crossing the street and getting on the righthand side, as required by ordinance, came up towards the Square on the lefthand side for a distance and then started to drive diagonally across the street, meeting the car; that as soon as the motorman saw plaintiff start across the track, and while he was some feet from the track, he sounded his gong to warn the plaintiff, but that instead of stopping or going straight across the track the plaintiff continued to drive diagonally across the street toward the car and commenced slapping the horse with the lines to quicken his speed; that the motorman immediately reversed his car and stopped it; that after the car stopped plain-
(462) tiff still continued in his course diagonally across the track, and ran across the fender, pressing it down and causing it to fly up and catch the rim of the hindwheel; that the plaintiff's conduct in driv-

ing his horse, which was an old fire horse, against the fender while at the same time slapping him with the reins caused the horse to take fright and run away and break the harness, and that the plaintiff, by continuing to hold to the lines after the harness was broken, was finally pulled over the dashboard, getting his leg caught in the wheel and broken.

The court charged the jury upon the first and third issues substantially as follows:

If you find by the greater weight of the evidence that it reasonably appeared to the motorman, or that he saw or could have seen by the exercise of ordinary care, that plaintiff was crossing the track and that there would be a collision, or that he was going to strike the buggy before the plaintiff could cross the track, then the court charges you that the defendant company owed a duty to the plaintiff to slow down its car; and if you find that it reasonably appeared to the motorman that he was going to have a collision with the plaintiff, striking his buggy before he cleared the track (the court charges you that it was the duty of the motorman to reverse his car and stop before he struck this man, if he could do it without danger to his passengers; and if he failed to do that, the court charges you that he would be guilty of negligence, and it would be your duty to answer the first issues "Yes.")

"If you find by greater weight of the evidence that he saw this man on the track or could have seen him by the exercise of ordinary care and prudence, and find by the greater weight of evidence that it reasonably appeared to the motorman that the plaintiff was in a perilous condition, the court charges you that it was the duty of the motorman to stop his car and avert the injury, (and if he did not do it, the court charges you that it would be your duty to answer the third issue 'Yes.' ")

There were other exceptions, but they need not be stated, as the opinion is confined to those already set forth.

Judgment was entered on the verdict for the plaintiff, and defendant appealed.

Thomas W. Alexander for plaintiff.
Osborne, Cocke & Robinson for defendants.

WALKER, J., after stating the case: We are of the opinion that the two instructions given to the jury, and to which exceptions were taken, are erroneous—not so much because of what was said, but because of what was omitted. Generally speaking, negligence is the absence of that care which under the circumstances should be exercised, (463) gauged by the rule of the ordinarily prudent man. The court

charged, in effect, and in the first of the instructions, that it was the absolute duty of the motorman "to reverse his car and stop before he struck the vehicle," and in the other that it was his duty "to stop the car and avert the injury," and in both instructions that if he failed in the respects mentioned it was negligence, and they should answer the issues "Yes." It was, perhaps, his duty, under the circumstances stated, to stop the car, but not so unless it could be done by the exercise of ordinary care. There was no legal duty to do it, if it could not be done, for instance, if he had not sufficient time to do it, but it was his duty to stop it if that could be done in the exercise of proper care. The court charged that the mere act of failing to stop was negligence, whereas the instruction should have been that there must have been a negligent failure in that respect before the jury could give an affirmative answer to the issues.

But there is more serious objection to the instruction, as we think. The court failed to tell the jury that the negligence of defendants must have been the proximate cause of the injury in order to be actionable, so that the issue could be answered "Yes."

In order to establish actionable negligence, the plaintiff is required to show by the greater weight of the testimony, first, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed, proper care being that degree of care which a prudent man should like circumstances and charged with a like duty; and second, that such negligent breach of duty was the proximate cause of the injury—a cause that produced the result in continuous sequence and without which it could have occured, and one from which any man of ordinary prudence could have foreseen that such a result was probable under the facts as they existed. *Ramsbottom v. R. R.*, 138 N.C. 51.

In the case just cited the plaintiff's horses were running along the railroad track ahead of an approaching train, and while so doing ran onto a trestle and were injured. The negligence alleged against the defendant was the failure of the engineer to stop the train before the horses ran onto the trestle. The trial court charged that "If the engineer of ordinary prudence and care could by reasonable diligence have seen that the horses were badly frightened and were rushing forward toward the trestle, then it was the engineer's duty to stop the engine. And if you find the further facts to be that the horses were driven onto the trestle by the approaching train and its failure to stop sooner than it did after passing the crossing, it is negligence on the part of the

defendant, and you will answer the first issue 'Yes'." This Court held this instruction to be erroneous on the identical ground (464) now urged by the defendants, and certainly the instruction in the case at bar is, at least as erroneous as the one there given. It is strictly analogous to it, and the two are almost literally the same.

It may be well to refer to several of the cases in which we have held that negligence and proximate cause must concur in order to make the former actionable, as it may emphasize the necessity of uniting the two when juries are instructed upon this question, which is of such frequent occurrence. "To constitute contributory negligence, the plaintiff must have committed a negligent act, and such negligent conduct must have been the proximate cause of the injury. The two must concur and be proved by the defendant by the clear weight of evidence. A failure to establish proximate cause, although negligence be proved, is fatal to the plea." *Brewster v. Elizabeth City*, 137 N.C. 394.

"It is not enough to show that there has been negligence in order to entitle a plaintiff to recover; he must, in addition, show that the defendant's negligence was the proximate cause of his injury. Negligence is not actionable unless it is the proximate cause of the damage." *Hoaglin v. Telegraph Co.*, 161 N.C. 398.

"It is generally held, and this we regard as the true doctrine, that the element of proximate cause must be established, and it will not necessarily be presumed from the fact that a city ordinance or statute has been violated. Negligence, no matter in what it may consist, cannot result in a right of action unless it is the proximate cause of the injury complained of by the plaintiff." *Henderson v. Traction Co.*, 132 N.C. 785, quoting Elliott on Railroads, sec. 711.

"In all courts where the common law is administered it is held that one cannot recover damages upon proof of negligence alone, and that he must proceed further and show that the negligence of which he complains was the real proximate cause of the injury." *Pritchett v. R. R.*, 157 N.C. 101.

In *Paul v. R. R.*, 170 N.C. 230, it was held that negligence, to be actionable, must be the proximate cause of the injury for which damages are sought, and ordinarily the question as to the proximate cause of an injury arises from the evidence, as an issue of fact for the jury, under proper instructions, and not solely as a matter of law. It was there said: "Much of the difficulty in the application of the doctrine of proximate cause arises from the effort on the part of the courts to give legal definition to what is essentially a fact, and in most cases, for the determination of a jury."

And the Court said in *Kellogg v. R. R.*, 94 U.S., 469: "The true rule is that what is the proximate cause of an injury is ordinarily a

question for the jury. It is not a question of science or of legal
(465) knowledge. It is to be determined as a fact in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or, as is the oft cited case of the squib thrown in the market place. 2 Bl. Rep., 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation?"

This case was approved in *Hardy v. Lumber Co.*, 160 N.C. 113, in which it was said, citing Cooley on Torts (Ed. 1879), p. 69: "When the act or omission complained of is not in itself a distinct wrong, and can only become wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by avertment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events and as a proximate result of a sufficient cause." See, further, *Davis v. Traction Co.*, 141 N.C. 134; *Wright v. Manufacturing Co.*, 147 N.C. 534; *R. R. v. Jones*, 146 Ala., 277, and especially *Wheeler v. Gibbon*, 126 N.C. 811.

It may further be said that the first and third issues necessarily involve the element of proximate cause by reason of the words in which they are expressed. The inquiry in each is not only whether defendant was negligent, but whether that negligence, if it existed, was the proximate cause of the injury, so that negligence constituted only one-half of the inquiry. *McNeill v. R. R.*, 167 N.C. 390; *Crenshaw v. R. R.*, 144 N.C. 314; *Pritchard v. R. R.*, 157 N.C. 101.

The rule is not disputed, but we again advert to it and the authorities sustaining it, so that there may be a clear understanding of it, and of the necessity for applying it to instructions as to negligence. The learned counsel, contends, in his brief, that the charge should be construed as a whole and there is sufficient in it to cure the error, but we do not think this is a case of that kind, admitting, as we do, that it can be corrected in that way. There is only a definition of negligence and proximate cause separately stated in the beginning of the charge, and no general or particular explanation of the relation of the one to the other, or the legal connection between the two—nothing by which the jury could know how to supply the fatal omission in the instruction. The error was, therefore, not removed by anything the judge said elsewhere in his charge, not even by a liberal construction of it.

New trial.

Cited: Hinnant v. Power Co., 187 N.C. 296; *Campbell v. Laundry*, 190 N.C. 654; *DeLaney v. Henderson-Gilmer Co.*, 192 N.C. 650; *Clinard v. Electric Co.*, 192 N.C. 741; *Ellis v. Power Co.*, 193 N.C. 361; *Lancaster v. Coach Line*, 198 N.C. 108; *Poplin v. Adickes*, 203 N.C. 727; *Bechtler v. Bracken*, 218 N.C. 524; *Price v. Gray*, 246 N.C. 168.

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JAMES M. MUSE v. FORD MOTOR COMPANY.

(Filed 1 May, 1918.)

1. Negligence—Evidence; Corroborative; Contradictory—Subsequent Repair.

Where damages are sought in an action by an employee against his employer for the latter's negligence in leaving a hole in a concrete floor with spikes in it, where plaintiff was required to work, and which caused the injury complained of, and there is conflicting evidence as to whether such condition existed at the time, it is competent in contradiction of the defendant's evidence and in corroboration of the plaintiff to show that the defect had since been remedied, though incompetent as substantive evidence of the negligence alleged.

2. Evidence: Corroborative; Contradictory—Instructions — Requests — Restrictions—Appeal and Error.

Where evidence is admissible only for corroboration or contradiction, the failure of the trial judge to thus restrict it is not reversible error in the absence of a special request to do so.

3. Appeal and Error—Instructions—Presumptions.

Where the record does not set out the judge's charge, and there are no exceptions thereto, it will be presumed on appeal that it was a correct one.

4. Appeal and Error—Opinions—Harmless Error.

The plaintiff's testimony, in his action to recover damages for a personal injury alleged to have been negligently inflicted, as to the result of the injury in producing hernia is harmless when he has testified that immediately thereafter he felt a severe pain and the other evidence tends to show it was so caused, and that hernia immediately followed.

5. Evidence—Illustrations—Spikes.

Where there is evidence tending to show defendant's actionable negligence in permitting a hole in a concrete floor with spikes in it to remain where the defendant, his employee, was required to work, it is competent for the witness to explain his testimony to the jury by using another spike like in size and form.

6. Pleadings—Interpretation—Liberal Construction.

Pleadings are liberally construed, and where it is apparent from the whole pleading that the complaint alleges a good cause of action, it will be sustained. Revisal, sec. 495. *Blackmore v. Winders*, 144 N.C. 215, cited and applied.

7. Pleadings—Indefiniteness—Motions—Demurrer.

Objection that a complaint is too indefinite in its allegations as to a cause of action should be taken by motion that it be made more certain, and not by demurrer.

8. Pleadings—Negligence—Effect—Statutes.

It is not necessary for the plaintiff to enumerate all of the particulars of the general damages alleged to have been caused by the negligent act of the defendant, in order to recover for them. *Conrad v. Shuford*, 174 N.C. 719, cited and applied.

9. Pleadings—Evidence—Scope—Amendments—Appeal and Error — Objections and Exceptions—Statutes.

Where the allegation of the complaint are sufficiently broad under a liberal construction to include within their scope the evidence objected to, it will not be considered as a variance, and where there is a variance, the objecting party must proceed under the statute, and if the trial judge may order an amendment, and if the proper course is not pursued, the variance will be deemed immaterial on appeal. Revisal, secs. 515-516.

10. Appeal and Error—Instructions—Contentions—Objections and Exceptions.

The judge should be given an opportunity to correct his statement of the contention of the parties by objection taken at the time, or error in that respect will not be considered on appeal.

11. Damages—Mental Anguish—Negligence—Personal Injury.

Where there is evidence, either direct or circumstantial, tending to show that mental anguish was suffered in connection with a physical injury negligently inflicted, it may be considered by the jury as an element of actual or compensatory damages in passing upon that issue. *Wallace v. R. R.*, 104 N.C. 442, 452, cited and applied.

ACTION, tried before *Webb, J.*, and a jury, at October Term, 1917, of MECKLENBURG.

Action for damages. Plaintiff alleges that he was injured by defendant's negligence under the following circumstances. It was (467) the duty of the plaintiff, as an employee of the defendant, to paint automobile bodies for Ford cars. The painting is done in this way: The paint is placed in an overhead tank with a hose attached; underneath this overhead tank is what is called the drip pan, which is in the share of a square with an open end. The Automobile bodies are placed on trucks, the bodies being longer and broader than the trucks and so project from the sides and

ends of the trucks. The truck with the automobile body on it is then run into the open end of the drip pan and the paint is sprayed on the body by use of the hose attachment to the overhead paint tank. The plaintiff averaged putting one coat of paint on about 100 bodies per day. It was the duty of the plaintiff to pull the truck with the body on it away from the drip pan as soon as he had sprayed it with a coat of paint, to make room for spraying another body. There was a hole worn in the cement floor just in front of the drip pan, over which it was necessary to pass the trucks in carrying the automobile bodies in and out from the drip pan. Standing in the hole were two iron spikes from one to two inches high. These spikes, at the time in question, were as plaintiff alleges, serving no useful purpose, but had been negligently left standing in the roadway of the trucks. The automobile bodies which the plaintiff was required to paint weighed about 480 pounds. On or about 27 July, 1917, the plaintiff took out several trucks with bodies thereon from the drip pan after spraying the (468) same, the trucks starting without trouble from off the sheet-iron upon which they were standing, but when they reached the defective place in the floor above described, and on account of the wheels of the trucks, striking the hole in the floor and the iron spikes, the plaintiff received a jerk or strain which ruptured him and caused him to have a painful hernia.

Defendant denies all allegations of negligence, including this allegation (No. 7) of the complaint: "That there was a hole in the cement floor just in front of the drip pan over which it was necessary to pass the trucks in carrying the automobile bodies in and out from the drip-pan; that this hole was about 12 or 16 inches square or larger and from an inch to two inches deep." Evidence was admitted over defendant's objection that repairs had been made after the accident to the cement floor of the garage where plaintiff alleges there was a hole and a spike. There were other exceptions, which are noted in the opinion of the Court by *Walker, J.*

The jury returned a verdict finding that there was negligence which proximately caused the injury, but that there was no contributory negligence, and assessed the damages. Defendant appealed from the judgment thereon.

Stewart & McRae for plaintiff.
Chase Brenizer for defendant.

WALKER, J., after stating the case: We have not set out the evidence, charge, and objections of the defendant extensively, but have stated so

much of them as will be necessary for a consideration of the assignments of error.

1. The evidence as to repairs was competent in one view of the case. It comes within the exception to the general rule, that such evidence is not admissible to show negligence. It seems to us that *Tise v. Thomasville,* 151 N.C. 281, is directly in point, as the plaintiff in that case was permitted to show that a hole was filled up, as proof of the condition existing at the time of the injury and to contradict or corroborate witnesses.

We said in *Pearson v. Clay Co.,* 162 N.C. 224, 225: "To show that a hole into which he had fallen, as he had testified had been filled up after the occurrence was competent, not to prove negligence, but to contradict defendant's assertion that the hole was not there at the time of the alleged fall, it having been filled up."

In *R. R. v. Hawthorn,* 144 U.S. 202, it was said, in discussing the rule: "Upon this question there has been some difference of opinion in the courts of the several States. But it is now settled upon much (469) consideration by the decisions of the highest courts of most of the States in which the question has arisen, that the evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibilty for the past, has no legitimate tendency to prove that the defendant has been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue and to create a prejudice against the defendant," citing many cases and among others *Morse v. R. R.,* 30 Min., 465; *Corcoran v. Peekskill,* 108 N.Y. 151; *R. R. v. Clem,* 123 Ind., 15. Part of the above quotation was taken from the opinion of *Judge Mitchell,* delivered by him in *Morse v. R. R., supra.* This Court adopted the same rule in *Lowe v. Elliott,* 109 N.C. 581, and approved what is above quoted from the opinion of *Mitchell, J.,* in *Morse v. R. R.,* citing three other cases, *Dougan v. Transportation Co.,* 56 N.Y., 1; *Sewell v. Cohoes,* 11 Hun, 626, and *Baird v. Daily,* 68 N.Y. 547. The case of *Lowe v. Elliott* was approved in *Myers v. Lumber Co.,* 129 N.C. 252; *Aiken v. Mfg. Co.,* 146 N.C. 324; *Tise v. Thomasville, supra; Boggs v. Mining Co.,* 162 N.C. 393. See Lockhart on Evidence, sec. 168.

But there are exceptions to this rule, some of which, with the reason for the rule, are stated in 29 Cyc., 616, 617, 618, and in the authorities which we have already cited. In this case the defendant denied that the hole and spike were out of the character described by the defendant, and this evidence tended to corroborate the plaintiff and his witnesses. This kind of testimony should be carefully explained to the

jury by the court, and they should be instructed not to consider it as evidence of negligence, but should confine it strictly to the purpose for which it is admitted. But if the judge fails to do so, it is not reversible error, unless he was asked for a special instruction thus restricting it. Rule 27 (164 N.C. 438); *Tise v. Thomasville, supra,* where it is said, at p. 282: "It was competent to show that the repairs were made afterwards—not that the repairs were evidence tending to prove negligence, but simply to prove their date to contradict the defendant's witnesses." *Westfeldt v. Adams,* 135 N.C. 591.

The evidence was also competent in corroboration of the plaintiff's evidence of the existence of the hole at that time and place. The defendant contends that, in this view, the court should have instructed the jury that this evidence was admitted only in corroboration. But Rule 27 (140 N.C. 692) provides that this is not error "unless the appellant asks, at the time of admission, that it be restricted." *Hill v. Bean,* 150 N.C. 437. Indeed, it does not appear that the judge did not give a proper instruction. The presumption is that he did, as there is no exception that he did not. *S. v. Powell,* 106 N.C. 638; *S. v. Brabham,* 108 N.C. 796; *Byrd v. Hudson,* 11 N.C. 211.

2. The testimony of the plaintiff as to the cause of his injury (470) was harmless. He stated that he felt the severe pain immediately after he had received the injury. He had no hernia before and there was scarcely any evidence to show that the hernia was not caused by the jerking of his body by the truck; but, on the contrary, it all tended strongly and almost conclusively to show that it was so caused.

3. The exhibition of a spike, not the one which was in the hole, was likewise harmless. It was offered, not to identify it as the one which caused or helped to cause the injury, but as being like it in size and form, for the purpose of giving the jury some light upon the question as to whether the spike was at all instrumental in injuring the plaintiff; (like a map or diagram is used in some cases), and as evidence it was merely explanatory.

4. We have read the complaint carefully, and are of the opinion that there is sufficient allegation therein as to the clogging of the truck's wheels. We must give it a liberal construction. *Blackmore v. Winders,* 144 N.C. 215; *Brewer v. Wynne,* 154 N.C. 467; *Talley v. Granite Co.,* 174 N.C. 445; *Simmons v. Roper L. Co.,* 174 N.C. 220. In the first of these cases we said:

"The uniform rule prevailing 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 can be rejected as insufficient."

This is as to the sufficiency of the pleading. If a more definite allegation be deemed necessary by the opposite party, he should ask, by motion, that it be made more certain. *Mullinax v. Hard,* 174 N.C. 607. Speaking to an objection that there was a variance between an allegation of general and special damages and the proof, we said re-
(471) cently in *Conrad v. Shuford,* 174 N.C. 719, that "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. 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 negligence and reckless act of the defendants in running by her vehicle and scaring her 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. If a more definite statement of the injuries was desired, the defendant could have asked for a bill of particulars," citing several cases.

As to the objection that there is variance between allegation and proof, we can well repeat here what was said in *Simmons v. Roper L. Co.,* 174 N.C. at p. 228: "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, Re-

visal, secs. 515-516, 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 conclude therefore, that there was no substantial variance, and certainly none which in the state of the record is available to the defendant.

5. If the court improperly stated the contentions of defendant, the matter should have been called to the judge's attention in due time, so that he could have an opportunity to correct his statement of them. Other wise they are not ground for exception. *S. v. Johnson,* 172 N.C. 920; *Jeffress v. R. R.,* 158 N.C. 215; *S. v. Blackwell,* 162 N.C. 672.

6. In actions for personal injuries, one of the elements for the assessment of actual or compensatory damage is mental anguish. The rule of damages in such cases is stated in *Wallace v. R. R.,* 104 N.C. 442, 452 (where the plaintiff was injured by defendant's negligence), as follows: "In this class of cases (injury by negligence), the plaintiff is entitled to recover as damages one compensation for all injuries, past and prospective, in consequence of the defendant's wrongful or negligent acts. These are understood to embrace indemnity for actual nursing and medical expenses and loss of time, or loss from inability to perform ordinary labor or capacity to earn money. Plaintiff is to have a reasonable satisfaction (if he is entitled to recover) for loss of body and mind, which are the immediate and necessary conse- (472) quences of the injury." The rule as thus formulated was taken from 3 Southerland on Damages (1st Ed.), p. 261, and is sustained by many cases here and elsewhere. *Osborn v. Leach,* 135 N.C. 633, and cases which are collected in the Annotated Edition of 104 N.C., at p. 452. Two of the more recent cases in which the rule was approved as being "full and comprehensive," are *Patterson v. Nichols,* 157 N.C. 407, and *Rushing v. R. R.,* 149 N.C. at pp. 161, 163. Of course there must be direct or circumstantial evidence from which the jury may infer that the injury was accompanied by mental anguish, and there was such in this case, as appears in the record.

We have carefully examined and considered all of the defendant's exceptions, and have reached the conclusion that the rulings of the learned presiding judge were free from error, and that the case was correctly tried in all respects.

No error.

Cited: Manufacturing Co. v. Building Co., 177 N.C. 106; *Holt v. Manufacturing Co.,* 177 N.C. 178; *Beck v. Tanning Co.,* 179 N.C. 126; *Ricks v. Brooks,* 179 N.C. 209; *State v. Lowe,* 187 N.C. 39; *Pridgen v. Pridgen,* 190 N.C. 105; *Nye v. Williams,* 190 N.C. 133; *State v.*

Steele, 190 N.C. 510; *Shelton v. Railroad*, 193 N.C. 674; *Krites v. Plott*, 222 N.C. 683; *Fanelty v. Jewelers*, 230 N.C. 698; *Mintz v. Railroad*, 236 N.C. 113.

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LESSIE HORTON v. SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 8 May, 1918.)

1. Master and Servant—Negligence—Assumption of Risks—Contributory Negligence—Employer and Employee.

The doctrine of assumption of risks by the servant engaged in a dangerous employment arises by contract, and does not embrace an injury received through the negligence of the master in failing to perform a distinctive duty that he owes to the servant therein engaged; and where through the negligence of a railroad company some of its box cars became loose and ran into its freight train, injuring the conductor thereon, evidence that the conductor was running his train without a headlight in violation of a statute, riding at the time in a caboose car which he had placed in front of the locomotive, and might not have been injured if it had been properly placed in the train, bears on contributory negligence to be considered by the jury in diminution of the damages under the Federal Employers' Liability Act.

2. Master and Servant—Negligence—Contributory Negligence — Statutes —Trespassers.

The conductor on a railroad train does not become a trespasser to whom the company owes no duty except to refrain from wilful injury by running his train without a headlight in violation of a statute.

3. Master and Servant—Federal Employers' Liability Act—Damages—Dependents—Issues—Statutes.

In an action to recover damages under the Federal Employers' Liability Act for the legal dependant of an employee suffering injury or death through the negligence of a railroad company while engaged in interstate commerce at the time of such injury, each of the beneficiaries coming within its provisions is entitled to recover the pecuniary benefit he or she may have sustained from the negligent act, and issues as to the amount as to each, should be submitted to the jury. Our State Statutes, Revisal, secs. 59-60, relating to a recovery by a personal representative of the deceased for a wrongful death, have no application. *In re Stone*, 173 N.C. 208, cited and distinguished, and the dictum therein overruled.

4. Master and Servant—Federal Employers' Liability Act—Instructions —Damages—Appeal and Error.

Upon the measure of damages to be awarded to the dependent children of an employee of a railroad company, killed by the negligence of the com-

pany while he was engaged in interstate commerce, a charge is proper that the jury should award to each such an amount as the deceased would reasonably be expected under all the facts and circumstances in the case to have contributed to the maintenance and education of the child, the loss sustained being pecuniary its own and including a recovery for the loss of that care, counsel, training, and education which the child might, under the evidence, have received from the parent, and which only could be supplied by the services of another by compensation; and where it is necessarily implied from the language used, that it is limited to the minority of such children, it will not be held objectionable as not restricting the maintenance allowable to their minority.

WALKER, J., dissenting; BROWN, J., concurs in this dissent.

APPEAL by defendant from *Long, J.*, at October Term, 1917, of UNION.

This is an action of damages for wrongful death under the Federal Employers Liability Act. The plaintiff's intestate was killed at 4 a.m., 9 February, 1917, in a wreck between Monroe and Wingate about a mile east of Monroe. Said intestate was conductor on the westbound freight train and was proceeding towards Monroe. He had placed a caboose and tank car in front of the engine and was pushing them and pulling 36 freight cars when 21 heavily loaded freight cars which had gotten lose at Monroe rolled down the grade, striking his train, and killing plaintiff's intestate.

The following issues were submitted:

1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

2. Did the plaintiff's intestate, by his own negligence, contribute to his death, as alleged in the answer? Answer: "Yes."

3. Did the plaintiff's intestate, by his own conduct, assume the risk of being killed by the collision between his train and the runaway cars, as alleged in the answer? Answer: "No."

4. What damage, if any, is the plaintiff entitled to recover for herself as the widow of her intestate? Answer: "$10,000."

5. What damage, if any, is the plaintiff entitled to recover for the infant Gus Horton? Answer: "$5,000."

6. What damages, if any, is the plaintiff entitled to recover (474) for the infant, Annie Horton? Answer: "$5,000."

To which the jury responded as above set out.

Judgment was rendered upon the verdict, from which defendant appealed.

Stack & Parker for plaintiff.

Cansler & Cansler, Armfield & Vann, and John M. Robinson for defendant.

CLARK, C. J. The defendant does not discuss in his brief Exceptions 3, 5, 6, 7, 11, and 12, which, therefore, under Rule 34, are deemed abandoned.

The plaintiff alleged that the death of her intestate was caused by the negligence of the defendant (1) in allowing loaded freight cars to run down its main line without any one in charge to exercise control over them; (2) in making up a train upon its main line upon a steep grade, and in allowing loaded freight cars to stand upon the grade without brakes being properly applied; (3) in violently bumping cars left upon the grade; (4) in equipping the cars which broke loose with defective couplers.

There was evidence tending to support these charges of negligence and the court properly instructed the jury in regard thereto.

The fourth assignment of error is that the court charged as follows: "If the jury find from the evidence that the wreck which caused the death of the plaintiff's intestate was solely and proximately caused by the negligence of defendant's servants in not properly applying brakes on cars standing on its main line on a grade, the jury are instructed that the risk of this negligence was not assumed by the deceased in allowing the caboose in which he was riding to be pushed by the engine, even if the deceased would have escaped injury if the caboose had been behind the engine instead of in front of it."

In this we find no error. The doctrine of assumption of risk is that an employee assumes the risks of accidents and injuries incident to the business properly operated. He does not assume the risk caused by the negligence of the company, in not furnishing proper appliances or in any other respect. In this case the jury have found that the death of the intestate was due to the negligence of the defendant in the particulars above set forth. If the plaintiff in any respect contributed thereto by putting the caboose and tank car in front of the engine, this was not assumption of risk, but was contributory negligence, and though it is not clearly apparent that this action contributed to the collision with the runaway cars, the jury have so found, and neither party has
(475) appealed on that ground, and the jury have apportioned the damages under the Federal statute. Such contributory negligence was the act of the intestate and not a risk of the business which he assumed.

In *R. R. v. Campbell,* 241 U.S. 497, the Court said: "It is most earnestly insisted that the findings established that Campbell was not

in the course of his employment when he was injured, and consequently that judgment could not properly be entered in his favor upon the cause of action established by the general verdict. This invokes the doctrine that where an employee voluntarily and without necessity growing out of his work abandons the employment and steps entirely aside from the line of his duty, he suspends the relation of employer and employee and puts himself in the attitude of a stranger or a licensee. The cases cited are those where an employee intentionally has gone outside of the scope of his employment, or departed from the place of duty. The present case is not of that character.... We are not aware that in this case it has been seriously contended that because an engineer violated his orders he went outside of the scope of his employment."

Conceding that the conduct of the deceased was in violation of State law because the intestate, who was a conductor, was running the train without the headlight displayed as required by State law, he did not thereby become a trespasser to whom the defendant owed no duty save to retain from willful injury. His conduct, at most, as between him and his employer was contributory negligence, which the jury have found. In the case just cited the United States Supreme Court held that though Campbell was guilty of a criminal offense in violation of State law, "his right to recover against his employer depends upon the acts of Congress, to which all State legislation affecting the subject-matter must yield." citing *R. R. v. Riggsbee,* 241 U.S. 33.

The deceased was not a trespasser, but was an employee engaged at the time of his death in the discharge of his duty, and if guilty of negligence in the make-up of his train, the damages have been diminished on account of that negligence by the provision of the Federal Employers Liability Act that the negligence of an employee should not defeat but merely diminish the recovery.

There is a vital difference between contributory negligence and assumption of risk, which is thus stated, 1 Labatt on Master and Servant, secs. 305 and 306, as follows: "Assumed risk is founded upon the knowledge of the employee, either actual or constructive, of the risks to be encountered, and his consent to take the chance of injury therefrom. Contributory negligence implies misconduct, the doing of an imprudent act by the injured party, or his dereliction in failing to take proper precaution for his personal safety. The doctrine of assumed risk is founded upon contract, while contributory negligence is solely matter of conduct. This distinction has often been approved by the United (476) States Supreme Court in cases under the Employers' Liability Act. *R. R. v. Horton,* 233 U.S. 492; *R. R. v. Wright,* 235 U.S. 376.

The distinction is well stated in Richie "Federal Employers' Liability Act" (2 Ed.), 169, as follows: "Though an employee is said to assume the risk of the consequences resulting from a violation of rules, this is properly contributory negligence. And an employee in view of severe weather conditions is guilty of contributory negligence and does not assume the risk when he fails to protect the rear of his train by proper signals, though warned by the following engineer that it was impossible to see the block signals and told to do a good job of 'flagging.' "

Exceptions 8 and 9 are as follows:

8. "If you answer this third issue (assumption of risk) 'Yes,' the plaintiff cannot recover at all."

9. "In this connection I will say to you that 'assumed risk' is founded upon the knowledge of the employee of the hazzards to be encountered and his consent to take the chance of injury therefrom."

We find no error in these instructions, which require no discussion.

The intestate left a wife and two children, and Exceptions 1 and 2 are to the court submitting an issue as to damages sustained by each of the three beneficiaries for whom the action was brought.

At the time of his death the deceased was engaged in discharging the duties of a freight conductor on one of the defendant's freight trains engaged in interstate commerce, as is admitted in the defendant's brief, and this action brought under the Federal Employers' Liability Act.

There is a radical difference between the wrongful death statute of North Carolina, Revisal, 59, and the provision of the Federal Statute under which this action is brought. Revisal 59, provides that the action shall be brought by the personal representative of the decedent: "The amount recovered in such action is not liable to be applied as assets in the payment of debts or legacies, but shall de disposed of as provided in this chapter for the distribution of personal property in case of intestacy." And Revisal, 60, provides: "The plaintiff in such action may recover such damages as are fair and just compensation for the pecuniary injury resulting from such death."

The Federal statute provides as follows: "Every common carrier by railroad, etc., shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee for such injury

or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason (477) of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, road bed, works, boats, wharves, or other equipment."

Under our State statute the damages are based upon the present worth of the net pecuniary value of the life of the deceased. *Ward v. R. R.*, 161 N.C. 186. Under the United States statute the damages are based upon the pecuniary loss sustained by the beneficiary. *R. R. v. Zachary*, 232 U.S. 248.

Under the State statute the jury assesses the value of the life of the decedent *in solido*, which is disbursed under the statute of distributions. Under the United States statute, the jury must find as to each plaintiff what pecuniary benefit each plaintiff had reason to expect from the continued life of the deceased, and the recovery must be limited to compensation of those relatives in the proper class who are shown to have sustained such pecuniary loss. *R. R. v. Vreeland*, 227 U.S. 59; *R. R. v. Didricksen, ibid.*, 145; *R. R. v. McGinnis*, 228 U.S. 173; *R. R. v. Zachary*, 232 U. S. 248. In the latter case the Court said: "The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This of course excludes any recovery in behalf of such as show no pecuniary loss."

This was not overruled in *R. R. v. White*, 238 U.S. 507. In the latter case the defendant did not ask to have the damages apportioned by the jury, but moved for arrest of judgment after the verdict was rendered because the verdict was a general one. The Court merely held that the verdict was not void because not apportioned and that the apportionment was no concern to the defendant, who can not be heard if it did not except on the trial. None the less the plaintiff has a right, as in this case, to have the jury apportion the recoveries.

The defendant in this case strenuously insists that the matter has been settled otherwise in this State by the decision *In re Stone*, 173 N.C. 208. In that case the decision was correct upon the facts, for it was not an action brought under the Federal Employers' Liability Act, but a proceeding to distribute a fund in the hands of the administratrix, and this Court held that it should be distributed according to our statute of distributions, and the writ of error to the United States Supreme Court was dismissed for want of jurisdiction. The opinion in that case, quoting in conclusion from *R. R. v. White, supra*, said: "The

amount allotted to each party entitled is no concern to the defendant, unless such allotment increased the amount of the total recovery." The *Stone* case was also correct in construing the Federal statute as
(478) to the three classes of beneficiaries and holding as follows: "The Federal statute, therefore, creates three classes, which are separate and distinct from the other. If there is any member of the first class, but one or more of the second, then the third class will be excluded. If any member of the last class does not come under the provision 'dependent upon such employee' *(Dooley v. R. R.,* 163 N.C. 454), then such person is excluded from that class, and if such exclusion should apply to the whole of that class, then there can be no recovery. If the recovery by 'next of kin' should be enlarged by the wrongful inclusion of one not 'dependent,' that question must be raised at the trial by proper exceptions. *R. R. v. Zachary,* 232 U.S. 248."

The opinion *In re Stone,* however, proceeded to say, as contended by the defendant in this case, that "the Federal statute makes no provision for the apportionment of the funds, and therefore the State statute controls. The source of recovery is the United States statute, and that indicates only the different classes of the beneficiaries and the manner of ascertaining the amount due. But when the amount and class are ascertained, the sum paid or recovered must be distributed in that class according to the requirement of the State law." It is true this was not necessary to the decision in that case, but we must frankly say, after further advisement and fuller consideration, that this conclusion cannot be sustained. It is at variance with the tenor of the Federal statute, which is based upon the loss of each beneficiary in the class entitled as the measure of the recovery, and this can only be ascertained, logically, by a finding of the jury as to the amount of loss sustained by each of the beneficiaries entitled. It may well be that one or more of the children or one or more of the next of kin may have received very slight or no pecuniary loss, while the loss to others who were "dependent upon the deceased" was much greater.

In *Collins v. R. R.,* 148 N.Y. Supp., 781, the Court quotes from *R. R. v. McGinnis,* 228 U.S. 173, as follows: "The statutory action of an administrator is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought. Though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary loss. That apportionment is for the jury to return. This will, of course, exclude any recovery in behalf of such as show no pecuniary loss," and adds that the jury having returned a verdict *in solido* without apportioning the amount among those dependent upon the plaintiff's intestate, the judgment was reversed.

In *Kenny v. R. R.*, 167 N.C. 14, this Court held that the words "next of kin" must be construed in each State by the statutory meaning of those words in that State, and on writ of error, 240 U.S., 489, this was upheld; but this does not militate against the apportionment required by the statute as to each member of the class (479) entitled to recover.

This matter has been so fully considered by the United States Supreme Court that we do not deem it necessary to elaborate it, or to say more than that our contrary ruling in the *obiter dictum* in the *Stone* case is overruled.

Exception 10 is as to the following charge: "As to the children, the damages would be such an amount as the deceased would reasonably be expected, under all the facts and circumstances in the case, to have contributed towards the maintenance and education of the two children; the loss sustained is peculiarly their own, including a recovery for the loss of that care, counsel, training and education which the child might under the evidence, have reasonably received from the parent, and which could only be supplied by the services of another for compensation."

And Exception 13 is that the Court charged: "The award for each child will embrace compensation for the loss of that care, counsel, training, and education which it might, under the evidence, have reasonably received from its father, and which can only be supplied by the services of another for compensation. The jury will note in this instruction that the element of damage with regard to the care, counsel, training, and education of the children is an element which applies to them but which does not apply to the wife."

We find no error in these instructions. The defendant objects that the jury were not restricted to the minority of the children as regard maintenance. But we think that it is fair and reasonable intendment from the context and that the jury could not have been misled. The instruction was as to the loss of care, counsel, training, and education, to be reasonably expected from the father, and maintenance naturally would be implied only to the same extent.

Exceptions 14 and 15 are merely formal, and the other exceptions not discussed above were, as already stated, abandoned by not being brought forward in defendant's brief.

No error.

WALKER, J., dissenting: The court, by its charge to the jury, virtually eliminated the defense of assumption of risk by the following instructions to which an exception was duly taken: "If the jury find

from the evidence that the wreck which caused the death of the plaintiff's intestate was solely and proximately caused by the negligence of defendant's servants in not properly applying brakes on cars standing on its main line, on a grade, the jury are instructed that the risk of this negligence was not assumed by the deceased in allowing the caboose in which he was riding to be pushed by the engine, even if the deceased would have escaped injury if the caboose had been behind the
(480) engine, instead of in front of it." There are several reasons why this instruction is erroneous:

1. There is no evidence to sustain it, as all of the testimony showed that the wreck was caused by the collision of the loose cars and the train, and this was due far more to the fault of the intestate than to that of the defendant.

2. Assumption of risks as a defense is not excluded by the act of Congress unless there has been a violation of the statute enacted for the safety of employees, or, in other words, the Safety Appliance Acts, and which relate to automatic couplers, grab-irons, height of drawbars, train brakes, driving wheels, and ash pans, and defects in appliances of that kind, but there is nothing in the enumeration which includes the negligence of an employee in coupling cars. There is no evidence in this case that any of the appliances were defective or that there was any failure to comply with the provisions of statutes passed for the protection of employees, as all appliances were there and in good order and condition; and here, we may well refer to decisions of the highest Federal Court upon the question whether there is any such evidence. The law does not infer negligence from the mere occurrence of an accident, such as the parting of a train of cars, even if a coupling has come apart, provided it was of the required kind and in good condition. There is nothing here but the fact that the cars parted and that the coupling was opened, though in good order, but how opened does not appear. Let us see, then, how such a state of the evidence is regarded by that Court.

In *Batten v. R. R.*, 179 U.S. 658, the Court held that the fact of the accident—where plaintiff, a fireman, was injured by stepping off his engine at the end of a trip, and the step turned with him and threw him under the engine, where his leg was crushed by the wheels—was no evidence of negligence on the part of his employer. The Court, premising that the fireman should have waited for the inspection to be made before hazarding the use of the step, then said:

(a) That while in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a

presumption which, in the absence of some explanation or proof to the contrary, is sufficient to sustain a verdict against him, for there is prima facie a breach of his contract to carry safely *(Stokes v. Saltonstall,* 13 Pet., 181; *R. R. v. Pollard,* 22 Wall., 341; 22 L. Ed., 877; *Glesson v. R. R.,* 140 U.S. 435, 443), a different rule obtains as to an employee. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence. R. R. *v. Barrett,* 166 U.S. 617.

(b) That in the latter case it is not sufficient for the em- (481) ployee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of a half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.

And again: "The plaintiff was not then called upon to have anything to do with the engine until after it had been inspected and repaired. He chose, for his own convenience, to go upon the engine and do his work prior to such inspection. No one can say from the testimony how it happened that the step became loose. Under those circumstances it would be trifling with the rights of parties for a jury to find that the plaintiff had proved that the injury was caused by the negligence of the employer."

Looney v. R. R., 200 U.S. 480, is also pertiment to this question. The essential facts of the case and the point decided are well stated in the headnotes to the case as reported in 50 L. Ed., at p. 564, as follows:

"1. A street railway pitman, by unnecessarily touching the uninsulated parts in adjusting the leads connecting the motive power of a street car with the overhead current, relieves the company from liability for his death from the resulting shock, although the conductor of the car may have been negligent in permitting the trolley pole to come in contact with the trolley wire.

"2. The existence of defects in the insulation which would render a street railway company liable for the death of an employee occasioned

by a shock received in adjusting the leads connecting the motive power of a car with the overhead current, cannot be inferred from the presumption of the exercise of due care on the part of a person killed, although, in the absence of a leak in the insulation, no shock could have received unless he had unnecessarily touched the uninsulated ends of the leads."

In the course of the opinion in *Looney's* case, the Court said, by *Justice McKenna:* "Plaintiff must establish grounds of liability against the defendant. To hold a master responsible, a servant must show that the appliances and instrumentalities furnished were defective. A defect cannot be inferred from the mere fact of an injury. There must (482) be some substantial proof of the negligence. Knowledge of the defect or some omission of duty in regard to it must be shown."

R. R. v. Barrett, 166 U.S. 617, is cited by the Court, wherein it appeared that a fireman in charge of a switch engine was injured by the explosion of the boiler of another engine. There was evidence tending to prove that the boiler was and had been in a weak and unsafe state by reason of the condition of the stay bolts, and that if a well-known test had been applied the condition of the bolts would have been discovered. The Circuit Court instructed the jury that the mere fact of the injury received from the explosion would not entitle plaintiff to recover; that, besides the fact of the explosion, he must show that the explosion resulted from the failure of the railroad company to exercise ordinary care either in selecting the engine or in keeping it in reasonably safe repair. The court also instructed the jury that the burden of proof was on the plaintiff throughout the case to show that the boilers and engines that exploded were improper appliances to be used on its railroad by the defendant; that by reason of the particular defects pointed out and insisted on by the plaintiff the boiler exploded and injured him, and the plaintiff was ignorant of the defects and did not by his negligence contribute to his injury.

Passing on these instructions, the Court said, in the *Barrett* case, that they laid down the applicable rule with sufficient accuracy; and in substantial conformity with the views of the Court expressed in prior cases which were cited. It was further said that a presumption in the performance of duty attends the defendant and must be overcome by direct evidence.

In the *Patton* case already cited, the Court, referring to this question, held that no inference of negligence can be based upon mere matter of conjecture, or the mere possibility that negligence existed. There must be something more than a guess or supposition that a defendant was negligent in order to charge him with liability. These cases are

cited with approval in *R. R. v. Wiles,* 240 U.S. 444 (60 L. Ed., 732), where it appeared that a train of cars had parted at one of the couplings by the pulling out of the drawbar, which the Court said was not, by itself, proof of the company's negligence, and disapproved the ruling of the court below, it having applied the rule *res ispa loquitur,* or the thing itself speaks. Wiles was required by the rules of the company to protect the rear of his train by going back and placing fuses or torpedoes on the track to warn the approaching train of the accident, so that a collision would be averted. He failed to do this and the approaching train crashed into the caboose, where he was at the time and killed him. The Court said of these facts:

"His fate gives pause to blame, but we cannot help pointing (483) out that the tragedy of the collision might have been appalling. He brought death to himself and to the conductor of his train. His neglect might have extended the catastrophe to the destruction of passengers in the colliding train. How imperative his duty was is manifest. To excuse its neglect in any way would cast inmeasurable liability upon the railroads and, what is of greater concern, remove security from the lives of those who travel upon them; and therefore all who are concerned with their operation, however high or low in function, should have a full and anxious sense of responsibility. In the present case, there was nothing to extenuate Wiles' negligence; that was nothing to confuse his judgment or cause hesitation. His duty was as clear as sit performance was easy." The Court further said that he knew the dangers of the situation, and it was his duty to avert them by obeying the rules of the company, adopted for his own protection as well as that of the traveling public. In our case, the facts are revealed to us. The train was properly equipped with brakes and couplings of the required type, and after the cars had been coupled together, they stood for some time before the coupling was opened, in some way not known, and the cars parted. There is no more reason in this case for the application of the rule *res ipsa loquitur* than in the cases we have cited, and not as much as in those cases; and, if we look on the other side of the question, it appears that the intestate brought the catastrophe upon himself by his own willful and reckless act. He knew the rules of the company, and he knew the law as to headlights, and he insistently took the course that resulted in this dreadful disaster against the earnest protest of his engineer, who warned him of the danger, and obscuring the view of the latter by the car which cut off entirely all light and all chance of safety, he blindly proceeded with his train towards Monroe from Wingate, and thus rode to his death. We may pause to blame him in the presence of the great calamity, but our present duty

is to declare the law and to preserve the rights of the defendant when it has been guilty of no legal wrong. We cannot conceive of more reckless conduct. He hazarded every chance and assumed every risk. He violated the law of this State, and, under, it, he was criminally negligent. If he had placed the caboose at the rear end of his train, there would have been "a wreck." as the instruction puts it, but his life would have been saved as the facts show. So that his death was caused by his own act while he was violating the company's rule and the general law. There is no act of negligence which has been more severely condemned by this Court, and properly so, than the movement of a train without a headlight. *McNeill v. R. R.*, 167 N.C. 390, and other cases
(484) *infra.*

What should be said of this act of negligence when a car is so placed ahead of the engine as not only to cut off the engineer's view to the front of his train but to blindfold him entirely and remove any possible chance of safety. If the caboose had been in its proper place the accident would not have occurred, for the engineer had 1,700 feet of clear and straight track in front of him, and east of the place where the collision occured the track was straight for 300 yards or 900 feet, and besides, he had a headlight of 1,500 candlepower, measured without the aid of a reflector. With all these aids he could have seen far ahead and reversed the motion of his train or backed to a higher level, and thus got beyond the reach of the runaway cars; but of all of these advantages the engineer was deprived by the intestate's own conduct, which was taken against his will and his strong protest.

Let us see what condemnation has been passed upon such a case in our own reports. In *McNeill v. R. R., supra,* it is said by the *Chief Justice* that the failure to have a headlight is not only criminal but is negligence of such a character as to be *"the causa causans of the death,"* where death ensues. And further, at pp. 398, 399, 400, and 404; "In the present case there is a statute requiring electric headlights, and if the plaintiff's intestate was stricken and killed by an engine running without any headlights, it was negligence *per se* under those authorities. The defendant was running in violation of law and was committing an indictable offense. If a man while committing an indictable offense kills another, it is at least manslaughter. For a stronger reason he is liable for negligence.... Even before the statute of 1909, ch. 466, it was held that it was negligence *per se* to carry no headlight. *Willis v. R. R.*, 122 N.C. 909. There is a long line of decisions which hold that it is negligence to operate a train without a headlight. *Stanly v. R. R.*, 120 N.C., 514; *Heaverner v. R. R.*, 141 N.C. 245; *Brown J.,* in *Allen v. R. R., ibid,* 340; *Walker J.,* in *Morrow v. R. R.*, 147 N.C. 627;

Brown J., in *Hammett v. R. R.*, 157 N.C. 322; *Shepherd v. R. R.*, 163 N.C. 518.

"As there was evidence sufficient to go to the jury that the deceased was killed by the train when it was operating without a headlight, such negligence was the proximate negligence.... If the jury found from the evidence that the defendant company operated its engine without a headlight, and that the deceased came to his death as the result of being struck by such engine, this was negligence *per se* or negligence of itself, on the part of the railroad company, and you should answer the first issue 'Yes' ... If this light was not furnished, the company was not only negligent, but its negligence was a continuing one. ... It is well established that the employees of a railroad company are required to keep a careful and continuous lookout along the track; and the company is responsible for injuries resulting as (485) the proximate consequence of their negligence in the performance of its duty. How could this duty be performed in the night-time in the absence of a headlight? ... A more deadly instrument of death and destruction cannot be devised than one of these powerful engines rushing across the country on a dark night at 20 to 70 miles an hour without giving warning by headlight. *Shepherd v. R. R., supra; Horne v. R. R.*, 170 N.C. 645."

This is all just condemnation, and the statutory denunciation is in full accord with it. When an employee brings disaster to himself by an open and deliberate violation of the law and the rules of his employer, we may regret the unfortunate result, but we cannot close our eyes to his legal wrong, and to the plain injustice of saddling someone else with damages, when the latter had adopted the rules for the protection of the wrongdoer, and to prevent the occurence of just such a disaster. The employer company knew, as everybody knows, that if there is no headlight on the engine, or the outlook of the engineer is completely obstructed by a caboose car, which is worse than no light, the train and its passengers are constantly exposed to fearful accidents, and, when the caboose is in the lead, without any possible chance of escape for the passengers, the train then becomes a deathtrap. Can it be said that the employee who by his own act and order brings about such a dangerous situation does not assume all risks? If in the presence of a risk created by the master, of which he knows and the danger of which he realizes, he is said to assume the risk, why does he not assume it when he creates the risk himself, the extreme danger of which is a constant one?

We said in *Whitson v. Wrenn*, 134 N.C. 86: "It is the duty of the servant, it is true to obey the orders given him, unless obedience to

them will be obviously dangerous; in which case he has the right and it is his duty to himself to disobey them. The law requires that he should do so or suffer the consequence of his recklessness. Our case is the very converse of the one stated. Here the servant was ordered to do his work in a safe way, and he preferred to do it in another and what proved to be a dangerous way. Why should the master be liable if the servant acted in disobedience to his orders and was thereby hurt? It must be admitted that he was the author of his own injury. If it was necessary that the method adopted by him should have been not only in disobedience of his orders, but in itself dangerous, in order to visit upon him the consequences of his refusal to observe his master's directions, it surely is not required that it should have been obviously dangerous. It is quite sufficient to bar his recovery if he knew that his method was a dangerous one, and chose to do his work in that way rather than in the manner pointed out by his master." That case has often been cited with approval.

(486) C. The instruction of the court quoted above is faulty in another particular. It takes away from the defendant the defense of assumption of risks, if the defendant's servants by their negligence caused the intestate's death. The act of Congress contains no such provision, and this case was tried under it. The company could not possibly foresee that such negligence would take place and provide against it. There is no reference to such negligence in the act of Congress, as being one of those things which is the subject of the legislation. It is not mentioned by name in the safety appliance act, and an employer could not well anticipate it, even if there is any evidence of such an act of negligence in this case. The jury could do no more than guess that it was the cause of the death, and this is not sufficient evidence, as we have shown.

D. If there was any evidence of negligence on the part of the defendant which caused the wreck, it was proper to instruct the jury, as the court did, that the wreck was the proximate cause of the death, as the jury might have found from the evidence that, while the wreck resulted from defendant's negligence, it was the proximate cause of the death, as the conductor would not have been killed if he had not been grossly negligent in placing the caboose in front of the engine, and all the evidence tended to prove that he would not have been killed had he obeyed his orders, and placed the caboose at the other end of his train; and their also was evidence that if the engineer's view and the headlight had not been obstructed, he might have escaped injury. What was the proximate cause of the death was not a question which the court could decide in favor of the plaintiff as a matter of law. It would

have been more nearly right to have given such a charge in favor of plaintiff's intestate." It is true that he died in the wreck, but whether this would have occurred but for his own act was a question for the jury and this error had a direct effect upon the first issue, as to whether the death was caused proximately by the defendant's negligence, as well as upon the issue as to assumption of risk. We do not think the court was justified in telling the jury that the wreck, in law, proximately caused the death, as whether it did or not involves the question as to the intestate's own negligence and the part it played in this tragedy. In this discussion we have assumed, of course, but only for the sake of argument, that there is tangible and legal evidence of the defendant's negligence.

It must be that a railroad company would be grossly derelict in its duty, both to the public and its employees, if it failed to adopt such rules and regulations for the running and operating of its trains as make for safety, and it follows that the servant, for whose guidance in the discharge of his important and hazardous duties these rules are made, must obey them, and if he fails to do so and is himself (487) injured by reason of his disobedience, he is to be regarded in law as the author of his own injury, and if thereby he injures others, the railroad company is liable to them under the rule *respondent superior,* and he is liable to the company for all damages caused by his negligence. *Holland v. R. R.*, 143 N.C. 435; *Haynes v. R. R., ibid.*, 154.

We said in *Holland v. R. R., supra:* "The intestate was the one to whose keeping had been committed the safety of his comrades in the company's service, of the passengers on the train, and of his employer's property, and he was more responsible for it than any one else. He failed in the performance of his duty at the very moment when his obedience to orders and his vigilance were most required to prevent the resulting catastrophe. His negligence was ever present and the efficient, and, indeed, the dominant cause of his injury and death, reaching to the effect and therefore proximate to it. To subject the defendant to a recovery in such a case does not seem to be equitable, and would certainly contravene established principles of law. Plaintiff's death was caused, not by the defendant's negligence, but by his own disobedience of instructions. If a servant disregards the express directions of his master, and pursues his own way in performing his duties, the resultant injury to himself, if any, the law imputes to his own willful or negligent act, as the proximate cause, if not the only cause thereof. The intestate simply did something which he was told not to do. He substituted his own will for that of his employer, and his case falls within the maxim *Volenti non fit injuria.*" *Whitson v. Wrenn*, 134 N.C. 86;

Hicks v. Mfg. Co., 138 N.C. 319; *Stewart v. Carpet Co.*, 138 N.C. 60; *Biles v. R. R.*, 139 N.C. 532; *Patterson v. Lumber Co.*, 145 N.C. 42.

What we said in the first appeal in the same case is quite as much, if not more to the point, as will be seen from this extract: "All things considered, the question at last is, Was the situation a safe one, if the intestate had kept the position assigned to him by the defendant at or near the switch, so that he could prevent any interference with it and guard against any resulting danger? If so, his failure so to act was the proximate cause of his death, as it was the sole efficient cause. The company had provided a perfectly safe method of management of its train at that point, which if adopted would have saved the life of the intestate." *Holland v. R. R.*, 137 N.C. 373; *Holland v. R. R., supra.* We are referred by defendant's counsel to the case of *R. R. v. Chapman*, 62 S. E. (Ga.), 488, as supporting the position that intestate having violated the company's rules promulgated for his safety, and also the statute, he occupied, as between himself and defendant no better position than a stranger, and was entitled to no greater degree of care from the company, and the case seems to be relevant to the
(488) point and sustains it. See, also, *Lloyd v. R. R.*, 151 N. C. 536, also cited in defendant's brief in the same connection. Rule 17 of the defendant requires that "the headlight be displayed to the front of every train at night." This rule is dosobeyed, even if the light is burning, provided a car is put in front of it so that the engineer cannot see ahead of his train, and though a man should be placed on the leading car—here a tank car—as lookout. The statute and rule requires a certain kind of light, sufficient in candlepower and so placed as to enable the engineer to see far ahead on the track and avoid collisions with objects on the tracks by stopping his train or reversing it, as the situation may require, and in this case such provision by the conductor would have saved his life and would have suggested itself to any man of ordinary prudence without a statute or a rule to guide him.

It all comes to this, that, if the verdict and judgment are to stand, the defendant will be made to pay heavy damages to the plaintiff for the death of her intestate, whose own act was directly responsible for it, and who committed that act in plain disregard of defendant's rules, adopted for the very purpose of protecting him and preventing it, not to say anything of the damage done to the defendant's property, and that, too, when the intestate's act was intentional, while that of the defendant was not so. The conductor disobeyed the law, and the positive orders of the defendant, as we have said, and the latter should not be required to bear any loss or pay any damages by reason of it. It has already lost property without recompense, or the probability of any.

E. Upon the question of damages, it may be said that the act of Congress does not contemplate a separate assessment of damages for each beneficiary, but one that is in *solido*, or for all the beneficiaries. *R. R. v. White*, 238 U.S. 507; *In re Stone*, 173 N.C. 208; *Kenney v. R. R.*, 167 N.C. 14. In the *Stone* case the *Chief Justice* said: "The Federal statute makes no provision for the apportionment of the fund, and therefore the State statute controls. The source of the recovery is the United States statute, and that indicates only the different classes of the beneficiaries, and the manner of ascertaining the amount due. But when the amount and class are ascertained, the sum paid or recovered must be distributed in that class, according to the requirement of the State law. In this case there being a widow and a child, the amount is to be divided between them, according to our statute, two-thirds to the child and one-third to the widow. That matter is regulated by the State statute of distribution," citing *Cent. Vt. R. Co. v. White, supra.*

It is said that in *Stone's* case the Court was dealing with a fund already recovered without apportionment, but, as I understand it, that was not the ground of the decision, which was the plain meaning of the act of Congress as declared by the highest Federal Court (489) in R. R. *v. White, supra.*

Referring to the statutes of those states which do not provide for an apportionment of the damages to the several beneficiaries, it is said by the Court in the *White* case: "The Employers' Liability Act is substantially like *Lord Campbell's* Act, except that it omits the requirement that the jury should apportion the damages. That omission clearly indicates an intention on the part of Congress to change what was the English practice so as to make the Federal statute conform to what was the rule in most of the states in which it was to operate. Those statutes when silent on the subject, have generally been construed not to require juries to make an apportionment. Indeed, to make them do so would, in many cases, double the issues; for, in connection with the determination of negligence and damages, it would be necessary also to enter upon an investigation of the domestic affairs of the deceased—a matter for probate courts and not for jurors."

This language would seem to condemn the form of the verdict in this case. The plaintiff in error, defendant below, insisted that the verdict should have apportioned the damages as here, instead of allowing a gross sum, as the jury did in that case. But the Court rejected this view and held that the verdict should be *in solido*.

It may not concern the defendant how the distribution of the fund is made by the law, but the verdict, as it now stands, presents an anom-

aly, when we consider how the money will be divided among the parties. Under our statute, the widow will get one-third, and the two children one-third each (Revisal of 1905, ch. 1, sec. 131), for "where there is a widow and not more than two children," that is the portion allotted to each of them. It follows that the widow will not get $10,000, which the jury gave to her, but only one-third of $20,000, which is the whole amount of the damages, or about $6,666.66, whereas the two children will each receive the same amount. That is, the widow will get about $3,333.33 less than the amount allotted to her, and the children will get that much more than the jury gave them, though this extra amount will not be received because of any dependency upon their father and the loss of his care and support, notwithstanding the act of Congress requires that the recovery by them should be based on such loss. The defendant may be interested to know that money is being collected from it, which will actually be paid to some of the parties who are not entitled to it under the terms of the act, though in form it was given to another by the verdict.

It is also objected by defendant that the charge of the court as to the children was too broad, that is, covered too much time, and that as to maintenance and education it should have been restricted to
(490) their minority. This would seem to be a just and proper criticism. There are other assignments of error, but we will not undertake to review them, as the discussion of the case has already been prolonged far beyond what we originally intended is due to the great importance of questions involved.

The Court has held that the judgment should be affirmed, while we think that it should be reversed, and a new trial awarded, as in opinion, serious error was committed at the trial.

Cited: Hudson v. R. R., 176 N.C. 496; *Moore v. R. R.*, 179 N.C. 638, 639, 647; *Strunks v. R. R.*, 187 N.C. 175; *Gerow v. R. R.*, 188 N.C. 79; *Cobia v. R. R.*, 188 N.C. 489, 491, 493; *Gerow v. R. R.*, 189 N.C. 815; *Barnes v. Utility Company*, 190 N.C. 388; *Wimberly v. R. R.*, 190 N.C. 445; *Carpenter v. Power Co.*, 191 N.C. 132; *Holeman v. Shipbuilding Co.*, 192 N.C. 238; *Batton v. R. R.*, 212 N.C. 268; *Wilson v. Massagee*, 224 N.C. 713; *In re Badgett*, 226 N.C. 93, 94.

W. L. WILSON *v.* WILLIAM J. POLK AND SARAH POLK.

(Filed 8 May, 1918.)

Automobiles—Negligence — Evidence—Ownership—Principal and Agent —Chauffeur — Minor Son.

Where the mother is the owner of an automobile which ran into a buggy at night and injured the plaintiff, the guest thereon of another, through the negligence of her 19-year-old son, driving the machine at the time, and the son, with his father, were engaged in the business of the mother, the latter is liablie whether she was then in the automobile or not; and evidence of her ownership and that the machine was being driven by her minor son in pursuance of her business is sufficient to take the case to the jury, subject to be rebutted. *Linville v. Nissen*, 162 N.C. 101, cited and applied.

APPEAL by defendants from *Webb, J.*, at October Term, 1917, of MECKLENBURG.

This is an action against the *feme* defendant to recover damages for personal injuries caused by an automobile running down the plaintiff, who was going home in a buggy drawn by a mule, in the night-time.

From a verdict and judgment in favor of the plaintiff the defendants appealed.

E. R. Preston and Duckworth &Puhlman for plaintiff.
J. D. McCall and Plummer Stewart for defendants.

CLARK, C. J. The evidence for the plaintiff is that he was a guest in the buggy owned by one Thompson, and was on his way home at night, when he was run into by the automobile in a head-on collision; that he recognized the *feme* defendant in the automobile and spoke with her; that the automobile was driven by her son, and that her husband was in the conveyance at the time. It was also in evidence that the *feme* defendant listed the automobile as her property on the tax list, and that license was issued in her name. She offered evidence that she was not in the automobile, and that she had given her auto- (491) mobile to her son, who had exchanged it for a new one. There was conflict of evidence, on which the jury found that the automobile was owned by the *feme* defendant and her son.

There was evidence that the defendants were running the automobile at night without headlight, or with defective headlights which did not enable them to see the plaintiff in the buggy, while the defendants offered evidence that the plaintiff's buggy was on the wrong side of the road and had stopped. This was denied by evidence for plaintiff. The jury found against the defendants as to the negligence which caused

the collision. There was no evidence of contributory negligence by the plaintiff, who was a passenger in the buggy.

There was some evidence, irrespective of the evidence of ownership, that the car was being sent out by the wife on a mission to her farm. The court charged on this phase as follows: "If you find the son guilty of negligence, or if you find the husband was guilty of negligence, and find that they were her agents, acting in the employment of the wife and mother, find that she had sent them out to look after her business and sent them in her car, and sent the boy along he being 19 years of age, if you find he was 19 years of age, and find that he was guilty of negligence, and that he was her agent, acting under her authority, the court charges you that she would be liable just as much as if she were along. But if you find that her husband and son were not acting as her agent, and if you find that she did not send them out to look after her business, and find that she was not along, find she was at home, and find she did not know where they had gone, but knew that they had taken the machine and gone off with it, but not to attend to her business or by her direction, the court charges you that any negligence of her husband or son would not be imputed to her, and it would be your duty to answer the issue 'No' as to her. If it was not her car she would not be liable."

The evidence as recited in the statement of the case is not very full as to the mission to the *feme* defendant's farm, but the exception is merely to the charge above given, and not on the ground that there was no evidence to support it. We cannot presume that the jury found the fact without evidence, and if such exception had been set out in the appellant's statement of the case on appeal, doubtless the evidence in support of that hypothesis would have been recited more fully. The jury absolved the husband from liability, but found against the mother and the son. It is unnecessary to discuss the other exceptions.

From the argument in this case and in others before us, there seems to be some misapprehension as to our ruling in *Linville v. Nissen,* 162 N.C. 101. The Court did not hold in that case that proof of the ownership of the automobile, and that it was being driven by the
(492) minor son of the owner was not evidence to go to the jury. These are facts which usually call for explanation from the defendant owner. The Court held in that case that such evidence was rebuttable, as in that instance by the fact that the son had been forbidden to use the machine and had taken it out and was using it contrary to his father's wishes and without his knowledge; and that the mere ownership of the automobile of itself would not make the owner liable for personal injuries; that a parent was not ordinarily liable for such

tort of his minor son (subject to exception where the father permitted a child of tender years to run his automobile), nor would the owner be liable for the negligence of his son or any other chauffeur running an automobile unless at the time driving the machine in the scope of his employment or implied authority. *Clark v. Sweeney*, at this term.

No error.

Cited: Bilyeu v. Beck, 178 N.C. 483; *Tyree v. Tudor*, 181 N.C. 216; *Tyree v. Tudor*, 183 N.C. 346; *Williams v. R. R.*, 187 N.C. 352; *Grier v. Woodside*, 200 N.C. 761; *Carter v. Motor Lines*, 227 N.C. 195.

(493)

JULIA J. ROBERTSON ET AL. v. WILLIAM J. ANDREWS, W. R. JOHNSTON ET AL.

(Filed 8 May, 1918.)

Bills—Devise—Survivors of a Class—Intent—Die Without Children—Ultimate Devisee.

A devise of land to the named children of the testator, providing that if any of them die without leaving child or children, such portion to be divided among the survivors; and upon the death of any of such children leaving a child or children surviving, this portion to be divided among his or her children; *Held*, the intent of the testator was that the share of his estate derived by each of his children, under his will, should go to the ultimate survivor, as between themselves, in case any one of them died without surviving children; and the portion so going over vested absolutely in him freed from the original limitation.

CLARK, C. J., concurring; HOKE, J., concurs in opinion of CLARK, C. J.

APPEAL from *Long, J.*, at February Term, 1918, of MECKLENBURG.

This proceeding is brought to sell a certain lot of land in the city of Charlotte and to determine the proper disposition of the proceeds. The property has been sold and the proceeds are in *custodia legis*. The court, *Long, J.*, entered a decree disposing of the same, from which H. C. Jones, guardian *ad litem* to the unborn children of William R. Johnston, appealed.

Hamilton C. Jones for appellants.

Clarkson & Taliaferro for appellee, *William R. Johnston.*

BROWN, J. The admitted facts appear to be that Col. William Johnston died in 1896 seized in fee of extensive real estate holding in

the city of Charlotte. His surviving children, devisees under his will, were Mrs. Julia M. Andrews, Mrs. Cora J. Robertson, Franklin G. Johnston, and the appellee, William R. Johnston. All are dead except William R. Johnson, who is unmarried, and without children. Franklin G. Johnston was the last to die, and left no children. He died intestate seized of the lot sold under his father's will. The will contained this clause:

"5. In the event of the death of either of my children without leaving a child or children surviving, his or her portion is to be equally divided between those surviving; and upon the death of any one of my children leaving a child or children surviving, his or her portion of my estate shall be divided among the issue of such deceased child, such division to be made *per stripes,* each of my children being allowed to hold and enjoy his or her portion of my estate during his or her life."

The Superior Court adjudged that William R. Johnston was entitled to one-third of the proceeds of the sale absolutely, and that any child he may leave surviving him can have no interest in them.

It is manifest that the testator intended, and so expressed his intention, that the share of his estate derived by each of his children under his will should go to the ultimate survivor as between themselves in case any one of them died without surviving children. Franklin G. Johnston died intestate leaving no children, having never married. The only survivor of the four children of the testator is William R. Johnston. Consequently, he took the entire estate of his brother, which had been devised to him by their father. Then the survivorship stops as to such estate of Franklin G. Johnston upon the principle that a portion going over to a survivor upon the death of the primary devisee vests absolutely in the survivor, and is no longer subject to the original limitation of the will. While the estate of William R. Johnston directly derived under his father's will is subject to such limitation, that which he received from his brother by survivorship ceases to be.

The rule seems to be generally recognized by courts as well as text-writers that, where under a will it is provided that upon the death without issue of the first taker, his devise shall go to the survivor of the class, upon the happening of such contingency the share going over vests absolutely in the survivor. That is to say, "A share having once survived vests absolutely."

It seems that this doctrine was at one time in dispute and *Lord Hardwicke,* in *Pain v. Benson,* 3 Atk., 78, held to the contrary; but it is now well established, both in this country and England. 3 Jarman on Wills, p. 560; 40 Cyc., 1513; 30 A. & E., 810; *Woodard v. Glasscock,* 2 Vernon, 388; *Perkins v. Micklethwaite,* 1 P. Wms., 274.

In Underwood on Wills, sec. 582, the author gives a clear statement of the law: (494)

"In an early case it was held that where the testator gives a fund to several as tenants in common, whether as a class or as individuals, with a limitation to survivors upon the death of any of them unmarried or during minority, and one dies, his share goes to those who survive him, and if afterwards another dies, only the latter's original share goes to those who survive him, but not the interest which accrued to him; for that, says the Court, is a new legacy, and having vested, devolves upon his personal representatives. This rule is applicable when the will is silent. And the fact that the testator directs that the share of any legatee dying shall go to the survivors will not carry his accruing share. The word 'share' will conclusively be presumed to refer only to his original share, and not to any interest which may have been gained by him by reason of survivorship. The same rule applies where the testator employs the term 'portion.' Thus, where a fund was to be divided among the children of A., to be paid to each one on majority or marriage, and in case any one should die before his or her 'portion' should become payable, then to the survivors, the share which accrues before the date of payment does not pass with the original shares of the surviving child or children. . .In the absence of a very clear expression of intention, it is settled that limitations or qualifications which are attached to the original shares do not attach to accruing shares. Thus, though the original shares are given for life only, a gift of the shares accruing by survivorship, in indeterminate language may carry them absolutely. So, where an original share is limited over to survivors on the death of the primary legatee without issue, and the accruing shares are given generally, the accruing shares do not go over on death without issue, but the surivivor takes absolutely an indefeasible interest, and on his death without issue the interest which accured to him by survivorship goes to his representatives."

The adjudications of this Court fully sustain the rule that a share having once survived, vests absolutely.

In the case of *McKay v. Hendon,* 7 N.C. 21, testator bequeathed to his three children, W., M., and S., certain slaves, to be divided when they became of age, and provided "that if either of said children should die under age, without heirs, then that share should be divided between the other two children." M. did under age without issue. W. then died without issue, leaving S. surviving and some brothers of the half blood.

It was held that the part of M.'s share which accured to W. upon her death did not survive to S., but went to W.'s next of kin.

In this case the Court, *Taylor, C. J.*, said: "The rule is that where legacies are given to three or more persons as tenants in com-
(495) mon, with a bequest to the survivors upon the death of any of them within a given period, the original legacies only and not those shares which accrued by survivorship, will survive; because such accrued shares, vesting the surviving legatee in distinct proportions, proper words are necessary to make these shares survive with the others." The old English case of Paine v. Benton, 3 Atk., 78, was cited and distinguished and its doctrine disapproved, and has been subsequently overruled by the later English cases.

The foregoing case has never been questioned or overruled in this State, but has been followed and cited with approval.

In *Owen v. Owen,* 45 N.C. 121, testator made a bequest to nine children, with a proviso that if any of them should die without lawful issue of their body then surviving, their part should be equally divided among the other children. Several died without issue, in succession.

It was held that only the original shares passed by the will to the survivors, and that the shares accruing to them by the deaths of their brothers and sisters became their absolute property. The case of *McKay v. Hendon, supra,* was cited and approved.

In *Mayhew v. Davidson,* 62 N.C. 47, property was devised to four children in trust for life, the shares of each to go his children, but if one or more should die without issue, "the property is to return to his, her, or their brothers and sisters."

It was held that the property to which one of the children became entitled as survivor was not subject to the original limitations, but vested absolutely.

The adjudications of other State Courts are in line with ours.

In *Marshall v. Safe Dep. Co.,* 101 Md., 1, *Chief Justice McSherry* of the Court of Appeals of Maryland discusses the subject very elaborately and holds that a share having once survived vests absolutely.

In *Boggs v. Boggs,* 69 N.J. Eq., 497 *Chancellor Magie* of New Jersey discusses the question at length, and so does *Chief Justice Hornblower* in *Sedel v. Wills,* 20 N.J.L., 22, and both recognize and apply the doctrine.

The following cases also fully sustain the rule: *Gorham v. Betts,* 9 Ky. L., 607; *In re Clark,* 78 N.Y. Supp., 108; *McGee v. Hall,* 26 S.C., 179; *Reams v. Spann,* 26 S.C., 561; *Lewis v. Claiborne,* 13 Tenn., 369; *Henley v. Robb,* 86 Tenn., 474.

We find no cases to the contrary, but all without exception hold that in the absence of a clearly expressed intention to the contrary, a share having once gone over under a clause of survivorship, vests absolutely

in the survivor, and such accrued share is no longer subject to the original limitations.

There is nothing in the will of Colonel Johnston that exempts (496) the shares or portions devised to his children from the operation of this rule.

Therefore we hold that upon the death of Franklin G. Johnston without children, the whole of the property devised to him vested absolutely in W. R. Johnston.

The latter seems to be content with one-third of it and submitted to the judgment of the Superior Court without appeal, which adjudges him to be the owner of one-third absolutely.

Affirmed.

CLARK, C. J., concurs in the result and also in the principle presented for decision that in the construction of a will "a portion of the estate going over to a survivor upon the death of the primary devisee vests absolutely in the survivor, and is no longer subject to the original limitations of the will," but does not concur in the holding that but for the assent of W. R. Johnston the entire share of Franklin G. Johnston would have gone to him, and would not have been divided between himself and the children of his two sisters.

Section 5 of the will reads as follows: "In the event of the death of either of my children without leaving a child or children surviving his or her portion is to be equally divided between those surviving; and upon the death of any one of my children leaving a child or children surviving, his or her portion of my estate shall be divided among the issue of such deceased child, such division to be made *per stirpes*, each of my children being allowed to hold and enjoy his or her portion of my estate during his or her life."

The provision that upon any child dying childless that share "is to be equally divided between those surviving," is not restricted to the testator's children then surviving, for the sentence proceeds "and upon the death of any one of my children leaving a child or children surviving, his or her portion of my estate shall be divided among the issue of such deceased child, such division to be made *per stirpes*."

It would seem from this that the intent of the testator was that if any of his children should die childless, such share should go to the surviving children, and to the children of those who are dead, leaving children, *per stirpes*. It is true, the ruling upon this question is not necessary, and is, so to speak, *obiter dictum*, but if acquiesced in, it may be quoted as a precedent to trouble us in some other case.

Cited: Yarn Company v. Dewstoe, 192 N.C. 125.

(497)

GRACE M. SPITTLE, ADMINISTRATRIX v. CHARLOTTE ELECTRIC RAILROAD COMPANY ET AL.

(Filed 8 May, 1918.)

1. Street Railways—Negligence—Proximate Cause—Fire Engines—Municipal Corporations—Cities and Towns—Streets—Railroads.

Where street cars, under a valid ordinance of a city, are required to stop for fire trucks, etc., going to a fire, and there is evidence that the motorman on one of them, on such occasion, could have heard the approach of a second fire truck after the passage of one of them, and also understood the signals given by the first of the approach of the second one and ran his car at a speed of 8 or 10 miles an hour into a street intersection where the second truck was to cross, running at 25 or 35 miles an hour, which could not have been stopped on seeing the street car in time to avoid the injury; in an action by an employee of the city on the second truck, driven by another employee in charge, to recover for a personal injury thus received; *Held*, defendants' request for instruction eliminating the element of proximate cause was properly refused.

2. Same—Evidence.

When it is material to the inquiry in a personal injury negligence suit, whether defendant's motorman on its street car should have heard the approach of a fire truck at a street crossing a block or two away, evidence is properly admitted tending to show the distance similar trucks could be heard by other motormen on similar cars under like conditions.

3. Instructions—Evidence—Negligence—Prayers for Instruction.

A modification of defendant's request for instruction in a personal injury negligence case, so as to incorporate other negligence acts of defendant, the evidence tended to show and omitted from the request, is proper.

4. Instructions—Negligence—Concurring Negligence — Prayers for Instruction.

Where the evidence tends to show concurring negligence of the defendant in a personal injury negligence case, defendant's request for instruction which omits this phase of the controversy is properly refused.

5. Instructions—Evidence—Questions of Fact—Prayers for Instruction.

A request for instruction is properly refused in a personal injury negligence case when erroneously based upon a conclusion of law instead of an issue of fact, or upon a principle of law unsupported by the evidence.

6. Street Railways—Municipal Corporations—Cities and Towns—Ordinances—Negligence—Question of Law.

Where a personal injury is alleged to have been proximately caused by the negligence of the defendant street car company's motorman, and there is evidence, among other things, tending to show he was running the car, under the circumstances, at a speed greater than that allowed by a valid city ordinance, his thus running the car is negligence as a matter of law,

if established, entitling the plantiff to recover if it was the proximate cause of his injury.

7. Municipal Corporations—Fire Regulations—Ordinances.

An ordinance regulating the speed of street cars therein outside of the fire limits, requiring them to stop for the passage of fire engines going to a fire, etc., giving the firmen thereon the right of way upon the streets, etc., is a valid one.

APPEAL by defendant from *Long, J.*, at February Term, 1918, of MECKLENBURG. (498)

This action is by the administratrix of her deceased husband, who was a fireman in Charlotte, for his death caused by collision between the automobile fire truck upon which he was riding and the street car of the defendant. The collision took place at the center of the intersection of two streets which crossed at right angles. The fire truck hit the street car about the center of the car, knocking it around and turning it crosswise.

The deceased was a machinist in the city fire department and riding on the fire truck, but had nothing to do with driving it or controlling its movements. The fire alarm having been given, the truck was running at a speed of 25 to 35 miles per hour, exhausting, sounding its gong, and blowing its horn continuously from the time it left the central fire station until the collision. On approaching the Southern Railroad crossing, it slowed up to about 15 miles an hour. Thereafter it again increased its speed to 25 to 35 miles per hour until the driver of the fire truck saw the street car, just before he reached the street upon which the street car was running. The driver of the truck, on perceiving the street car, applied his emergency brake and locked the rear wheels of his truck. According to the testimony of the draftsman who had prepared the blue-print in evidence, the distance from the Southern Railroad crossing to the point of collision is 500 feet, and there is testimony that 150 feet further the truck could have been seen by the motorman on the street car, who by that time was 80 feet from the point of collision.

The street car as it approached the crossing where the collision occurred was running 8 to 10 miles an hour until it got within 10 feet of the line of Park Avenue, on which the fire truck was coming, when it slowed down to 4 to 5 miles an hour, as if in the act of stopping. But when the motorman, looking down the avenue, saw the approach of the fire truck some hundred feet away, he suddenly speeded up the car and ran it on the crossing just in time to be hit by the fire truck. The motorman admitted that if he had seen or had heard the approach of

the fire truck he could have stopped his car within 45 feet if running from 8 to 10 miles an hour. Two of the defendants' witnesses testified that if the car was running 6 miles an hour it could have been stopped within 12 feet. The plaintiff's witness testified that he had made the test with a similar fire truck, at the same point, under similar
(499) conditions, and that running 27 miles an hour the truck could not have been stopped in less than 200 feet.

The plaintiff's witnesses testified that when this fire truck was running at a speed of 25 to 35 miles an hour, making its usual noises and signals, it could be heard from half a mile to a mile, and that motormen operating cars similar to the one used should have heard it from 2 to 8 blocks away. The motorman testified that under such conditions he should have heard it a block away.

The Ordinances of Charlotte, sec. 93, require all street cars running outside of the fire limits to stop on the approach of any fire engine being operated in response to the fire alarm. Section 94 gives fireman operating fire trucks the right of way over all streets while responding to a fire alarm. Section 408 (14) requires the driver of street cars upon the approach of fire trucks to stop his car and keep it stationary until such fire truck shall have passed. The jury found that the plaintiff's intestate was killed by the negligence of the defendant Southern Public Utilities Company as alleged in the complaint, and assessed the damages. From judgment upon the verdict the defendant appealed.

F. M. Redd and Cansler for plaintiff.

C. W. Tillett and Osborne, Cocke & Robinson for defendants.

CLARK, C. J. The issue is almost entirely one of fact as to the proximate cause of the collision in which the plaintiff's intestate was killed.

The plaintiff contends that the driver of the fire truck was not guilty of negligence; that running at a speed of 25 to 35 miles an hour in response to a fire alarm he had a right to assume that the motormen of all street cars and other vehicles in obedience to the ordinances of the city would give the right of way. And that it was impossible for the driver of the truck to have stopped in time to have avoided the collision after he saw or should have seen the street car, and that if when he turned into the avenue on which the street car was running he had endeavored to avoid the collision by slowing up and turning to the left or right, the truck would have skidded broadside and have done more damage to the occupants of the street car as well as to those on the truck.

The motorman of the street car, according to his own evidence, should have heard the approach of the fire truck at least a block, and

according to the evidence of the plaintiff's witnesses at least three blocks away.

Assignments of error 1 and 2 cannot be sustained. It was competent for the plaintiff to prove by other motormen the distance in which they had heard the approach of similar fire trucks while operating street cars under similar conditions.

As to assignments of error 4, 5, and 7, the trial judge committed no error in modifying the defendants' prayers for instruction in regard to the negligence of the truck driver by requiring the (500) jury to find that negligence was the sole proximate cause of the injury, before answering the issue as to negligence of the defendant "No." Unless the negligence of the driver of the truck was the sole proximate cause of the injury, the court could not charge the jury to answer the first issue "No." *Crampton v. Ivie*, 126 N.C. 894; *McMillan v. R.R.*, 172 N.C. 853. In the latter case the Court said: "Where intestate was killed by the collision of an automobile in which he was riding, independently driven by another, with a train at a crossing, the negligence of the driver may be considered only upon the question of proximate cause in the action against the railroad."

Whether on the facts of this case the negligence of the driver of the truck was the sole proximate cause of the injury, was a question essentially for the jury. According to plaintiff's testimony, the approach of the truck could have been heard by the driver of the street car several blocks before the point of collision was reached. The motorman says at least a block away, and the witnesses on both sides testify that the motorman could have seen the approach of the truck when it was 150 feet south of the place where the collision occurred.

Sixth assignment of error. It was proper for the judge to modify the defendant's fourth prayer for instruction by requiring the jury to find the driver of the street car was not guilty of any other act of negligence, though not specified in the prayer, before answering the first issue "No."

Eighth assignment of error. The court also properly refused to charge as requested in the defendants' sixth prayer, because that required the jury to answer the first issue "No," even though they should find the motorman was guilty of concurring negligence.

Ninth assignment of error. The court also properly modified the defendant's seventh prayer by requiring the jury to find that the alleged negligence of the truck driver was the sole proximate cause of the injury before they could answer the first issue "No."

Tenth assignment of error. The court also properly refused the defendant's eighth request to charge, for it was a question of fact as to

whether the motorman heard, or understood, the warning of the driver of the first truck that another was following.

Eleventh and twelfth assignments of error. The defendant's ninth and tenth prayers were refused evidently because not based upon the evidence, the motorman having admitted that if the truck had been making the usual noises he could have heard it a block away.

Thirteenth assignment of error. The court properly declined to give the twelfth instruction asked because if the motorman discovered, either from the warning of the driver of the first truck, or other-
(501) wise, that a second truck was approaching in consequence of the alarm of fire, the city ordinance required him to stop his car immediately.

The fourteenth assignment of error. The court did not err in charging as requested by the plaintiffs in their second prayer. If the motorman ought to have seen the approach of the second truck in time to have stopped, his failure to do so was in violation of a city ordinance and negligence as a matter of law. If such negligence was the proximate cause of the injury, the defendant was liable therefor.

The case turns almost entirely upon the question whether upon the evidence there was violation of the city ordinance by the motorman which was the cause or the concurring cause of the collision. There can be no question of the validity of the ordinances in question. The plaintiff not being in control of the fire truck, the defendant was not entitled to have the issue of negligence answered in its favor unless the negligence of the driver of the fire truck was the sole proximate cause of the collision. *Crampton v. Ivie, supra.*

The amount of damages, and the earnestness and ability with which the cause has been presented in this Court, and doubtless in the court below also, have caused us to consider with great care the contentions of the parties. But aside from the issues of fact, which were solely for the jury, the propositions of law are in a small compass, and we think are summed up in stating the above conclusions of the Court.

No error.

Cited: Dail v. R. R., 176 N.C. 113.

SAM WARE v. SOUTHERN RAILWAY COMPANY.

(Filed 8 May, 1918.)

Railroads — Negligence — Instructions—Evidence—Proximate Cause——Questions for Jury.

Where the evidence tends to show that the plaintiff, an experienced section hand, ordinarily left a moving handcar of the defendant railroad to turn a switch for it to pass and boarded it again as it was running, under orders of his foreman in charge, and that he was injured under such circumstances by attempting to board the car running 7 or 8 miles an hour, driven at the time by gasoline, and that he was clumsy in doing so on this occasion, the mere fact that he attempted to board the car thus running and that he was ordered by his foreman to turn the switch, does not warrant an instruction to the jury to answer the issue of defendant's negligence in the affirmative, the question of negligence being for the jury to determine under the circumstances, as well as the question of the proximate cause of the injury.

CLARK, C. J., dissenting.

Appeal by defendant from *Harding J.*, at the November Term, (502) 1917, of Guilford.

This is an action to recover damages for personal injury.

The plaintiff was a section hand in the employment of the defendant, and was engaged in working upon the section near High Point under Foreman T. W. Pierce. He had been engaged in this work for more than two years, and on 27 October, 1917, the foreman with four section hands, including the plaintiff, was taking two cars from the belt-line which runs around a section of the city of High Point onto the main line which leads from High Point to Asheboro. The foremost of the two cars was propelled by a gasoline motor; attached to it in the rear was what is known as a "hand" or "push car," which is flat platform resting upon two trucks and has no motive power, but is ordinarily propelled by the men walking upon the tracks and pushing the car in front of them. On this occasion, it was attached to and propelled by the gasoline car. When the cars reached a point near the junction between the main line and the belt line, the plaintiff jumped off and went forward to the switch in order to change the switch so that the cars might leave the belt line and go upon the main line.

The evidence of the plaintiff is that the cars did not stop, and that as they were passing him the foreman directed him to jump on, and that he was injured in attempting to do so; that he had been jumping off and on about two years in changing the switch.

According to the plaintiff's testimony, they were running about six or seven miles an hour.

According to the defendant's testimony, they were running from four to five miles an hour.

His Honor charged the jury, among other things, as follows: "If the plaintiff has satisfied you by the greater weight of the evidence that this car was going at a dangerous rate of speed for him to get off and on the car, six or seven miles an hour, the court charges you if defendant, through its section master, ordered the plaintiff to get on this car, that would be negligence on the part of the defendant, and you should answer the issue 'Yes.' "

The defendant excepted. There was a motion for judgment of nonsuit, which was overruled, and the defendant excepted.

The jury returned the following verdict:

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

2. Did the plaintiff contribute to his injury by his own negligence, as alleged in the answer? Answer: "Yes."

3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: "$300."

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

John A. Barringer for plaintiff.
Wilson & Ferguson for defendant.

ALLEN J. The case of *Myers v. R. R.*, 166 N.C. 234, decided by a unanimous Court, is a controlling authority on both questions raised by the appeal, sustaining the exception to the charge and overruling the exceptions to the refusal to nonsuit the plaintiff.

In the *Myers case* the plaintiff was injured while attempting to get on a freight train running six or eight miles an hour, in obedience to the command of his superior, and upon appeal a refusal to nonsuit was affirmed.

It also appears from an examination of the original record that his Honor charged the jury that if they found from the evidence that the plaintiff was an employee of the defendant; that he was directed by his superior to get on the moving train; that he attempted to do so in obedience to the order given him: "that the train was running at a speed of about seven miles an hour, and that a reasonable man could have seen that it was dangerous for a man to get on a moving train going that fast"; that he used due care and caution in trying to do so, and was injured, and this was the proximate cause of the injury, it would be the duty of the jury to answer the first issue "Yes."

This charge was excepted to, and the exception was relied on in the brief, and the Court, without discussing each exception separately, says: "We have examined with care the exceptions set out in the record to the reception and rejection of evidence, and also to the charge of the court, and we think the case was substantially tried under the well-settled principles of law obtaining in this State."

It will be observed that in the charge, which has been approved, his Honor did not determine the fact that it was dangerous for an employee to get on a freight train moving seven miles an hour, nor did he declare as matter of law that to direct him to do so was negligence, nor did he instruct the jury to answer the first issue "Yes" without a finding that the negligence of the defendant was the proximate cause of his injury. On the contrary, he left the question of danger to the jury, under the rule of the reasonable or prudent man, and incorporated the principle of proximate cause as secondary before the issue could be answered in favor of the plaintiff, while in the charge now before us his Honor declared a speed of six or seven miles an hour to be dangerous and eliminated the finding of proximate cause altogether, which is an essential fact involved in the first issue.

"The authorities fully sustain the position of the plaintiff, (504) that it is negligence to run a train without a headlight at night along a track frequented by the public, but a plaintiff cannot recover upon proof of negligence alone. He must go further and prove that the negligence complained of was the cause of his injury. *Crenshaw v. R. R.*, 144 N.C. 314; *Pritchett v. R. R.*, 157 N.C. 101; *Henderson v. Traction Co.*, 132 N.C. 784.

"In the first of these cases the Court said: 'The burden is always on the plaintiff to show by a preponderance of evidence that the defendant committed a negligent act, and that it was the proximate cause of the injury. The two facts must coexist and be established by the clear weight of the evidence before a case of actionable negligence is made out. *Brewster v. Elizabeth City*, 137 N.C. 392'; in the second: 'In all courts where the common law is administered it is held that one cannot recover damages upon proof of negligence alone, and that he must proceed further and show that the negligence of which he complains was the real proximate cause of the injury'; and in the last: 'It is generally held—and this we regard as the doctrine—that the element of proximate cause must be established, and it will not necessarily be presumed from the fact that a city ordinance or statute has been violated. Negligence, no matter in what it may consist, cannot result in a right of action unless it is the proximate cause of the injury complained of by the plaintiff.'" *McNeill v. R. R.*, 167 N.C. 395.

That the question of proximate cause was material and in controversy is shown by the evidence of the defendant that the plaintiff was injured by his own carelessness, which caused him to stumble and fall on the car, and by the answer of the issue of contributory negligence in favor of the defendant.

There was less reason for submitting to the jury the question of the danger of getting on the moving car in the *Myers* case than in this, because the plaintiff in this action is an employee of experience who had for two years been jumping off and on the car when in motion without injury, while in the *Myers* case the injured employee was performing different services, some of them not connected with the operation of trains, and he was told to get on a heavy freight train, and in this on a low gasoline car. The danger was more apparent and the experience and skill of the employee less in the one case than in the other.

It is also recognized in *Reeves v. R. R.*, 151 N.C. 318, that the rule which usually prevents a recovery by one injured while getting on a moving train does not apply in strictness to experienced trainmen, and if to do so cannot be declared to be contributory negligence as matter of law, why should a direction to get on under the same conditions be arbitrarily declared to be negligence, instead of leaving the
(505) question to the jury to say whether the officer giving the order was acting as a reasonably prudent man, considering the speed of the train, the experience of the employee and other relevant circumstances?

This seems to us to be the better and safer rule, and it leaves to the jury disputed facts instead of permitting the judge to decide them.

New trial.

CLARK, C. J. dissenting: It is settled in this and indeed in all jurisdictions that when reasonable men can draw only one conclusion from a given state of facts, whether there is negligence or not, it is a matter of law. *Whitley v. R. R.*, 122 N.C. 987; *Clark v. Traction Co. (Brown, J.)*, 138 N.C. 77; *Miller v. R. R.*, 128 N.C. 26; *Chesson v. Lumber Co.*, 118 N.C. 59. It would seem that reasonable men could draw no other conclusion than that there is negligence when a railroad official, taking no risks himself, directs an employee to jump off a motor car "running 6 to 7 miles an hour, to run across the track, open the switch, and get back on the motor running 6 to 7 miles an hour." The judge, therefore, committed no error in telling the jury that if they found such state of facts to find the defendant guilty of negligence. The jury have found that the employee was guilty of contributory negligence in jumping back on the car, though ordered to do so, and have apportioned the

negligence in accordance with our State statute, Laws 1913, ch. 6, which was enacted since the decisions which made contributory negligence a complete defense.

It was in evidence that on 27 October, 1917, the plaintiff, who had been working for the defendant for more than two years as a section hand and who during that time had, under the orders of the section foreman in charge, been jumping off and on this motor car while it was running, to open and shut switches, on this occasion was told by his foreman to jump off and unlock the switch and get on again. To obey this order he had to jump off and run across the track, open the switch, and then jump back on the motor car, the motor running when he jumped off and when he jumped on. When the plaintiff attempted to jump back on the car it was running so fast that its momentum threw him off and the car ran over him. When he opened the switch he did not give any signal for the car to come on, for according to the custom and under the orders for two years past the car did not stop either for him to get off or on. He had always gotten back on the front car and, according to custom, attempted to do so again. There was a rear car, but that was loaded with tools and jacks and he had never had orders to get on that car.

The plaintiff had to act in haste before the car should pass him. He ran, according to custom, around the rear car to get on the gasoline or motor car where he had been riding when he jumped off (506) and on which the other men were riding at the time. Pearce, the foreman, was present on the car all the time, and plaintiff had been acting under his orders for two years past in this very matter of jumping off and on the car while in motion, and if he had not done so the plaintiff certainly could not have retained his job.

In *Pressly v. Yarn Mills*, 138 N.C. 410, the concurring opinion quotes as follows from *Judge Henry Clay Caldwell*, than whom no abler judge has sat upon the U. S. Circuit Bench: "Dangers which needlessly imperil human life and which can be remedied at little cost are not dangers necessarily incident to the operation of a railroad, but are dangers which it is the duty of the company to remove. The necessities of laboring men are often very great. The necessity of providing food for themselves and families may drive them to accept employment at the peril of their lives. But the employer does not obtain a license to kill his employees with impunity by proclaiming his purpose to subject them to unnecessary and needless perils—to perils that a reasonably prudent man, having a due regard for human life, would remove. Common humanity demands this. Moreover, the State has an interest in the lives of her citizens, and will not permit an employer needlessly to

imperil the lives of employees. The very highest consideration of public policy demands an enforcement of this rule. And the peril is unnecessary and needless where, as in this case, it can be removed at a slight expense. Notice (to employee) of the unnecessary peril in such case goes for nothing. As long as the needless peril is maintained, the employer is guilty of culpable negligence; and when by reason of such needless peril, an employee is killed, the law presumes he was exercising due care to escape the peril, and the employer is responsible for his death, unless he can prove affirmatively that the employee was guilty of negligence. In such case the death of the employee testifies that he was in the faithful discharge of his duty in the exercise of due care, and that his death is the result of the needless peril to which he was subjected." Upon this decision a very learned law writer, the author of Thompson on Corporations, says: "It is hard, very hard, to understand how human judges can balance the question of slight, very slight, expense to the railroad company against the maiming and death of meritorious laboring men, the tears and agony of their widows, and the beggaring of the orphaned children."

In this case, fortunately, the plaintiff was not killed, but he suffered pain and agony and permanent injury and those dependent upon him will suffer from his diminished capacity for earning caused by his exposure to such dangers by the negligence of the defendant.

(507) A case identical with this on the facts is *Reeves v. R. R.*, 151 N.C. 318, where *Brown J.*, held that "The rule that persons cannot recover damages for an injury received while getting off and on a moving car does not apply to brakemen acting in the line of their duty." In that case it was held that the plaintiff as a matter of law, was not guilty of contributory negligence. In this instance the jury was more favorable to the defendant railroad than it had a right to claim under the decision in *Reeves v. R. R.*, and found that while the railway company was guilty of negligence in requiring the plaintiff to jump off and on a moving car, yet the plaintiff was guilty of contributory negligence in doing so and apportioned the damages at $300. *Reeves v. R. R.*, has been approved. *Heilig v. R. R.*, 152 N.C. 469; *Carter v. R. R.*, 139 N.C. 500. The defendant has no cause to complain.

The defendant excepts, however, because the judge charged the jury that "If the plaintiff has satisfied the jury by the greater weight of the evidence that this car moving at 6 or 7 miles an hour and the foreman ordered him to get off the car and open the switch and get back on the car without stopping, the car going at the rate of 6 or 7 miles an hour, or if the foreman stood by and acquiesced in his doing so and allowed the plaintiff according to custom to jump off and get back on

the car while going 6 to 7 miles an hour, and made no effort to have the car stopped for the plaintiff to get on, that that would be negligence." In this there was no error, for when the facts are found whether there is negligence is a matter of law. 1 Thomas Neg., 672.

The plaintiff testified that the car was running 6 or 7 miles an hour. To order an employee to jump off and on a car running 6 to 7 miles an hour is evidently dangerous, and the judge properly told the jury if that were found, there was negligence as a matter of law. This is simply applying the law to the facts found. The plaintiff had a right to have this phase of the evidence submitted to the jury. *Brown J.*, in *Clark v. Traction Co.*, 138 N.C. 77.

The conduct of the defendant was negligence *per se* which made the defendant liable notwithstanding contributory negligence as found by the jury, for it needed no proof that making the plaintiff jump off and on a car moving 6 to 7 miles per hour was dangerous and hence negligence, as a matter of law. Under the recent statutes, both State and Federal, contributory negligence, which the jury finds, is not a bar to recovery.

It may be as well, in this case, to call attention to the meaning of several expressions often used in actions for death or injury caused by negligence.

Negligence *per se* is defined to be negligence as a matter of law upon a given state of facts found or admitted. 1 Thompson Negligence, sec. 10 *et seq.;* 6 *ibid.*, secs. 7393, 7396. There are many (508) instances, both on the part of plaintiffs and defendants, of negligence *per se* given in that work. See Index, Vol. 6, under head "Negligence *per se.*" This always arises where there is a violation of a statute or ordinance, or when the facts of themselves, as in this case, constitute negligence. 1 S. & R. Neg., sec. 27a; 4 Thompson Neg., 4416-4418, 4728, 4731; 6 *ibid.*, 7638, 7396. In most cases, of course, it must be found by the jury that such negligence was the proximate cause of the death or injury, that is the defense of contributory negligence is admissible.

In *Troxler v. R. R.*, 124 N.C. 189, and *Greenlee v. R. R.*, 122 N.C. 977, and cases cited to both in the Annotated Edition, and in many other cases, the failure of the defendant to furnish self-couplers or other safety appliances was held to be negligence *per se*, that is, negligence in law, before it was made a statutory duty to furnish such appliances.

In the *Greenlee* and *Troxler cases, supra,* it was held that the failure to furnish self-couplers or other safety appliances was a continuing negligence, and no evidence of carelessness by the injured party while

making a coupling, when ordered, without them could be heard in defense. In this case there is no evidence of negligence in the manner of plaintiff in jumping back on the moving car, but if there has been it was not contributory negligence, for there was continuing negligence on the part of defendant in the order given the plaintiff.

Then there is *prima facie* negligence, which raises a presumption of negligence as the occurrence of a collision, *Marcom v. R. R.*, 126 N.C. 200, and cases cited in the Annotated Edition, and there are many other instances, 29 Cyc., 599. When there is a *prima facie* negligence the defendant is liable unless he rebuts the presumption by evidence of the negligence is shown to be the proximate cause of the injury. *Moore v. Parker*, 91 N.C. 275, and *Aycock v. R. R.*, 89 N.C. 321, and citations in Annotated Edition.

Res ispa loquitur, i. e., "The thing itself speaks," is not a presumption of negligence, much less is it negligence *per se*, or negligence as a matter of law, but it is merely evidence of negligence for the consideration of the jury. 1 S. & R. Neg., sec. 58a.

The conduct of the defendant in requiring the plaintiff to jump off and on a shifting engine moving at a rate of 6 or 7 miles an hour was negligence *per se*, that is, it was negligence as a matter of law if the jury found, as it did under the instruction of the court, that the car was moving at that speed and that its momentum caused the injury sustained by the plaintiff.

It is true that Pearce testified that the car was moving from 4 to 5 miles an hour. The court did not even instruct the jury that it might be negligence as a matter of fact, to require the plaintiff to jump
(509) off and on when the car was running at that speed. The plaintiff, not the defendant, has cause to complain of this, for the jury might well find on that state of facts it was negligence on the part of the defendants. To make the defendant liable, it was not necessary that the car should have been going at a high rate of speed as 6 or 7 miles an hour. Yet the charge of the court was in effect to that purpose.

The jury found the plaintiff guilty of contributory negligence in getting back on the car, according to his orders and reduced the damages to $300. If it was contributory negligence for the plaintiff to get off and on a moving train, as a matter of law, then of course it was negligence, as a matter of law, for the defendant to order or permit, or by long custom known to the defendant to require the plaintiff *(Farris v. R. R.*, 151 N.C. 483; *Heilig v. R. R.*, 152 N.C. 469) to get off and on a moving car, whether the speed was 4 or 5 miles an hour as its foreman testified, or at 6 or 7 miles an hour as the plaintiiff testified.

In its essential features, the danger to the employee here is similar to that in "kicking" cars, which this Court has always held illegal. This

case being under the State statute, while contributory negligence can be apportioned, there could be no assumption of risk. In no case could it be deemed that employees working in such imminent danger voluntarily assumed to do so, but only under the spur of necessity. They know the danger, but do not assume it.

"Each toad beneath the harrow knows
Full well where every toothpoint goes."

Cited: Enloe v. Railroad, 179 N.C. 86; *Moore v. Railroad,* 185 N.C. 192.

(510)

L. A. BRISTOL v. CAROLINA CLINCHFIELD AND OHIO RAILWAY CO.

(Filed 8 May, 1918.)

1. Pleadings — Indefiniteness — Motions—Courts—Discretion—Statutes.

Where the complaint alleges that the defendant railroad company's locomotive, on or about a given day, negligently set out fire to the damage of plaintiff's land, and on defendant's motion to make the complaint more certain and definite, Revisal, sec. 496, the court orders that, within a fixed time, the complaint show "as near as practicable the hour and the direction of the train or trains"; *Held,* the plaintiff's objection to the order is addressed to the sound discretion of the trial judge, the exercise of which is not reviewable on appeal in the absence of its abuse.

2. Same—Appeal and Error.

Where a party has improvidently appealed from an order to make his pleading more definite and certain. Revisal, sec. 496, and has not addressed his objection to the sound discretion of the trial judge, based on his inability to comply, he may yet do so after the case has been remanded by the Supreme Court.

3. Pleadings—Indefiniteness — Motions — Certainty—Bill of Particulars —Statutes.

Where the complaint sets out neither a defective cause of action, nor a defective statement of a cause of action, but an uncertain or indefinite statement of a cause of action, it can only be corrected by a motion to make the pleadings more definite, Revisal, sec. 496, or by application for a bill of particulars, Revisal, sec. 494.

ACTION, heard upon motion in the cause, before *Justice, J.,* at December Term, 1917, of BURKE.

Plaintiff seeks to recover damages for injury to his hand by burning his timber, which he alleged was caused by fire negligently set out from one of defendant's engines "on or about 28 April, 1916." The complaint was filed at October Term, 1916, and answer 17 March, 1917, and motion was made by defendant under Revisal, sec. 496, to make the complaint more certain and definite at December Term, 1917. The court made the following order upon the motion: "In the above entitled cause and six others against the said defendant, it is ordered, upon motion of the defendant, that the complaint be made more definite, so as to show the day, and as near as practicable the hour and the direction of travel of the train or trains, alleged to have set out fire, as alleged in the complaint. The plaintiff to have forty days in which to file these amendments." Plaintiff excepted and appealed.

Spainhour & Mull and S. J. Ervin for plaintiff.
No counsel for defendant.

WALKER, J., after stating the case: The motion might well have been denied, because of defendant's long delay and gross laches in moving for the amendment or for a bill of particulars, but, on the other hand, it does not appear that the plaintiff could not have amended his allegation so as to have complied with the order. Plaintiff says, in his brief, that it is impossible to make the allegation more definite. This, however should have been addressed to the judge, who has a large discretion in such matters. If it had appeared to him, by affidavit or otherwise, that such was the case, he doubtless would not have granted the motion, and no appeal would have been necessary to review his action, if an appeal will lie in such a case, it being purely a matter of discretion. *Allen v. R.R.*, 120 N.C. 548; *S. v. Brady*, 107 N. C. 822, 827; *Conley v. R. R.*, 109 N.C. 692; *Blackmore v. Winders*, 144 N.C. 216; *S. v. R.R.*, 149 N.C. 508.

(511) It was said in the case last cited that this Court "will not review or disturb on appeal" the order of the judge unless there has been manifest abuse of his discretion. We find no such abuse. The judge has merely ordered that the amendment, in the particular respects set forth by him, be made "as near as practicable," and the plaintiff should at least have made an attempt to comply with this order instead of appealing. If he found that he could not make the complaint more certain or definite, after proper effort to do so, and this appeared to the court to be the fact, it would, we are sure, not have required any further amendment, and this course may be taken when the case goes back to the Superior Court.

A motion was made in *Conly v. R. R., supra,* for a more definite statement upon a complaint similarly worded, and this Court strongly intimated that it should have been granted. But the defendant was far more diligent in that case than the defendant has been in this one. Such a motion should be granted by the court with great caution, when made on the eve of the trial, as it causes delay and vexation, and if the party who makes the motion has been very dilatory, his motion should not commend itself to the favorable consideration of the court, if he is allowed to so move at all after answer is filed. *Allen v. R. R.,* 120 N.C. at p. 550.

But the court may, *ex mero motu,* direct the pleadings to be reformed. *Buie v. Brown,* 104 N.C. 335; Clark's Code, p. 207, sec. 261.

There is no reversible error in the ruling of the court, but the plaintiff will be allowed an opportunity to make his allegation more definite, if he can, and if it reasonably appears to the court that he cannot do so, the cause should proceed on the present complaint. There is neither the statement of a defective cause of action nor a defective statement of a cause of action, but an uncertain or indefinite statement of a cause of action, which can be corrected only by motion to make the pleading more definite, under Revisal, sec. 496, or by application for a bill of particulars, under section 494. Cause remanded with above directions.

No error.

Cited: Barbee v. Davis, 187 N.C. 82; *Power Company v. Elizabeth City,* 188 N.C. 286; *Sentelle v. Board of Education,* 198 N.C. 391; *Insurance Company v. Griffin,* 200 N.C. 254; *Farrell v. Thomas & Howard Company,* 204 N.C. 633.

J. D. GRANDY v. CAROLINA PRODUCTS COMPANY.

(Filed 8 May, 1918.)

Judgments—Appearance—Trials—Default—Attorney and Client—Laches—Motions.

The plaintiff allowed the return term of court to pass without filing complaint, and also negligently delayed filing reply after the answer, alleging a counterclaim had been filed. The defendant's attorneys were nonresident of the county, but practitioners therein, and repeatedly informed their client that no advantage could be taken by plaintiff, and they knew that the case would not be reached, according to the usual

setting of the trial calendar, until a year or more thereafter. The reply was filed near the end of a term, the case specially set by the judge and called therein, but continued to a fixed time at the next term with order to notify defendant's attorneys. The only notification was by sending a copy of the calendar by mail in an unsealed envelope, showing the setting thereon of the case in question. A meritorious defense being shown on defendant's motion to set aside the judgment consequently rendered by default, it is *Held*, the action of the trial court in setting aside the judgment for excusable neglect was not erroneous; and even if the defendant's attorneys were in laches, it would not bind the defendant, who had shown himself free therefrom.

CLARK, C. J., dissenting.

APPEAL by plaintiff from order of *Webb, J.*, made 9 October, (512) 1916; from MECKLENBURG.

This is a motion to set aside a judgment on the ground of excusable neglect. The judge found the facts, and among others that the defendant has a meritorious defense. The motion was allowed, and the plaintiff excepted and appealed.

Thomas W. Alexander for plaintiff.
Kenan & Wright and Stewart & McRae for defendant.

ALLEN, J. The summons was served on the defendant on 6 October, 1916, but the complaint was not filed until 9 January, 1917, three months later, although due at the October Term of Court.

The answer, which denied the plaintiff's cause of action and alleged a counterclaim, was filed 23 January, 1917, twelve days after the complaint, and the reply on 9 February, 1917, seventeen days after the answer.

The reply was filed during a term of court which began 5 February, 1917, and the action was set for trial 12 February, 1917, three days after issue joined.

It thus appears that the defendant had the opportunity to move to dismiss the plaintiff's action for failure to file complaint within the statutory time, and to move for judgment on his counterclaim at the beginning of the February term for want of a reply.

The attendance of the defendant and its counsel on 12 February could not reasonably be expected, nor could a trial be anticipated when the filing of the reply was delayed until after the term of court began, and this is not urged as negligence.

The judge who presided at the February term saw and appreciated the situation, and he directed that the trial be postponed and

the cause set for hearing on 14 March, 1917, and that the defen- (513) dant be notified of his order.

No notice was sent to the defendant except a copy of the calendar was mailed to counsel as second-class matter, and was overlooked, and the action was tried on 14 March in the absence of the defendant and his counsel.

If these facts show negligence on the part of counsel, it consists in failure to examine a court calendar sent to him as a circular, which frequently finds its way to the waste basket without being read, or because he did not make inquiry as to the status of the action during a period of thirty-three days elapsing between the filing of the reply and the date of the trial, when in the regular course of the docket and in the absence of the order advancing it ahead of other cases, it would not have been reached for trial until six or eight months later. The twelfth and thirteenth findings of fact are:

"That defendant's counsel knew that the civil issue docket of Mecklenburg County was congested, independently of what plaintiff's counsel wrote them; that in the ordinary course it would take about a year from the time action was brought to secure a trial in its regular order. Defendant's counsel were of the impression that plaintiff's counsel had agreed to notify them when the case would be called, but the court finds that there was no such definite agreement.

"This case was placed on the calendar and tried ahead of many other cases on the civil issue docket in this county which were instituted before it was, and if they had been tried in their regular order this case would not have been called for trial until some time later than the last February Term, 1917."

If, however, the negligence of counsel is established, this is not sufficient reason for denying relief to the defendant, since it has been held in numerous cases that the negligence of counsel in the performance of professional duties will not be attributed to the client. *Griel v. Vernon,* 65 N.C. 76; *Bradford v. Coil,* 77 N.C. 76; *Ellington v. Wilker,* 87 N.C. 16; *Gwathney v. Savage,* 101 N.C. 107; *Taylor v. Pope,* 106 N.C. 267; *Gaylor v. Berry,* 169 N.C. 733; *Shiele v. Ins. Co.,* 171 N.C. 431; *Seawell v. L. Co.,* 172 N.C. 325; *Lumber Co. v. Cottingham,* 173 N.C. 328; *Gallins v. Ins. Co.,* 174 N.C. 555.

In the *Cottingham* case, *Walker, J.,* says: "The distinction between the negligence of counsel while engaged in the performance of a professional duty and the negligence of the party is clearly marked, and the uniform rule with us is that the negligence of the first will not be attributed to the client, if he himself is in no fault; and this is true without regard to the solvency or insolvency of counsel. *Schiele v. Ins.*

Co., 171 N.C. 426." And *Brown, J.*, in the *Gallins case:* "As-
(514) suming 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.*, 171 N.C. 324."

It is true that in nearly all these cases relief was sought against judgment by default on failure to answer, but the same principle prevails now where there has been a verdict, since the amendment of 1893, incorporating "verdict" in the original statute.

We must then inquire as to the conduct of the defendant and see if it is in default.

Hoke, J., says in *Bank v. Palmer*, 153 N.C. 503: "That a party litigant 'who seeks to be excused for laches on the ground of excusable neglect, must show that the counsel employed is one who regularly practices in the court where the litigation is pending or at least one who is entitled to practice therein and was especially engaged to go thither and attend to the case.' *Manning v. R. R.*, 122 N.C. 824."

This requirement has been complied with strictly, as the judge finds: "That immediately after the service of summons on defendant it employed Kenan & Wright, a reputable firm of experienced lawyers, living in Wilmington, N. C., duly licensed to practice law in the State of North Carolina, authorized to practice in the courts of Mecklenburg County, and who, while they did not regularly attend every term of court of Mecklenburg County, had and were then practicing in said court, had other cases and especially agreed to go to Charlotte and try this case, and do everything that was necessary to protect the defendant's interest."

But the employment of counsel does not excuse the client from proper attention to his case *(Pepper v. Clegg*, 132 N.C. 312), and "the test of the negligence of the client or party is whether he has acted as a man of ordinary prudence while engaged in transacting important business." *Seawell v. L. Co.*, 172 N.C. 325. "The standard of care required of a defendant is that which an ordinarily prudent man bestows upon his important business." *Gaylord v. Berry*, 160 N.C. 733.

The defendant has met this test, and has measured up to the standard.

The judge finds that: "Defendant, after it first employed Kenan & Wright, continually consulted them about the case, asked them time and again if there was any chance of plaintiff securing a judgment without defendant being notified, advised said counsel that it has

never been sued before, and did not know what was necessary to do; that said counsel assured defendant that they would attend to the case, and do all things necessary, and that no judgment would be taken against them without due notice; and defendant relied on (515) the assurance of said counsel, and proceeded to locate the witnesses and arrange for having their deposition taken, and acted in regard to this matter as a reasonably prudent business man would in regard to important business."

In *Ellington v. Wicker,* 87 N.C. 15, the client failed to attend a term of court upon the assurance of counsel that it was not necessary for him to do so, and the Court said: "Surely his absence upon this information was excusable and the judgment entered up a surprise within the meaning of the statute, and no culpable default can be implied to him," and in *Taylor v. Pope,* 106 N.C. 270, a party was relieved of a judgment on the ground of excusable neglect when he left court relying on the promise of his counsel "to attend to the case."

The facts in these cases show no greater diligence than that of the defendant, nor was there more reason for relying on the assurances of counsel.

Affirmed.

Cited: Sutherland v. McLean 199 N.C. 349; *Moore v. Deal,* 239 N.C. 227.

JOSEPH GADDY v. THE NORTH CAROLINA RAILROAD COMPANY.

(Filed 8 May, 1918.)

1. Commerce—Railroads—Statutes—Federal Decisions.

Where it appears from plaintiff's evidence, in his action to recover damages from a railroad company for a wrongful injury, that he was engaged in interstate commerce at the time, the Federal statute excludes and supercedes the State law in regard to the doctrine of assumption of risks, and the decisions of the Supreme Court of the United States will control.

2. Same—Master and Servant—Assumption of Risks—Employer and Employee.

While under the decisions of the Federal court the doctrine is recognized that the master should furnish the servant reasonably safe tools and appliances and place to work, and to keep and maintain them in such condition, they also enforce the doctrine of assumption of ordinary risks

by the employee incident to his employment, including his continuing to work without objection when he has knowledge of a defect and an apprehension of the danger which it entails.

3. Same—Evidence—Nonsuit—Trials.

Where an experienced switchman of an railroad company is injured while acting for the company in the course of his employment, in interstate commerce, and it appears from his own evidence that he was at the time engaged with a crew in switching cars upon several diverging tracks, with full knowledge of the conditions; that after leaving a car that had been "kicked" upon one of the tracks he, with knowledge of the approach of other cars "kicked" upon another track, was injured by his foot catching between the guard and stock rails and run over by the cars moving towards him, and to which he was walking to continue his duties as brakeman; that at the time he saw that the cars had no brakeman on them to stop them, and had seen them "kicked" upon the track: *Held*, under the Federal decisions, the employee assumed the risks, and a motion to nonsuit thereunder should have been allowed in his action to recover damages against the railroad company.

4. Commerce—Railroads—Through Trains—Master and Servant—Employer and Employee.

A railroad switchman engaged in making up a through train passing into, through and beyond the State is engaged in interstate commerce.

CLARK, C. J., dissenting.

APPEAL by defendant from *Harding, J.*, at the July-August (516) Term, 1917, of DAVIDSON.

This is an action to recover damages for personal injury.

The plaintiff, together with five others, composed a switching crew on the railroad yards of the defendant's lessee at Spencer, N. C., and on the first day of November, 1915, was switching cars and making up trains on the yard. About the hour of 12:15 o'clock p.m., the crew was working in the north end of the yard shifting cars and making up trains. From the north end of the yard they backed in on the straight lead track, which leads entirely through the yard and extends from Spencer to Salisbury. They coupled up to seven cars on the said straight lead and pulled these cars north on the ladder lead, which connects all the switch tracks in the north end of the yard. There are sixteen switch tracks connected with the ladder lead. The cars are switched by being taken out on the ladder lead and the switches set for the tracks upon which the cars are to be placed, and the cars are kicked in on these tracks wherever they are desired to be placed for the purpose of making up trains.

After the crew had pulled the cut of seven cars out on the lead they kicked one car down on the double track, which car plaintiff rode about 100 yards down the track. The engine and balance of crew then went out onto the ladder lead with the other cars for the purpose of placing these cars on other tracks. It was their purpose to put three cars of the seven attached to the engine into an orange train, which was a through freight train from Spencer, N. C. to the Potomac Yards, Va.

When plaintiff had set the brakes on the car which he rode down the double track, he dismounted from the car and saw the balance of the crew were cutting off three cars on the ladder lead for track No. 2 or 3. He got off the car he had stopped and walked down the main line of the railroad and crossed over to the track where the three cars were to be placed. He was about 60 feet from the cars—saw them coming down toward him; he walked toward the cars about three feet and attempted to cross the track at the switch for the purpose of getting on the cars on the other side. In attempting to cross the switch his foot (517) was caught between the guard rail and the stock rail and fastened, and before he could get it out the front truck of the first cars passed over his foot, cutting off part of his foot. When plaintiff saw that he could not get his foot out he laid down between the rails and the front truck passed over his foot. He crawled from under the car between the front and rear trucks.

Plaintiff says that he saw the cars coming toward him—saw the cars as they were cut loose when he was on top the car on double track; that there were three cars in the cut, the first car being a gondola car loaded with scrap iron, destined for Richmond, Va.; that the said cars were rolled about 15 miles per hour; that he knew there was no one on the cars to stop them; that it was his duty to stop the cars, which was done by applying the brakes when they had rolled to the place where he wanted them to go.

Plaintiff was an experienced brakeman; had been engaged in this work at this place for eleven years; was thoroughly familiar with this kind of work; he belonged to the crew that was doing the switching and making up the trains, and he was what was called "field-man"; that it was his duty to get on the cars and apply the brakes at the place he wanted to stop them; that he knew of the guard rail.

At the conclusion of the evidence the defendant moved for judgment of nonsuit, which was refused, and the defendant excepted.

The defendant also requested the court to instruct the jury to answer the issue as to assumption of risk in favor of the defendant if they believed the evidence, which was refused, and the defendant excepted.

The jury returned a verdict in favor of the plaintiff, and judgment was rendered thereon, from which the defendant appealed.

John A. Barringer for plaintiff.
Linn & Linn for defendant.

ALLEN, J. Accepting the plaintiff's evidence as true, he was employed in interstate commerce at the time of his injury (see note to *R. R. v. Behrens,* 233 U.S. 473, 33 Anno. Cases 165; *Saunders v. R. R.,* 167 N.C. 379; *Rich v. R. R.,* 166 Mo. App., 379), and the action must therefore be disposed of under the Federal statute, which is exclusive and supersedes the right of action under the State law, and which unlike the statute in this State, recognizes the assumption of risk as a defense. *Renn v. R. R.,* 170 N.C. 128, affirmed 241 U.S. 290.

The doctrine of assumption of risk, first recognized in the courts about 1837, when Priestly v. Fowler, 3 M. & W., 1, was decided in England and *Murray v. R. R.,* 1 McMullan (S.C.), 385, and
(518) *Farewell v. R. R.,* 4 Met. (Mass.), 49 in this country, is upon the idea that the employee knows and appreciates the dangers of his employment and assumes the risk of these dangers as a part of the contract of service, being paid for his risk in the increased wage, and also upon the ground of public policy, it being assumed that the employee will be more careful if he knows that he will not receive compensation for injuries received in the course of his employment.

Many of the courts, regarding the reasons upon which the doctrine is based as a fiction adopted to throw upon the employee all the hazards of the employment, have been reluctant to give it effect and have frequently taken hold upon seemingly immaterial matters to avoid its results. Consequently there is great diversity and conflict in judicial opinion as to the correct application of the doctrine, which we will not attempt to examine, as this action must be tried under the Federal law, and we are only concerned with what we conceive to be the doctrine of the Federal courts as announced by the Supreme Court of the United States. That Court enforces the rule that it is the duty of the employer to provide reasonably safe and adequate machinery and appliances for the use of the employer and to keep and maintain them in such condition, and that a failure to perform this duty is negligence. *Gardner v. R. R.,* 150 U.S. 349. It also holds that the employee assumes the ordinary risks incident to his employment, and that if he continues to work without objection, having knowledge of a defect and an apprehension of danger, and is injured, that this is one of the ordinary risks of his employment. *R. R. v. McDade,* 135 U.S. 570.

In *Butler v. Frazee,* 211 U.S. 459, it is held that "One understanding in the condition of machinery and dangers arising therefrom, or who is capable of doing so, and voluntarily, in the course of employ-

ment, exposes himself thereto assumed the risk thereof, and if injury results cannot recover against the employer."

In *R.R. v. Shalstrom,* 195 Fed., 729, it is said: "Although the risk of the master's negligence and of its effect unknown to the servant is not one of the ordinary risks of the employment which he assumes, yet if the negligence of the master or its effect is known and appreciated by the servant, or is obvious, or 'so patent as to be readily observed by him by the reasonable use of his senses, having in view his age, intelligence, and experience,' and he enters and continues in the employment without objection, he elects to assume the risk of it, and he cannot recover for the damages it causes."

In *R. R. v. Archbald,* 170 U.S. 671, *White, C. J.,* says: "The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care, and that the employee has a right to rely upon this duty being performed; and that while in entering the employment he assumes (519) the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employee with respect to appliances furnished. An exception to this general rule is well established, which holds that where an employee receives for use a defective appliance and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used."

Running through the cases is the principle that if the employee has knowledge of the conditions and the dangers, or if these are obvious, and he continues in the employment without objection, he is held to have assumed the risk, although he may be injured by reason of some neglect of the employer, and in its application it was held in *Seley v. R. R.,* 152 U.S. 145, that a brakeman, familiar with a certain freight yard, whose foot was caught in an unblocked frog while making a coupling assumed the risk.

The Court, after referring to several decided cases, says: "The evidence showed that Seley had been in the employ of the defendant for several years as brakeman and as conductor of freight trains; that his duty brought him frequently into the yard in question to make up his trains; that he necessarily knew of the form of the frog there in use; and it is not shown that he ever complained to his employers of the character of frogs used by them. He must, therefore, be assumed to have entered and continued in the employ of the defendant with full knowledge of the dangers asserted to arise out of the use of unblocked frogs.

"*Appel v. R.R.*, 111 N.Y. 550, 19 N. E., 93, was a case where the plaintiff's intestate was a brakeman employed in coupling cars in the yards of the defendant at Buffalo, N. Y., and while so engaged his foot was caught in an unblocked frog, and he was run over and killed; and the Court of Appeals held that 'in accepting and continuing in the employment, the deceased assumed the hazard of all known obvious dangers, and that he was chargeable with notice of the difficulty in removing the foot when caught in the frog and of the danger to be apprehended therefrom, and therefore that a cause of action was not made out, and a refusal to nonsuit was error.'"

The facts in the case from New York and in the *Seley case* are more favorable to the employee than are the facts in the case before us, as in those cases there was evidence of a defect in the frog in which the foot of the employee was caught, while here there is neither allegation nor evidence that the guard rail which caught the foot of the plaintiff was defective.

(520) The plaintiff is a man of eleven years experience; he was familiar with the yards where he was working; he knew of the existence and location of the guard rail; that the cars had been kicked towards him; that they were coming at the rate of 15 miles an hour, and every condition which had any bearing upon his injury was obvious and known to him, and under the authorities cited we must hold that he assumed the risk of his injury.

The *Seley case*, with its approval of the case from New York, is also authority for the position that it is proper to enter a judgment of nonsuit when the evidence for the plaintiff makes out clearly the defense of assumption of risk.

His Honor was in error in refusing to enter the judgment of nonsuit upon the defendant's motion, and our decision upon this question makes it unnecessary to consider the other exceptions.

In *Ware v. R. R.*, at this term, the plaintiff was not employed in interstate commerce, and the action was tried under the State statute, which does not recognize assumption of risk as a defense.

Reversed.

CLARK, C. J. dissenting: As stated in the opinion of the Court, "Many of the courts deem the doctrine of assumption of risk a fiction adopted to throw upon the employee all the hazards of employment," and such it undoubtedly and clearly is; but even that doctrine goes no further than to hold that the employee assumes "the ordinary risks incident to his employment properly operated." When there is negligence on the part of the employer, either in the manner of operation or in

the nature of the appliances furnished, whether defective or not of the best kind in general use, or there is failure to furnish a reasonably safe place to work, and in similar instances, the employee does not assume the risk of such negligence on the part of the employer. To do so would be to exempt the employer from liability for negligence. There is one exception, and that is where the implement furnished is defective but the employer is ignorant of the defect and the employee, with knowledge thereof, fails to inform the employer. The rule as to what is "assumption of risk" is the same in the Federal as in the State courts.

In this case the defendant was "kicking" the cars back without any man on the rear car to give notice of their approach, or to stop them. This has always been held negligence on the part of the employer. *Bradley v. R. R.*, 126 N.C. 735; *Peoples v. R. R.*, 137 N.C. 98. This was held irrebuttable negligence, as to those not employees, in *Purnell v. R. R.*, 122 N.C. 832, where the car was running backward at 4 miles an hour, this Court saying that when the train is rolling backwards (even though it is not "kicked") there "must be both a man and a light at night and a man and a flag by day" on the rear car (521) which is thus rolling backward. That case has been cited numerous times, as will be seen in the Anno. Ed., the most recent cases being *LeGwin v. R. R. (Hoke, J.)*, 170 N.C. 361; *Mumpower v. R. R.*, 174 N.C. 742.

As to an employee, we have cases exactly "on all-fours" with the present case. In *Lassiter v. R. R.*, 133 N.C. 244, the conductor in charge of the freight train was killed in a railroad yard by a shifting engine moving backwards at 4 miles an hour. The Court held that this was negligence on the part of the company, and that whether the conductor was guilty of contributory negligence was a defense to be submitted to the jury. There was no intimation that the conductor assumed the risk of the company's negligence in running the car backward at 4 miles an hour without giving notice.

In *Peoples v. R. R.*, 137 N.C. 97, it is said: "There was evidence that at the time the intestate was killed he was in the discharge of his duties as an employee of the defendant, with his mind absorbed in the attempt to mount the shifting engine coming towards him, with his back to the approaching box cars, which were giving him no warning of their approach, and which were not properly manned with a lookout upon the leading car," and it was held that the refusal to nonsuit was proper, citing *Lassiter v. R. R.*, 133 N.C. 247; *Smith v. R. R.*, 132 N.C. 824.

In the present case the defendant was guilty of negligence in "kicking" back the car, also in not having a lookout on the rear end of the

car and, further, in rolling back the car at 15 miles per hour. All these were acts of negligence, the risk of which, therefore, was not assumed by the plaintiff.

Furthermore, there was evidence, from the foot of the plaintiff being caught between the guard rail and the stock rail, that it was not properly constructed, *res ipsa loquitur,* and this was further evidence of negligence. *Raper v. R. R.,* 126 N.C. 563. If the jury should have so found, then the defendant had not furnished the plaintiff a safe place to work. This also was a risk which the plaintiff did not assume. The fact that he might or might not have known that the switch was defective did not place upon him the risk, for it does not appear that, knowing the defect, he had failed to furnish the information to the defendant, who, moreover, was not shown to have been ignorant of it.

Furthermore, while it is true the plaintiff had been working in the yard for eleven years, he did not thereby assume the risks of the negligent operation of the defendant. *Lloyd v. Haynes,* 126 N.C. 359, which, quoting the English authorities as well as our own, pointed out the wide distinction between the "knowledge of the danger" and "voluntary assumption of risk," saying that "assumption of risk is a matter of defense, analogous to contributory negligence, to be passed (522) upon by the jury, who are to say whether the employee voluntarily assumed the risk; it is not enough to show merely that he worked on, knowing the danger." That case has been cited numerous times since (see (Anno. Ed.) and has always been regarded as settled law.

Assumption of risk being a defense, the burden was on the defendant to prove it, and, therefore, also the motion to nonsuit should not have been allowed.

It may be doubted if in all the cases that have come to this Court a more pathetic instance of mental anguish can be shown than in this case. The plaintiff was required to dismount from the car in motion which he had ridden down, and then to cross over the track where these other cars were coming and to get upon them while in motion. He had to cross the track in order to get on the car, which was coming down at about 15 miles per hour. His testimony is that "in attempting to cross the switch his foot was caught between the guard rail and the stock rail and fastened, and before he could get it out the front truck of the first cars passed over his foot, cutting off part of it. When plaintiff saw that he could not get his foot out he laid down between the rails and the front truck passed over his foot." He further says that "he saw the cars coming towards him—saw the cars as they were cut loose when he was on top of the car on double track; that there were three cars

in the cut, the first car being a gondola car loaded with scrap iron, destined for Richmond, Va.; that the said cars were rolled about 15 miles per hour; that he knew there was no one on the car to stop them; that it was his duty to stop the cars, which was done by applying the brake when they had rolled to the place where he wanted them to go; . . . that it was his duty to get on the cars and to apply the brakes at the place he wanted to stop them."

It would require the vivid mental vigor of Victor Hugo to depict the mental sufferings of the plaintiff with his foot caught in the defective track between the guard rail and the stock rail and fastened. Seeing the leading car heavily loaded with iron coming on and his helplessness, he laid down on the track, allowing the car to pass over him, cutting off his foot. For this excruciating suffering and the terrifying mental anguish attendant, the plaintiff was entitled to compensation. "Mental suffering accompanying physical injury has always been held a proper element of damages to be considered by the jury." *Britt v. R. R.*, 148 N.C. 39, citing *Watkins v. Mfg. Co.*, 131 N.C. 536.

The court below properly denied the motion to nonsuit the plaintiff:

1. Assumption of risk is a defense and therefore is not ground for a nonsuit

2. In *Kenney v.* R.R., 165 N.C. 103, *Allen J.*, said, "The word 'kicking' seems to be used in railroad parlance as synonymous with making a flying switch," and cites from 3 Elliott on Rail- (523) roads (2 Ed.), sec. 1265*g*, that "The practice of making running or flying switches is inherently dangerous, and is so considered by the courts in numerous decisions. The courts have not hesitated to hold railroad companies liable for injuries to trespassers on the track, thus inflicted, on the ground of negligence," and held that where an employee was thus killed it was sufficient in an action for negligence to submit the case to the jury. It was negligence to "kick" the cars back and especially at the rate of such moving car and to send him across the track for that purpose in front of the car that he might get up on the other side.

3. It was evidence of negligence to go to the jury that in a crowded yard where men constantly had to cross the track in front of moving cars the space between the guard rail and the block rail was not filled up so as to avoid the plaintiff's foot being caught and cut off. *Roper v. R. R.*, 126 N.C. 563.

4. The defendant was not absolved from responsibility for its negligence in these several respects by the fact that employees oppressed by the strong necessity of earning a subsistence for themselves and

families remain in the service of the corporation notwithstanding the knowledge that such negligence was daily used by the defendant. It is true it was convenient to the company to save the expense of safer methods just as it would be economy not to use automatic car couplers or headlights or other necessary appliances—provided it was not required to pay for injuries and death occurring to the employees by such misconduct.

It is because corporations are intangible and therefore not liable to imprisonment or physical punishment that the courts resort to compensation to employees as a measure of justice to them and of punishment as well as to the corporations when injuries and death occur by such disregard of the safety of employees as was shown by the defendant in this case.

As the Court says in its opinion, "Assumption of risk is a fiction." It is created by the courts, and not by legislation, to throw upon the employee, as far as possible, liability for death or injustice sustained in the course of his employment. But such doctrine has never yet been extended to the point, in this State at least, that long continuance in such negligence and of so dangerous a nature should be deemed an exemption of the company from all liability. That would simply make continuance in wrongdoing a ground of exemption—the greater the wrong, the surer the safety from liability.

While "assumption of risk" is still held by the Federal courts to be a defense, which is not to be "apportioned" as in cases of contri-
(524) butory negligence, it has not been extended by any case to require an employee to mount a car rolling 15 miles an hour, nor does it throw on him liability for a defective switch in the railroad yard.

Beyond controversy, the injury to the plaintiff was caused by the defendant not giving him time to go back and get upon the cars before they were shunted onto the sidetrack, or another member of the crew placed upon the rear end of the cars to stop them at any time, and in that the plaintiff was required to cross the track in front of cars rolling 15 miles an hour and mount the box car so that he might apply the brake to stop the cars on the switch track at a proper place. The defendant thus saved the expense of another necessary hand, but caused the loss of plaintiff's foot and might well have caused the loss of his life. The plaintiff was not injured in doing the act which caused his injury. He did not shunt the cars nor did he have anything whatever to do with kicking or shunting the cars and never had, according to the evidence. It is sardonic irony for the defendant to claim that the plaintiff was in any wise responsible for these matters over which he had no control.

There were decisions of the United States Supreme Court years ago which extended the doctrine of assumption of risk to cover some instances of pure negligence on the part of corporations. But the decisions of the courts grow wider and wider and more just with the passage of the years. In *Lochner v. New York,* 198 U.S. 45, that Court (reversing the Court of Appeals of that State) held invalid an act of the State of New York which prohibited the employment of bakers for more than ten hours in a temperature of 120 degrees. Last year it held valid the "Adamson Act," which prohibited the employment of railroad employees more than eight hours. Thus the thoughts of judges, as of other men, are "broadened with the process of the suns." A statute expresses the public will as it grows from time to time, and when the courts create law they must do the same.

By judicial decree it was long held that if any one among many thousands of railroad employees was injured in its service he could not recover if the injury was caused in any degree by the negligence of a fellow servant—upon the "fiction" that he knew the character of his fellow servants and by remaining in service assumed the risk of any one of them being negligent or careless! That was changed by statute, and then for years the party injured could not recover if he himself, in any degree, was guilty of negligence contributory to the injury. Now, by both State and Federal statutes, contributory negligence does not defeat an action against a railroad corporation, but the damages must be apportioned.

The courts have also, without statutory authority, created the doctrine of assumed risk. This should not be stretched to supply the place formerly occupied by the fellow servant doctrine or the (525) doctrine of contributory negligence.

Till 1871 it was an indictable offense in England for two or more employees to ask for an increase of wages or to organize a laborer's union, and a strike was severely punishable. Today these unions everywhere are legal and the hours of labor are restricted by law, and in many States damages for injuries or death are awarded without the delay and cost of legal proceedings, while childhood is protected by an age limit.

We are moving out into more spacious times and into a larger field of vision. No court in the twentieth century should hold a railroad company free from liability when to reduce expenses for the increase of dividends to capital an employee is sent, as in this instance, on a dangerous errand across the track with a defective switch in which he is caught in front of cars rolling 15 miles an hour which he was ordered to mount and thus do the work of another man who should have been on the rear car already. The sense of justice of this age forbids such

treatment. The lives and limbs of the employees who operate these great works of public necessity should not be exposed to such risks merely to increase dividends upon great aggregations of capital, nor should their wives and children be thus thrown upon the charities of the world because the necessities of the husband and father from him to accept employment. Justice to the laborer is to the interests of the employer and the public.

The British soldiers and sailors who fought at Blenheim, at Landen, at Talavera, at the storming of Badajos, at the Battle of the Nile, at Trafalgar, were rewarded with no pension (unless officers), but with a license to beg, and by a statute which made it a hanging offense for them to ask alms of a grateful country without such license. Today, not only in this country, but in England, disabled soldiers are pensioned. It is not just to apply to the soldiers of industry, upon whom the existence of civilization depends, and who are crippled in the discharge of their duty by unnecessary dangers imposed upon them, rule of law created by the courts, and not by any statute, at a time when labor had no rights which capital was bound to respect.

The judge below should be affirmed. A jury should find the facts.

Cited: Moore v. R. R., 185 N.C. 192; *Cobia v. R. R.*, 188 N.C. 491; *R. R. v. Armfield*, 189 N.C. 583; *Batton v. R. R.*, 212 N.C. 268; *Erickson v. Baseball Club*, 233 N.C. 630.

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JAMES A. BELL, TRUSTEE v. E. L. KEESLER.

(Filed 8 May, 1918.)

1. Estates—Limitations—Contingencies—Statutes.

Our statute with regard to contingent limitations by will or deed depending "upon the dying of any person without heirs or issue," etc., was enacted for the primary purpose of making such limitations good by fixing a definite time when the death of the first taker shall become absolute, and also to establish a rule of interpretation by which the estate of the first taker shall be affected with the contingency till the time of his death, unless a contrary intent appears upon the face of the instrument. Revisal. sec. 1581.

2. Same—Intent—Vesting of Estates—First Taker—Direct Descendant.

In ascertaining whether the intent of a donor or testator is to fix an earlier period for the estate to become absolute than at the death of the

first taker without heirs or issue, Revisal, sec. 1581, the instrument should be construed in reference to the principles that the law favors the early vesting of estates; that the first taker is ordinarily to be regarded as the primary object of the testator's bounty, especially when he is his child or lineal descendant.

3. Same—Wills—Wife—Children—Nephews.

A devise of lands to testator's wife for life, "at her death to such child or children as may survive her," etc., "upon their coming of age or marriage, share and share alike," etc., and a following item, with limitation over to a nephew upon contingency that no child "live to become of age or marry or die without heirs": *Held*, upon the death of the wife and one child surviving having become of age, such child took a fee simple absolute estate, the contingency thereof being the estate of the first taker becomes absolute upon his becoming of age or marrying, or dying without heirs or the issue of children or offspring, and in either or any one of these events.

4. Estates—Limitations—Contingency—Children—Words and Phrases—"Or."

When a gift over, in case of death without issue, is accompanied by a gift over in case of death before arriving at a certain age, the dying without issue will generally be restricted to a dying without issue before arrival at the age specified, to aid which the word "or" may be construed as "and."

CIVIL ACTION, heard on demurrer before *Long, J.*, at Spring Term, 1918, of MECKLENBURG.

The action was to collect the purchase price of a tract of land bought by defendant at trustee's sale and payment of purchase money being refused by reason of the fact that plaintiff could not make a valid title and on further facts set forth in the answer. Plaintiff having demurred, there was judgment sustaining demurrer, and defendant excepted and appealed.

Pharr & Bell for plaintiff.
H. L. Taylor for defendant.

HOKE, J. Plaintiff Bell, holding the land under a deed of trust to secure $1,770, conveying to him the title of Marie Anna Glover, sold said land pursuant to the terms of the deed, when defen- (527) dant became the last and highest bidder at the price of $4,875. Said plaintiff having prepared and tendered a deed, payment of purchase money was refused on the ground that plaintiff could not make a good title to the land according to the terms of the contract.

On present action, instituted to recover purchase money, defendant, admitting that plaintiff had sold pursuant to the terms of the deed, and

that the title offered was that of Marie Anna Glover, grantor in the deed of trust, contended that said title was defective in that the grantor only had a defeasible fee in said land and on facts stated in the further defense as follows: That the land was formerly owned by F. H. Glover, who died some time in 1888, leaving him surviving his widow, Laura Amanda Glover, and their own child, Marie Anna Glover, grantor in plaintiff's deed; that said F. H. Glover, by his last will and testament, in the fifth and sixth items of the same, made disposition of the property as follows:

"Fifth. After the payment of my just debts aforesaid, I give and bequeath half of all my estate, real and personal, to my beloved wife, Laura Amanda Glover, for and during the term of her natural life; at her death of what may remain to such child or children as may survive me by her, to them and their heirs forever. I give, devise and bequeath the other half of all my estate, real and personal, to any child or children that may survive me by my beloved wife, Laura Amanda Glover, upon their becoming of age or marriage, share and share alike, to them and their heirs forever.

"Sixth. In event of my dying and no child or children by my beloved wife Laura Amanda Glover, live to become of age or marriage, or die without heirs, I then give, devise and bequeath all my estate, real and personal aforesaid, to my beloved wife, Laura Amanda Glover, during her natural life, and at her death what may remain to Francis Glover, son of my brother, Joseph E. Glover, of Colleton County, State of South Carolina, to him and his heirs forever."

That Laura Amanda Glover, the widow, died in the latter part of 1904, and in 1905 said Marie Anna Glover, now about 50 years of age and unmarried, executed the deed of trust under which the sale was had and defendant bought.

On these, the controlling facts relevant to the question presented, we concur in his Honor's view that the title offered is a good one and no valid defense to plaintiff's action has been alleged.

Our statute, Revisal, sec. 1581, provides that "every contingent limitation by deed or will made to depend upon the dying of any person without heirs or issue, etc., shall be held and interpreted a limitation to take effect when such person shall die not having such heir (528) or issue or descendant or other relative, etc., living at the time of his death or born to him within ten lunar months thereafter unless the intention of such limitations be otherwise and expressly declared in the face of the deed or will creating it." This statute was enacted for the primary purpose of making such limitations good by fixing a definite time when the estate of the first taker shall become abso-

lute, and it is held to establish a rule of interpretation by which the estate of the first taker shall be affected with the contingency till the time of his death unless a contrary intent appears on the face of the instrument. *Kirkman v. Smith,* 174 N.C. 603; *Harrell v. Hogan,* 147 N.C. 111; *Sain v. Baker,* 128 N.C. 256, etc.

In ascertaining whether there is an intent in the face of the will or deed to fix an earlier period when the estate shall become absolute, we have held in numerous cases that the instruments should be construed in reference to the recognized principles that the law favors the early vesting of estates and that the first taker is ordinarily to be regarded as the primary object of the testator's bounty, and more especially so when such taker is a child or lineal descendant. *Bank v. Murray,* 175 N.C. 62, 94 S. E., 665; *Dunn v. Hines,* 164 N.C. 113.

Considering the question presented in view of these positions, we are of opinion that the will, on its face and under the admitted facts, clearly confers on Marie Anna Glover, the testator's only child and heir at law, an unqualified estate in fee simple and that, under its provisions and on the death of her mother she was to have all the property in absolute ownership, either on her becoming of age or on her marriage or on her death leaving heirs in the sense of children or offspring. *Harrell v. Hogan,* 147 N.C. 111; *Fairley v. Priest,* 56 N.C. 383.

In Item 5, standing alone, the effect of the will is to confer on this child all of the property in absolute ownership, subject to a life estate in the wife as to one-half. In Item 6 he annexes a qualification by which the estate is limited over, but carrying his property, as it does, to collateral relations, it is not to be operative if his own child, the primary object of his bounty, becomes 21 or marries or, as stated dies leaving children. The principle applicable is stated in 40 Cyc., p. 1506, as follows: "When a gift over, in case of death without issue, is accompanied by a gift over in case of death before arriving at a certain age, the dying without issue will generally be restricted to a dying without issue before arrival at the age specified, to aid which the word 'or' may be construed as 'and.'" And this statement of the principle has been approved in many well considered cases and elsewhere. *Ham v. Ham,* 168 N.C. 486; *Parker v. Parker,* 46 Mass., 134-137.

In this last citation the position apposite is stated as follows: "The manifest object of the testator was, we think, that if (529) the son who was the first object of his bounty should die without leaving children to take after him, and whilst he was under age, so that he could not make any disposition of the property on account of the incapacity of nonage, then the testator intended to make disposition of it himself. But if the son should leave no children, but still if

he should arrive at an age at which the law would allow him to dispose of real estate by his own act by deed or will, then it was intended that the gift to him should be absolute, and the devise over would fail."

In the case before us, the charge suggested or authorized by these cases does not seem to be required, for the two items of the will, to our minds, clearly mean "that this property is to go to our child, Marie Anna Glover, to be hers in absolute ownership if she becomes 21 years of age or if she marries or dies leaving heirs living at her death in the sense of children offspring." In the case of *Dawson v. Emmett,* 151 N.C. 543, cited and relied upon by defendant, there was no intervening period referred to and no provision of the will tending to show that the estate was to become absolute at any time before the death of the first taker.

We find no error in the record and the judgment sustaining the plaintiff's demurrer will be

Affirmed.

Cited: Goode v. Hearne, 180 N.C. 478; *Williams v. Hicks,* 182 N.C. 113; *Vinson v. Gardner,* 185 N.C. 195; *Christopher v. Wilson,* 188 N.C. 760; *Westfeldt v. Reynolds,* 191 N.C. 806; *Walker v. Trollinger,* 192 N.C. 748; *Elmore v. Austin,* 232 N.C. 22.

BERRY MEDLIN v. IDA MEDLIN.

(Filed 8 May, 1918.)

1. Divorce—Alimony—Judgment—Cross Bill—Estoppel—Statutes.

A denial of alimony in an independent action brought by the wife under section 1567 of the Revisal, on the ground that her husband maliciously turned her out of doors, will conclude her upon her cross-bill setting up the same matter in an action thereafter brought by her husband against her for divorce *a vinculo.*

2. Same.

The ground for divorce *a mensa* given the wife (Revisal, sec. 1562, subsec. 2) because of being maliciously turned out of doors by her husband is but an instance of wrongful abandonment provided by subsection 1 thereof, and the basic facts of these two suits being the same, an authoritative decision on the right of alimony will conclude the parties as to such right and as to the relevant facts existent at the time and involved in the inquiry.

3. Divorce — Statutes — Common Law — Expense Money — Allowance to Wife—Costs—Courts—Remedies.

Our statute allowing, in given instances, alimony to the wife is remedial in its nature, affirmative in its terms, and cumulative in its effect, and does not conflict with or abrogate the common law existent on the subject or withdraw from the court any powers already possessed by them in administering its principles; and hence the court in its sound discretion may allow a reasonable amount to the wife to enable her to properly present her defense to an action brought against her by her husband for divorce *a vinculo*, though she may be concluded by judgment against her in her former and independent action for divorce *a mensa* under the provisions of the statute, Revisal, sec. 1567. The history of this principle discussed by HOKE, J. *Wilson v. Wilson*, 19 N.C. 377; *Reeves v. Reeves*, 82 N.C. 348, cited and overruled on this point.

ACTION, heard on motion by *feme* defendant for an allowance of alimony and of $150 expense money, before *Harding, J.*, (530) at Spring Term, 1918, of UNION.

The principal action is for divorce *a vinculo* brought by the husband against the wife on account of her alleged adultery.

Defendant answers, and under oath, denied the alleged adultery and also filed a cross-bill for divorce from bed and board on the alleged ground that plaintiff had maliciously turned her out of doors.

It appeared further that some time prior to the institution of the present suit the *feme* defendant had instituted on independent suit for alimony for her support under section 1567 of Revisal, alleging a wrongful abondonment by her husband. On issue joined in that suit there was verdict for the husband on the question of wrongful abondonment and judgment denying alimony as prayed for.

On the present hearing his Honor was of opinion, and so ruled, that no alimony for support could be allowed by reason of the verdict and judgment in the former suit involving the same state of facts as those relied upon in defendant's cross-bill, but on affidavits duly filed, the court found as pertinent facts "That defendant has denied, under oath, the adultery charged against her in the complaint; that such (her denial) is made in good faith; that defendant is unable financially to employ counsel or to bring to the court the witnesses necessary for her proper defense; that plaintiff, her husband, is solvent and amply able to pay the sum of $150, and that said sum is a reasonable allowance for the purpose," and thereupon adjudged that plaintiff pay to the defendant the said sum of $150 expense money to enable her to defend the suit, from which judgment plaintiff, having duly expected, appealed.

Maness, Armfield & Vann for plaintiff.
Stack & Parker for defendant.

(531) HOKE, J., after stating the case: Under recognized principles, we must approve his Honor's ruling that no alimony can be allowed the defendant as an incident to her cross-bill, on application for divorce from bed and board, because of her being maliciously turned out of doors, and for the reason given by him that in a separate and independent action for alimony under section 1567 of Revisal, the facts involved in the present bill have been determined against the defendant and judgment entered denying her alimony for support.

It is understood with us that a suit for divorce because of being maliciously turned out of doors, under subsection 2, section 1562, of Revisal, is but an instance of a wrongful abandonment provided for in subsection 1 of the statute, and the basic facts of these two suits being the same, the accepted principle is that an authoritative decision on the right of alimony will conclude the parties as to such right and as to the essential relevant facts existent at the time and involved in the inquiry. First Ruling Case Law, title, Alimony, sec. 87, p. 940, and cases cited.

We concur also in his Honor's decision awarding to defendant $150 expense money as an incident to the husband's suit against her for divorce on account of her alleged adultery, the defendant having formally denied the same under oath, and, on the facts found by his Honor, "That defendant's denial and her desire to defend the suit are in good faith; that she is unable by reason of her poverty to prepare and present her defense; that her husband is able to furnish the same, and that the sum awarded is reasonable for the purpose."

On these facts and under the rulings and precedents of the ecclesiastical courts in England having jurisdiction in matters of divorce and questions appertaining thereto, an award of a reasonable amount to enable the wife to properly present her defense was allowable in the sound discretion of the court, there usually as a part of the costs and very much on the principle that alimony for support was given. *D'Aguilar v. D'Aguilar,* 3 Eng. Ecclesiastical Reports, pp. 329-338.

And these rulings and precedents, as a constituent part of the common law, were transported to the English-speaking colonies of this country and allowed to prevail here afterwards as the basis of our State jurisprudence to the extent that its principles were "not inconsistent with the genius of a free people," except when abrogated or modified by constitutional or express statutory provision. And so considered, and as approved and applied by authoritative decisions here and elsewhere,

they are in full support of his Honor's ruling. *Webber v. Webber,* 79 N.C. 572; *Crump v. Morgan,* 38 N.C. 91; *Methoen v. Methoen,* 15 Ga., 97 (reported in 60 Am. Dec., 664); *Van Gorder v. Van Gorder,* 54 Cal., 57 (reported also in 44 L.R.A. (N.S.), 998); 1 Ruling Case Law, p. 910, title, Alimony, sec. 57; Bishop on Marriage (532) and Divorce, sec. 976; 1 Enc. Pl N Pr., 541; 14 Cyc., 767.

In the citation to 1 Enc. Pl. & Pr., *supra,* it is said: "That suit money and counsel fees are awarded on the same principles as those which govern the granting of alimony *pendente lite,* and so it has been universally held by the English courts as well as by most of those in this country that this allowance to the wife is a common-law right and grantable without statutory aid."

And that from Bishop, *supra:* "Natural justice and the policy of the law alike demand that in any litigation between the husband and the wife they shall have equal facilities for presenting their case before the tribunal. This requires that they shall have equal command of funds, so that if she is without means, the law having tested the acquisitions of the two in him, he shall be compelled to furnish them to her to an extent rendering her his equal in the suit. This doctrine is a part of the same whence proceeds temporary alimony. And so the English courts have from the earliest times to the present held without the aid of an act of Parliament, and nearly all of our own have accepted the doctrine as of common law."

True, it was at one time held in this State *(Wilson v. Wilson,* 19 N. C., 588) that the precedents of the ecclesiastical courts did not obtain here as to the right to award alimony in divorce proceedings cognizable before them, and that such alimony could only be allowed by express legislative sanction, but this as a general proposition was ruled to the contrary in *Morgan v. Crump,* 38 N.C. *supra,* and, as to the right to alimony *pendente lite,* was directly disapproved in the later case of *Webber v. Webber,* heretofore cited.

We are not inadvertent to the case of *Reeves v. Reeves,* 82 N.C. 348, in which it was held that the matter of awarding alimony *pendente lite* and expense money is entirely controlled by statute, and that the power is only conferred by the law where the suit is by the wife and does not extend to a case like the present, wherein the allowance must be made, if at all, as an incident of the husband's suit against her. But, with full recognition of the ability and learning of the Court when that ruling was made and of the eminent judge who wrote the opinion, we are unable to concur in their view and are constrained to hold that the case of *Reeves v. Reeves,* in the respect suggested, was not well decided.

In *Webber v. Webber, supra,* very clear intimation is given that the statute itself, by correct interpretation, should be extended to cover all

cases where the wife was a *party* to a divorce proceedings, whether as plaintiff or defendant; but apart from this the statute, being remedial in its nature and affirmative in terms, gives no indication that it was intended to abrogate the common law existent on the subject or (533) to withdraw from the court any powers already possessed by them in administering its principles. In such case, if there were repugnancy between the two, the repeal would only operate to the extent of the interference, but there is no repugnancy between them and nothing to show that the remedies provided by one are not cumulative or declaratory of those afforded by the other. *Waddill v. Masten,* 172 N.C. 582-586, citing *Humphrey v. Wade,* 70 N.C. 280; *Oliveira v. University,* 62 N.C. 69; *McKay v. Woodle,* 28 N.C. 352; *Davies v. Fairbairn,* 44 U.S. 636; *Rosin v. Lidgerwood,* 86 N.Y. Supp., 49; Endlich on Statutes, secs. 204 and 205; 36 Cyc., 1145 and 1175.

While divorce *a vinculo* was not originally awarded by the ecclesiastical courts for causes transpiring subsequent to a valid marriage, the reason upon which the power was made to rest and the principle of public policy involved in its exercise are present whenever jurisdiction to grant a divorce is conferred. Even in *Wilson v. Wilson, supra,* in which the principles of the common law permitting an award of alimony *pendente lite* was denied, the great and humane judge who delivered the opinion, conscious that the decision might at times operate with harshness against an innocent and helpless defendant, felt constrained to express himself further on the subject as follows: "We are not called on to say whether there may be cases in which the husband is an applicant for a divorce and is endeavoring to stignatize his wife with foul imputation where the court may withhold its aid from him unless he will furnish the means of a fair investigation."

In our opinion, both right, reason and approved precedent are in support of his Honor's ruling, and on the facts as found by him the judgment is

Affirmed.

Cited: Allen v. Allen, 180 N.C. 467; *Hennis v. Hennis,* 180 N.C. 607; *Garris v. Garris,* 188 N.C. 324; *McMamus v. McMamus,* 191 N.C. 742; *Green v. Green,* 210 N.C. 150; *Holloway v. Holloway,* 214 N.C. 664; *Briggs v. Briggs,* 215 N.C. 79; *Oliver v. Oliver,* 219 N.C. 303; *Byers v. Byers,* 223 N.C. 91; *Blanchard v. Blanchard,* 226 N.C. 154; *Welch v. Welch,* 226 N.C. 543; *Cameron v. Cameron,* 231 N.C. 130; *Cameron v. Cameron,* 232 N.C. 689; *Johnson v. Johnson,* 237 N.C. 385; *Pruett v. Pruett,* 247 N.C. 23; *Branon v. Branon,* 247 N.C. 79, 80.

L. P. HORTON v. L. E. WILSON.

(Filed 15 May, 1918.)

1. Bills and Notes — Negotiable Instruments — Endorser — Notice — Dishonor.

The liability of an endorser on a promissory note is conditional, entitling him to notice of dishonor; and payment may not be enforced against him unless such notice has properly been given.

2. Same—Anticipated Dishonor.

Notice given to an endorser on promissory note prior to maturity, in anticipation of dishonor by the maker, is not sufficient to hold him to liability thereon; such notice to be valid must be properly given after the note is dishonored.

APPEAL from justice of the peace, tried before *Ferguson, J.*, (534) at Fall Term, 1917, of Yancey.

From the judgment rendered, defendant appealed.

No counsel for plaintiff.
J. Bis Ray for defendant.

BROWN, J. Plaintiff sues to recover of defendant as endorser on a note payable to defendant and endorsed to plaintiff. The note was secured by a mortgage on a mare and mule. The defense is lack of notice of dishonor. The motion to nonsuit should have been sustained.

The defendant being an endorser, comes within the cases of *Perry v. Taylor*, 148 N.C. 362; *Sykes v. Everett*, 167 N.C. 600; *Houser v. Fayssoux*, 168 N.C. 1.

A surety is a maker of a note and is primarily liable for the debt, and is not entitled to notice of dishonor, while an endorser is liable conditionally, and does not undertake to pay absolutely, but only after notice of dishonor, and is entitled to such notice.

There is no evidence of notice of dishonor through the mail or otherwise. Notice to defendant by plaintiff, given the day before the note became due, that the note would fall due the next day, and plaintiff had been informed that the maker of the note could not pay it, and that he intended to hold defendant liable for balance due on it after selling mortgage property, is insufficient notice of nonpayment.

Notice of dishonor must be given after the note is dishonored by non payment when due, and not before it is due. A note cannot be said to be dishonored by the maker until after it matures. Notice given to an endorser before maturity and before default of the maker in anticipation of a default is a nullity. Daniel on Neg. Inst., 6th Ed., by Calvert., sec. 1035.

In this case plaintiff testified: "I did not present the note to Mr. Wilson, or tell him that Honeycutt had failed to pay it, but I did tell his son the day before the note was due."

This is not notice of dishonor. The motion to nonsuit is allowed.

Reversed.

Cited: Wrenn v. Cotton Mills, 198 N.C. 91; *Bank v. Whitehurst,* 203 N.C. 309; *Hyde v. Tatham,* 204 N.C. 161; *Bond Company v. Krider,* 218 N.C. 363.

(535)

S. M. PUETTE v. W. P. AND A. M. MULL.

(Filed 15 May, 1918.)

Judgments—Default—Terms of Court—Orders—Clerk of Court.

A judgment by default for the want of an answer must be rendered in term; and where, in an action to recover land, the court enters an order that the clerk enter judgment for plaintiff, if the defendant does not answer and file justified defense bond within ten days after adjournment for the term, the judgment so entered after the term by the clerk is a nullity and unenforcible by writ of possession, though the judgment was duly signed in term and attached to the order.

ACTION pending in TRANSYLVANIA upon motion to enjoin the enforcement of a writ of possession before *Carter, J.,* at April Term, 1918.

The court held that the issuance of the writ was erroneous as there was no valid judgment to support it and set the writ aside and granted defendant leave to file defense bond and answer.

Plaintiff excepted and appealed.

D. L. English for plaintiff.
No counsel for defendant.

BROWN, J. This action was brought to recover possession of a tract of land. The summons was duly served and returned at July Term, 1917, at which time the complaint was filed, duly verified.

The plaintiff did not move for judgment at the return term and the cause was continued until the following term, November, 1917. At that time the plaintiff moved the court for judgment by default final

for failure of the defendant to file answer or defense bond. At that term *Ferguson, J.*, entered the following order:

"It is ordered by the court that the defendants be and they are hereby allowed ten days from this date to file answer and justified defense bond, and in default the plaintiff is allowed judgment final by default, and the judgment hereto attached shall be and constitute such judgment by default final."

This order is dated 7 December, 1917, and attached to it as a judgment in the ordinary form by default final for failure to file an answer or defense bond, whereby the plaintiff is adjudged to be the owner of the land described in the complaint, and directing the issuing of a writ of possession. No answer or defense bond having been filed within the ten days from the adjournment of the court this judgment was duly docketed by the clerk on 24 December, 1917.

After that, on motion of the plaintiff, a writ of possession was issued. The cause came on to be heard before *Carter, J.*, upon a motion to enjoin the execution of the writ and to set the same aside. Upon the hearing he adjudged that the writ of possession was improv- (536) idently issued; that no judgment had been duly entered and docketed during the regular term of the court, and that the docketing of the judgment on 24 December after the term expired was a nullity. His Honor set aside the writ of possession and directed that the defendants be permitted to file an answer and defense bond. The plaintiff excepted.

We are of opinion with his Honor that, according to the record, no judgment was rendered by *Judge Ferguson* during the term of the court, and that the docketing of the judgment on the 24th of December—three weeks after the term had ended—was a nullity.

We have often held that a judgment to be valid must be rendered during the regular term of the court and before it has been adjourned. In this case it is manifest that no judgment was rendered to become effective during the term of the court. The order made during the term was that the defendants should file an answer and defense bond within ten days after the term expired 7 December, and if they failed to comply with that order, then, and then only, was the judgment to be docketed by the clerk and entered upon the minutes of the court. It is true, a judgment sufficient in form was drawn up and signed by the judge and attached to that order, but it did not go into effect and was not docketed during the term. The judge had no power to provide that the judgment should go into effect at some future date upon the failure to perform the condition named in the order.

Therefore, we are of opinion there was no valid judgment rendered and docketed during the term upon which a writ of possession could issue.

This case is the opposite from *Hopkins v. Bowers*, 111 N.C. 175. In that case the judge rendered and signed the judgment, but directed the clerk to strike it out if a bond were filed within five days after the court adjourned. This Court held that the condition was invalid and that the judgment was regular and would be enforced. In the case at bar the judge granted ten days within which to file the answer and bond, and provided that if they were not filed within that time, that then, and then only, the judgment was to be docketed and go into effect.

Affirmed.

(537)

MARY JORDAN, I. M. DEATON AND WIFE, MOLLIE v. JAMES A. SIMMONS.

(Filed 15 May, 1918.)

1. **Limitations of Actions—Deeds and Conveyances—Tax Deeds—Possession—Evidence—Husband and Wife.**

   The right of action to recover lands under a tax deed is barred by the three-year statute of limitations; and where the evidence tends only to show that the wife was the purchaser and remained in possession with her husband, the owner, the latter of whom continued to exercise acts of owner, such possession does not, for its duration, suspend the operation of the statute or repel its bar to the wife's action brought after a delay of more than three years from her acquisition of the tax deed.

2. **Appeal and Error—Evidence—Unanswered Questions.**

   Where in answer to a question calling for the knowledge of the witness as to relevant facts at issue, the witness states he can only give the declarations of others, without further answering, the competency of such declarations are not before the Court on appeal.

CLARK, C. J., concurring.

APPEAL from *Cline, J.*, at September Term, 1917, of MONTGOMERY, from a judgment of nonsuit. Appeal by plaintiffs.

W. A. Cochran and R. T. Poole for plaintiffs.
Jerome & Scales for defendant.

BROWN, J. This case was before this Court at a former term, and is reported in 169 N.C. 140. That report is referred to for a statement of the case.

The land is controversy was claimed by Allen Jordan, who was in possession of it on 2 May, 1898, when it was sold for his taxes and bid off by G. S. Beaman, who assigned his bid to Mary Jordan, the wife of Allen Jordan. The sheriff's deed to Mary Jordan is dated 6 May, 1899. This action was commenced on 6 May, 1903, by Mary Jordan and her husband, Allen Jordan, to recover the land. They died pending the action, and their heirs at law, I. M. Deaton and wife, Mollie O. Deaton, have been made parties plaintiff, claiming the land under Mary Jordan. It is claimed that Mary Jordan was not a party plaintiff when the action was instituted, but became so in 1905. In our view, that is immaterial.

In our former opinion the statute is cited which enacts that no action for the recovery of real property sold for the nonpayment of taxes shall lie unless the same in brought within three years after the sheriff's deed is made. It appears in the evidence offered by plaintiff and upon the record that this action was not instituted until four years from date of the sheriff's deed, and therefore it cannot be maintained (538) unless there is something to take it out from the bar of the statute.

Plaintiff claims that after the land was sold, Mary Jordan entered into possession and has remained in possession until ousted, and therefore no action was necessary. There is no evidence that Mary Jordan ever was in possession of the land in her own right. The land belonged to her husband, Allen Jordan, so far as this record discloses, when sold for taxes. There is no evidence that Mary Jordan asserted any dominion over the land after she received the sheriff's deed other than she did prior thereto. There is no evidence that her husband yielded up possession to her, or that she committed any acts tending to prove that she had taken possession and was asserting her rights as owner. On the contrary, plaintiff's witness Russell testified that he and his father rented the land in 1899 and 1900 from Allen Jordan, and that the latter took out claim and delivery proceedings in his own name in 1900 for the rent.

Plaintiff's witness Howell testifies: "Well, about as far back as I remember, the land was being tended by old Colonel Jordan, and was in his possession up until, well, ever since he purchased it until Mr. Simmons got into law and got in possession."

We are unable to find any evidence in the record that prevents the bar of the statute.

The learned counsel for plaintiffs earnestly contends that the court erred in excluding the following question asked witness Saunders: "What acts of possession did Mrs. Jordan exercise over this land?"

This question was competent and relevant and should have been allowed, and we would grant a new trial but for the fact that, although it was excluded, the witness stated: "I know only what I have heard her and Colonel Jordan say."

Their declarations were not asked for and are not set out in record, and whether competent or not is a matter not before us.

Affirmed.

CLARK, J., concurring: The fact, however, should not pass without notice that though this action is for the recovery of land sold in May, 1898, for taxes in arrears for 1896, and was begun on 6 May, 1903, it is now here for decision in May, 1918, twenty years after the sale of the land, and the purchase whose validity is in question.

There is widespread complaint in this State, as well as elsewhere, at the congestion and delays in the courts. There has been no congestion at any time in this Court, but counsel recently stated in an argument here that on an average appeals did not get to this Court from his district under three and a half to four years after the suit was
(539) begun. It may be safely said that the same average will apply doubtless to the whole state. Not infrequently appeals are heard here in cases which have been in the courts over ten years and sometimes even twenty years.

In *Taylor v. Gooch,* 110 N.C. 387, the action was brought in 1852 and the final appeal was heard at this Court in 1892, after a lapse of forty years. The cause of action originated in the purchase of land under a judgment obtained in 1806. Charles Dickens, in his description of the chancery suit of *Jarndyce v. Jarndyce,* in "Bleak House" rendered an invaluable service to the legal profession and to the public by describing the evils and the infinite wrongs inflicted by needless delays in the courts.

In *Taylor v. Gooch* this Court said: "This is the fifth time this matter, which has been in litigation more than forty years, has been in this Court. The defendants and those under whom they claim have been in continuous and unbroken possession of the premises for ninety years. Eighty nine years ago a decree was made in a cause pending between the parties under whom the plaintiff and defendants, respectively, claim, adjudging that those whose title and possession the defendants hold had paid in full for the premises, and adjudging that the plaintiff's ancestor execute title to the same."

In *Penny v. R. R.*, 161 N.C. 530, attention was called to the fact that that case had then been pending already fifteen years, and in that time four appeals had been taken to this Court, and for the fourth time a new trial had been granted. Surely this state of things should incline the bench and the bar to concede—and that without sensitiveness on the part of any one—that in the administration of justice there should be greater efficiency and a prompt determination in all matters coming before the courts. Such delays and the expense thereto add to the burdens of the loser and often deprive even him who gains the final judgment of all benefit therefrom.

Then, too, as in this case, papers are lost from the loose files which are kept, witnesses die, and the memory of those who survive is weakened so that too often, in addition to the great and unnecessary bill of costs and the loss of time and the expense entailed upon witnesses and suitors in attending court, justice may finally miscarry from the lack of evidence which once existed, or defective memories.

There is no evidence that the great delay in this case is any wise due to the judges of the Superior Court, nor does it clearly appear who is to blame, but there must be blame somewhere, for such long drawn out litigation and such inefficiency would not be permitted in any other business, and should not exist in the administration of justice.

Calling public attention to this matter will be the surest means in this as in all other matters to cure the evil Congestion and other evils in the administration of the courts are not matters which (540) concern only lawyers and judges, but they are the concern of all litigants and of the taxpayers and of the public generally as well.

The American Bar Association and many State Bar Associations have passed resolutions and appointed committees to secure a lessening of the delays in litigation, and they have urged that the judges should shorten their opinions, and the Legislature of this State has suggested that per curiam decisions should be used where no new principle of law is involved. Revisal, 1548. This however, would not lessen any congestion which exists in the Superior Court.

In that much misunderstood instrument, the Magna Carta of John (for there were several Magna Cartas), there was a promise that "justice should not be delayed" which was coupled with a provision that justice should not be sold, as if the two were similar evils so far as suitors were concerned. A far greater intelligence than that of the brutal barons and the contemptible king who met in conference at Runnymede has classed "the law's delay" among the greatest evils "that flesh is heir to." Shakespeare, Hamlet, Act 3, sec. 1.

One fruitful case of delay is the abuse of legal process by taking an appeal which suspends the execution on the judgment without subsequently perfecting the appeal. One remedy for this is Rule 17, which allows the appellee to docket a certificate and dismiss the appeal if not brought up to the next term, but this in many instances involves a delay of 6 months. There is a much speedier method pointed out in *Avery v. Pritchard,* 93 N.C. 266, which holds that "the Superior Court may, upon proper notice, adjudge that the appeal has been abandoned, and proceed in the cause as if no appeal had been taken." This has been approved several times. See citations in Annotated Edition. This course can usually be taken at the very next term of the Superior Court, and even at chambers, when the statutory time has elapsed without serving the case on appeal or otherwise complying with the requirements for perfecting the appeal.

This applies to the appeals in criminal as well as in civil cases. At this term an appeal in a criminal case was docketed and dismissed under Rule 17, in which the judgment was rendered two years ago, and thus the defendant obtained two years delay by simply taking an appeal and failing to perfect it. The execution of the judgment in that case should have been had at the next term of the Superior Court or at chambers, by applying to the judge, on notice to defendant to adjudge the appeal abandoned under *Avery v. Pritchard,* 93 N.C. 266, or at the next term of this Court by moving to docket and dismiss under Rule 17, as has finally been done. Among many cases calling attention to this matter from time to time is the very recent case of *Lancaster v. Bland,* 168 N.C. 377.

Cited: Dunbar v. Tobacco Growers, 190 N.C. 610: *S. v. Taylor,* 194 N.C. 739; *Pentuff v. Park,* 195 N.C. 611; *Pruitt v. Wood,* 199 N.C. 789; *S. v. Moore,* 210 N.C. 461; *Hoke v. Greyhound Corp.* 227 N.C. 376; *Jones v. Brinson,* 238 N.C. 511.

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(541)

W. A. FOSTER, ADMINISTRATOR OF JOHN A. DAVIS v. I. C. DAVIS ET AL.

(Filed 15 May, 1918.)

1. Principal and Surety—Husband and Wife—Bills and Notes—Extension of Time—Release.

Where the wife mortgages her lands to secure a personal debt of her husband, an extension by his creditor of the time of payment of the mort-

gage note, without her consent, will release the wife, as surety, and discharge her property from liability.

2. Same—Mortgages.

Where a wife has signed as surety on her husbands note, and has mortgaged her separate property to secure it, and thereafter the husband gave the creditor a note in a larger amount, inclusive of the former note, and later maturing, the creditor may not successfully maintain his action against the principal on the joint note, until the maturity of his later one.

3. Same—Evidence—Trials—Questions for Jury.

A purchaser of a pair of mules gave his note for them, in the absence of his wife, and thereafter she and the vendor obtained a mortgage on her lands, voluntarily given, to secure their joint note in the same amount and for the same purpose. Thereafter the husband, with the consent of the vendor, but without the knowledge of his wife, traded the mules, and again swapped, paying the vendor the boot which he had received, obtaining a credit on a note he had given in a larger amount, including that of the joint note, and later maturing. *Held*, between the original parties it was competent to show that the wife signed as surety and sufficient to release her, as such, by the extension of time given to her husband.

APPEAL by defendants from *Cline, J.*, at the November Term, 1917, of DAVIE.

This proceeding was commenced for the purpose of selling the lands of John A. Davis, deceased, to make assets, but Foy & Shemwell were permitted to be made parties to enable them to claim the share of Mrs. Ida Walser, one of the heirs, under a mortgage, subject to the debts of John A. Davis, and the whole controversy relates to the mortgage and the debt secured thereby.

A jury was waived, and the issues involved tried before a referee, who made the following findings of fact:

"2. I find as a fact on 22 May, 1915, the defendant C. H. Walser purchased of the interpleaders Foy & Shemwell, in Lexington, N. C., a pair of gray mules, for which he agreed to pay the sum of $625, and executed the attached written instrument marked 'Defendant Walser's Exhibit A,' and asked to be taken as part of this report.

"3. That on the date above mentioned, 22 May, 1915, C. H. Walser had been working in Lexington, N. C., for some weeks, and that his wife, Ida Walser, lived in Davie County, N. C., above 20 miles from Lexington, N.C., on the land belonging to her father's estate. That the said C. H. Walser bought said mules in Lexington and (542) signed the paper-writing above referred to and marked 'Defendant Walser's Exhibit A,' while in Lexington, and after signing said paper-writing he and an agent of Foy & Shemwell came over to the house of C. H. Walser and his wife, Ida Walser, in Davie County, and

the said Ida Walser and C. H. Walser executed and delivered to Dermot Shemwell for the firm of Foy & Shemwell, on 22 May, 1915, the attached note and mortgage, as further security on the pair of gray mules, said note and mortgage marked 'Foy & Shemwell's Exhibit A,' and is hereto attached and made a part of this report.

"4. I find that at the time of the execution of the above-named note and mortgage by Ida Walser and husband, C. H. Walser, that Ida Walser was one of the three children and heirs at law of John A. Davis, deceased, and that she at the time of the execution of said note and mortgage owned a one-third undivided interest in the land of John A. Davis, deceased, and described in said mortgage, subject, however, to a mortgage on said land held by one Williams and the debts due by the estate of John A. Davis, deceased, mentioned in the pleadings.

"5. I find that on 20 August, 1915, the said C. H. Walser traded the pair of gray mules purchased on 22 May, 1915, above described, to Foy & Shemwell for one pair of black mules, and agreed to pay Foy & Shemwell $150 difference in said trade; that the said C. H. Walser did not pay Foy & Shemwell any money, but exchanged the gray mules for the black mules and gave to Foy & Shemwell a note or paper-writing for $775, and that said note of $775 consisted of the $625 secured by the note and deed of trust executed to Foy & Shemwell by Ida Walser and her husband, C. H. Walser, on 22 May, 1915, and the $150 that the said C. H. Walser was to pay Foy & Shemwell in the exchange of the gray mules for the black mules. That this trade was made in Lexington, N. C., and the said Ida Walser was not present or consulted about making said trade by Foy & Shemwell. That the defendant C. H. Walser executed and delivered to Foy & Shemwell the hereto attached paper-writing at the time the trade was made for the black mules; that said written instrument, marked 'Defendant Walser's Exhibit B,' is made a part of this report.

"6. That on 4 February, the said C. H. Walser, with the consent and knowledge of Foy & Shemwell, traded the pair of black mules to Frank Jones for a pair of bay horses, and received in said trade from Frank Jones the sum of $200, which was turned over by the said C. H. Walser to Foy & Shemwell as part payment on the note of $775 above mentioned. That Ida Walser was not consulted and took no part in said trade. That Foy & Shemwell surrendered to C. H. Walser the paper-writing of $775 marked 'Defendant Walser's Exhibit B,' on the
(543) black mules and gave Frank Jones the said black mules free and clear from all encumbrances. That C. H. Walser at said time executed a paper-writing to Foy & Shemwell for the sum of

$610.94, which paper-writing is hereto attached and marked 'Defendant Walser's Exhibit C,' and made a part of this report.

"7. That Ida Walser willingly signed the note and mortgage given Dermot Shemwell for Foy & Shemwell, but she signed same as surety for her husband C. H. Walser; that the gray mules, black mules, and bay horses were used by C. H. Walser on the land of Ida Walser; that the said teams were used in tilling the land, handling wood and timber, which wood and timber was sold from the land of Ida Walser; that the money earned by said teams was not paid to Foy & Shemwell, but was used by C. H. Walser and Ida Walser in the support of themselves and their family.

"8. I find that in December, 1916, after the note for $610.94 executed on 4 February, 1916, had become due and payable, the interpleaders, Foy & Shemwell, issued claim and delivery papers, took possession of the bay horses and, after advertising them according to law, sold them at public auction in Mocksville, N. C., when and where J. F. Smith purchased the said horses for the sum of $225. That the said sale was conducted in a fair manner, there being a number of bidders at said sale, but that J. F. Smith bought said horses as the agent of Foy & Shemwell. I further find that $225 was the market value of the bay horses at the date of the sale.

"9. I find that there is still due Foy & Shemwell the sum of $417.66, the same being the $610.94 as evidenced by a note of 4 February, 1916, with interest from 4 February, 1916, less $225, the price of the bay horses brought when sold at public auction."

The referee held as matter of law that the land of Mrs. Walser was discharged from the operation of the mortgage.

Exceptions were filed by Foy & Shemwell, which were overruled, and judgment rendered confirming the report of the referee. Foy and Shemwell appealed.

The assignments of error chiefly relied on in the brief are (1) that there is no evidence to support the finding that Mrs. Walser occupied the relation of a surety to the transaction; (2) that if she was a surety, the subsequent dealings did not discharge her.

A. T. Grant, Jr., for appellant.
Hastings, Stephenson & Whicker for appellee.

ALLEN, J. In our opinion there is ample evidence to sustain the finding of fact that Mrs. Walser executed the mortgage conveying her interest in the land of her father as security for the debt (544) of her husband.

The evidence shows that the mortgage secures a note for $625; that the note was for the purchase price of two gray mules; that the mules were bought by the husband at Lexington in the absence of the wife; that the husband signed an instrument at Lexington promising to pay $625 for the mules, in which the title was retained, and that the parties then went to the home of Mrs. Walser, 20 miles distant, and she and her husband signed another note for $625 of the same tenor as the promise to pay of the husband, and representing the same debt, and then executed the mortgage.

The husband testified: "I bought a pair of gray mules from Foy & Shemwell." ... "I was at work in Lexington when I made the trade, and my wife knew nothing about it." And the subsequent conduct of Foy & Shemwell in agreeing that the husband might trade the gray mules for the black ones without the knowledge or consent of the wife was a clear recognition of the ownership of the gray mules by the husband, that the trade was his, and the debt, in whatever form evidenced, his debt.

If so, the wife promised to pay the debt of her husband when she signed the note, and was a surety, and it was competent to prove the relationship by parol as between the parties, although she appeared to be a principal on the face of the note. *Williams v. Lewis,* 158 N.C. 574.

The same relationship would also have existed, so far as the property conveyed in the mortgage is concerned, if she had not signed the note, as "It is settled by abundant authority that 'where a husband mortgages his property for his debt, and in the same mortgage the wife conveys her own separate property as security for the same debt, her property so conveyed will be treated in all respects as a surety ... and will be discharged by anything that would discharge a surety or guarantor who was personally liable.' 1 Brandt on Suretyship, par. 32; *Cross v. Allen,* 141 U.S. 528; *Spear v. Ward,* 26 Cal., 659; *Gahn v. Niemcewieg.* 11 Wend., 312; *Bank v. Burns,* 46 N.Y. 170; Bishop Law of Married Women, 604; Jones Mortgages, 114; *Gore v. Townsend,* 105 N.C. 228; *Purvis v. Carstarphen,* 73 N.C. 575" *(Hinton v. Greenleaf,* 113 N.C. 7), and the same principle applies when no part of the husband's property is covered by the mortgage, and it simply conveys the property of the wife to secure the debt of the husband. *Smith v. Loan Assn.,* 116 N.C. 73-102; *Edwards v. Ins. Co.* 173 N.C. 617.

We must then deal with the wife and her property as a surety, and it is not contended that forebearance or extension of time to the principal does not discharge the surety *(Forbes v. Shepherd,* 98 N.C. 115; *Chemical Co. v. Pegram,* 112 N.C. 620), and that there has been
(545) an extension of time and a release of securities held by the principal without the consent of the surety seems clear.

The original debt of the husband was $625, the price of the gray mules, and there was only one debt, although two papers were executed, each in the sum of $625. These papers were due 1 October, 1915, and on 30 August, 1915, the husband traded the gray mules to Foy & Shemwell for a pair of black mules, agreeing to pay $150 boot money, and executed his note to Foy & Shemwell for $775, in which was included the debt of $625, payable 15 November, 1915.

Again on 4 February, 1916, the husband, with the consent of Foy & Shemwell, traded the black mules to one Jones for a pair of bay horses and $200, and on the same day the husband paid said sum of $200 to Foy & Shemwell and executed a new note for $610.94, payable 15 March, 1916, which included the balance due on the debt of $625. These transactions were without the knowledge or consent of the wife and extended the time of payment to the principal from 15 October, 1915, to 15 November, 1915, and then to 15 March, 1916.

If the principal had been sued on the note he and his wife signed, he could have successfully defended upon the ground that the debt was covered by the new notes, and that the creditor had agreed not to demand payment until the notes became due. We therefore conclude there is no error in the ruling of his Honor holding that there has been an extension of time, and that this discharges the surety and the land.

The case of *Fitts v. Grocery Co.*, 144 N.C. 463, is easily distinguishable from this, as in that case the mortgage executed by the wife was for the purpose of giving continuing credit to the husband, and the monthly transactions were such as were contemplated by the parties.

Affirmed.

Cited: Kennedy v. Trust Company, 180 N.C. 229; *Haywood v. Russell,* 182 N.C. 713; *Wallace v. Robinson,* 185 N.C. 532; *Trust Company v. Boykin,* 192 N.C. 266; *Barnes v. Crawford,* 200 N.C. 438; *Smith v. Smith,* 223 N.C. 437.

G. B. WOODY v. CAROLINA SPRUCE COMPANY.

(Filed 15 May, 1918.)

1. Evidence—Letters.

For a letter to be competent eivdence in an action, there must be testimony as to the genuineness of the signature thereto, and the authority of the writer for sending it, so that it may be shown that it was not the act

of a stranger; and where the evidence is only that a letter had been received, but was destroyed with the name of the president of the defendant corporation appearing as the writer, but of this the witness was not quite sure, and there being no proof of the genuineness of the signature, it is insufficient to admit testimony of its contents bearing adversely to the contentions of the defendant.

2. Appeal and Error—Letters—Evidence—Reversible Error.

Where an employee sued his employer to recover damages arising from malpractice of a physician alleged to have been employed by the company to attend him, which employment the defendant denied by its pleading and evidence, the erroneous admission of a letter claimed to have been written by the defendant's president, which tends to contradict the defendant's evidence, is not harmless but reversible error.

ACTION tried before *Ferguson, J.*, and a jury, at Fall Term, 1917, of YANCEY.

The plaintiff sought to recover damages for an injury to his arm while he was in the service of the defendant and under the treat-
(546) ment of its surgeon, as plaintiff alleged. Defendant denied that the surgeon had been employed by it. In order to prove his allegation that the surgeon was employed by defendant, plaintiff introduced a letter which, he alleged, was signed by C. S. Aldrich, president and general manager of defendant, and received by Milt Dellinger, one of defendant's employees, who testified that it had been destroyed, and that he thought C. S. Aldrich's name was at the bottom of it, but he was not sure. It came to him in the mail. The letter stated that "if we (employees) did not pay the doctor's bill, we had to leave the job." It was written on a letter-head of the Carolina Spruce Company, its name at the top and C. S. Aldrich at the bottom. Dr. C. S. Aldrich testified that he did not write such a letter, or authorize any one else to write it, and it was not his letter, and that Dr. Smith was not employed by the company or connected with it, and that he never discharged any employee for failure to pay a doctor's fee nor authorized any one to do so. The relevancy of this letter as evidence, if it is competent, will appear by the statement that plaintiff claimed that Dr. Smith was defendant's surgeon, and, as such, attended him when his arm was broken, and negligently failed to treat it properly or with reasonable surgical skill; while defendant alleged that Dr. Smith had not been so employed by it, and was not its surgeon, but that he was the surgeon of the employees only, who paid him by the month, the defendant, by consent of the parties, merely having agreed to retain the amount due by the employees from

their wages and pay it to the doctor for them, and that the defendant had no other interest in the matter.

The court admitted the letter, and defendant excepted. There was another exception, which is stated in the opinion of the Court. Verdict assessing damages for the plaintiff at $3,500, and from the judgment thereon the defendant appealed.

G .E. Gardner and Hudgins, Watson & Watson for plaintiff.
Pless & Winborne for defendant.

Walker, J., after stating the case: It is perfectly evident from (547) a reading of the case that the witness Milt Dellinger did not know who had written the letter except by his inference from what he saw on its face, which he imperfectly and doubtfully recalled, the letter having been lost or destroyed. What he stated that he saw was not sufficient to authenticate the letter or to fix the defendant, through its president, as the author of it. The general rule as to the proof of the genuineness of a letter or telegram and its admissibility as evidence is thus stated in 25 Enc. of Law, at p. 876: "Ordinarily the general rules of law relative to the admission of letters in evidence apply to telegrams. A telegram is not admissible as evidence in the absence of proof of the hand-writing where the original message is offered, or of other evidence of its genuineness."

This statement of the law is approved in *Reynolds v. Hinrichs,* 94 N. W. Rep., 694, which cites *Burt v. Winona R. R. Co.,* 31 Minn., 472. To the same effect is *Adams v. Lumber Co.,* 32 Minn., 216. It is held in those cases that a letter or telegram does not necessarily prove itself, and that there must be some evidence of the handwriting of the person whose name is signed to it, or some other proof of his signature to the letter, or of his authority for the sending of it, or other proof of its genuineness, and that without such proof there is nothing to show that it was not the act of a stranger. Any other rule might open wide the door to fraud and imposition. Lockhart on Evidence says, at section 96; "Before letters are admissible in evidence there must be some proof that they are genuine. They may be identified by the writer, the handwriting of the writer may be proved, etc., but some satisfactory proof of their authenticity is absolutely essential," citing *McLeod v. Bullard,* 84 N. C. 515; *Michael v. Foil,* 100 N.C. 178; *Rencher v. Aycock,* 104 N.C. 144; *Trust Co. v. Benbow,* 135 N.C. 303; *Edwards v. Erwin,* 148 N.C. 429.

We held in *Tyson v. Joyner,* 139 N.C. 69, that the introduction of a note with the name of a party endorsed on it is no evidence by itself

that he endorsed it, which was approved in *Bank v. Drug Co.*, 152 N.C. 142; *Worth Co. v. Feed Co.*, 172 N.C. at p. 342; *Midgette v. Basnight*, 173 N.C. 18; *Moon v. Simpson*, 170 N.C. 335. There must be proof of the handwriting or other evidence of its genuineness. It was not shown here that the letter in question was part of a correspondence between Dellinger and Aldrich or that it was a reply to a letter from Dellinger, nor is there any circumstance of sufficient probative force shown to make even a *prima facie* case of its authenticity. It was just assumed that Aldrich sent it because his name was subscribed to it, which he testified was not his signature, and there is other evidence to show that it is not.

(548) The plaintiff contends that the letter was harmless, if incompetent, but we do not agree with him. There was positive testimony to the effect that Dr. Smith had not been employed by the defendant, and that the latter was not responsible for his acts. The contents of the letter tended to show that he was not dealing independently with the employees, as contended by the defendant, but that he was in the defendant's employ, as if the letter is genuine it showed defendant's interest in having the money paid Dr. Smith, and that it was not merely a stakeholder, as between the parties, or only an intermediary. It was introduced, of course, for that reason, and must have had much weight with the jury. When properly considered, it was a strong piece of evidence, if not the strongest the plaintiff introduced, and notwithstanding the positive statement of Dr. Smith that he was not employed by defendant, and of Aldrich that the doctor had no connection whatever with the company, it undoubtedly contributed to the result, which was contrary to the direct and positive testimony of these witnesses. It may be that the verdict is correct, but we cannot know whether it is or not when it was allowed to be influenced by incompetent evidence. It would appear that plaintiff thought it was valuable evidence to contradict defendant's version of the business connection between it and the surgeon, and it was stated here, without contradiction, that it was so used in the discussion before the jury.

The two cases *(Phillips v. R.R.*, 17 L.R. Anno. (N.S.), 1175, and *Nations v. Lumber Co.*, 48 L.R. Anno. (N.S.), 535) cited by the plaintiff as showing that the letter was harmless are very different in their facts from this case. In both of them there was no dispute as to the employment of the surgeon by the defendants and the question was as to the extent of the company's liability for their acts.. In one of them the surgeon was specially employed by the defendant, and in the other he was employed in a hospital owned by the defendant. Collecting the fees monthly by the company, in each of those cases, was only a

method of reimbursing itself for the salary or compensation it was bound by its contract to pay the surgeon. The contract in the *Nations* case as the Court says, showed that "beyond making the weekly contribution, the employees took no part in procuring medical aid. The company retained that function in its own hands." In the other case it was clear that the company also retained that function, as it owned the hospital in which the doctor was employed. Those two cases were like *Guy v. Lanark Fuel Co.*, 48 L.R.A. (W. Va.), 536, where it is said in the first head-note: "A master who employs a physcian to treat his employees, and collects small monthly fees from their wages, all of which he turns over to the physcian as his compensation, is not liable for the physician's malpractice unless he is negligent in selecting or retaining him." And in the opinion at page 538: "To entitle (549) plaintiff to recover, it is necessary to prove two things: (1) That the malpractice of Dr. Nelson was the proximate cause of her injury; and (2) that defendant was negligent in selecting and in retaining him. Defendant was under no legal obligation to provide a physician and surgeon for its employees; but having assumed to do so, it was bound to exercise reasonable care to select a competent and skillful one."

In our case the question relates solely to the employment of the physician, and not to the company's liability for his acts. The case, therefore, is within the rule we have stated and which was applied by this Court to facts similar to those in this case in *Beard v. R. R.* 143 N.C. 140, where it is said: "Among other testimony regarding the discharge of plaintiff, defendant proposed to introduce two letters purporting to be signed by the plaintiff which he denied writing or sending. Defendant's witness, assistant superintendent, testified 'that he received in due course through the mail the letter,' etc. The letter was upon plaintiff's objection excluded. We concur with his Honor's ruling in this respect. While it is well settled that where it is shown that a letter was addressed, stamped, and mailed, there is a presumption that it was received by the addressee, it cannot be that the receipt of a letter purporting to be signed by a person is any evidence that it was written by such person. No authorities are cited to sustain the exception." See, also, *Foushee v. Owen*, 122 N.C. 360.

There is another exception, which need not be considered as it may not be again presented.

New trial.

Cited: Arndt v. Insurance Co. 176 N.C. 655; *Woody v. Spruce Co.*, 178 N.C. 592; *S. v. Boswell*, 192 N.C. 151.

C. J. JULIAN v. J. S. DANIELS.

(Filed 15 May, 1918.)

1. Register of Deeds—Marriage License—Statutes—Reasonable Inquiry—Evidence—Questions of Law.

The question of reasonable inquiry to be made by the register of deeds as to the age of the woman for whom a marriage licence is requested, or as to the consent of those required by the statute, Revisal, sec. 2088, is one of law when the evidence is not conflicting.

2. Same—Consent—Penalty.

Where the uncontradicted evidence tends only to show that a register of deeds issued a license for the marriage of a woman under 18 years of age without the consent of her father, who lived about 20 miles distant, was well known in his community, accessible by telephone, and solely upon the oath of the prospective groom and his friend, unknown to him, and that he only made further inquiry of one person known to him, who was unaware of the information desired: *Held*, such inquiry was not reasonable under the statute, as a matter of law, and the register of deeds is liable for the penalty at the suit of the father. Revisal, secs. 2088, 2090.

APPEAL from *Cline, J.*, at the August Term, 1917, of DAVIE.

Civil action to recover of defendant, the register of deeds of (550) Davis County, the penalty of $200 allowed by the statute, section 2088 and 2090 of the Revisal, for having issued a marriage license for plaintiff's daughter. Nona Thelma Julian, then about 16 years of age, to one Floyd Kincaid without the consent of her parents and without reasonable inquiry as to her age, she being at the time under the age of 18. There was no claim or evidence that any written consent had been given by the parents, guardian, etc., and on the issue as to reasonable inquiry the material testimony was as follows:

"C. J. Julian, the plaintiff: I live in Rowan County, six or seven miles from Cooleemee, N. C., and have been living around there for twenty years. My daughter, Nona Thelma Julian, who was married to Floyd Kincaid on the 14th day of April, A.D. 1917, was born on 23 March, 1901, and was just a little past sixteen years of age at the time of her marriage. A few weeks after the birth of Nona Thelma Julian, my wife, in my presence, entered her name and the date of her birth in the family Bible, and this (exhibits the family Bible and testifies that the name is correct) is the entry she made: Nona Thelma Julian was born March the 23, 1901.'

"Floyd Kincaid had been to my house to a party, but I did not know that he was going to see my daughter, Nona Thelma Julian. I found on Sunday, after they had obtained marriage license at Mocksville,

N. C., to get married, that they were married. It was a run-away marriage and I did not give my consent. I called for the register of deeds at Mocksville N. C., over the telephone and a man answered who said he was the register of deeds for Davie County. I asked him if Floyd Kincaid had secured marriage license for Nona Thelma Julian, and he said he did.

"Cross-examination: My daughter and Floyd Kincaid lived near Second Creek Branch in Rowan County, N. C. I had nothing against him and did not threaten to run my daughter away from home. He did not visit my home; was only there one time. If other times, he slipped in. I could not tell you how they are getting along; we are peaceable. G. D. Daniels, witness, is a first cousin to my daughter. He lives three miles from me around the road, and has been living there for two years. I have married twice, and Nona Thelma Julian is the daughter of my first wife."

Grover Swicegood, a witness for the plaintiff testified as fol- (551) lows (direct examination): "I live in Davie County. On or about the 14th day of April, 1917, in company with J. C. Shepard, Mr. Barnes, Kincaid and Daniels, Floyd Kincaid applied for license to marry Nona Thelma Julian. The register of deeds called me in from the machine and asked me if I knew the parties applying. I told him that I knew Kincaid, but I did not know the girl, Nona Thelma Julian, and that I did not know the witness Daniels, and that I did not know the girl's age.

Cross-examination: "I have known Floyd Kincaid about eight years and Mr. Daniels, the defendant, about seven years. I never knew C. D. Daniels, the witness, at all. I went to school with Floyd Kincaid one winter, and think he was about 21 years old, and he is all right as far as I know."

Redirect examination: "I did not know the girl, and there was no one there who did know her."

Recross-examination: "The witness G. D. Daniels was in the machine and said that was his name, but I did not know him."

The witness Swicegood was later recalled by the court and testified further as follows:

Question by the Court: "What did the register, Mr. Daniels, say to you?" Answer: "He came to the door and called to me to come in, and I went in and he asked me if I knew the parties applying for license, and I told him I knew Kincaid and did not know the girl or the other witnesses, and he asked me if there was any trouble, and I told him none that I knew of."

Q. (By the Court): "Was there anything else said?" A. "Not that I remember."

The defendant, a witness in his own behalf, testified as follows:

"J. S. Daniels, the defendant, testified as follows (direct examination): I have been register of deeds for Davie County for three years. I issued a marriage license for Nona Thelma Julian and Floyd Kincaid. Mr. Kincaid, Mr. Daniels, Mr. Swicegood, and Mr. Barnes and another gentlemen in the machine I did not know, came to my house about 6 o'clock P. M. I came up to the office with them. Kincaid and Daniels came into the office and said there was no trouble; that the girl was 19 years old; that they lived near her and had gone to school with her. Mr. Swicegood said that he knew Kincaid and that they did not run away as he knew of. I swore Kincaid and Daniels on the Bible after reading the oath to them. Swicegood said that he had known Kincaid for seven or eight years, and that he, Kincaid, was a good man as far as he knew; that he did not know the witness G. D. Daniels.

"The oath taken by Kincaid and Daniels was as follows:

(552) "F. A. Kincaid and G. D. Daniels, being duly sworn, say that the parties applying for license are of lawful age and that, so far as he is informed and believes, there is no lawful cause or impediment forbidding said marriage.

F. A. KINCAID
G. D. DANIELS

"Sworn to and subscribed before me, this 14 April, 1917.
J. S. DANIELS."

Cross-examination: "I had closed my office and was at home in the afternoon when a man by the name of Kincaid came to my home for a marriage license. I did not know him and did not know where he lived. I have parties who live in town to come as late as 9 o'clock P. M. for license. I knew some of the parties in the crowd, but did not know the girl. They said they lived in this county. The only one in the crowd whom I knew was Mr. Swicegood, and he told me he did not know the girl Nona Thelma Julian. I knew there were telephones, but did not telephone to Cooleemee or any other place, and did not ask the sheriff of the county concerning it. I thought all the parties were citizens of Davie County and lived near Cooleemee, N. C. I did not think it my duty to make any inquiry other than taking their oath and having them sign the same. I did not think it was my duty to find some one who knew the girl. I made no further inquiry except taking the oath of Mr. Kincaid and Mr. Daniels. I never swore Mr. Swicegood."

Redirect examination: "I asked George Daniels if he knew her age, and he said she was his first cousin and that he had known her all his life."

Plaintiff also introduced the family Bible.

On the issue as to reasonable inquiry, his Honor was of opinion and so construed the inquiry that, on the entire testimony if believed by the jury, including that of defendant, no reasonable inquiry had been made. There was verdict for plaintiff; judgment, and defendant excepted and appealed, assigning for error chiefly: (1) The charge of his Honor on the second issue as indicated. (2) For that, on the facts in evidence, the question of reasonable inquiry should have been submitted to the jury.

T. Frank Hudson, J. G. Hudson, and T. G. Furr for plaintiff.

A. G. Grant, Jr., for defendant.

HOKE, J., after stating the case: There is no substantial difference in the testimony relevant to the issue, and, under our decisions on the subject, his Honor correctly held that the question of reasonable inquiry was one of law for the court. *Gray v. Lentz,* 173 N. C. 346; *Joyner v. Harris,* 157 N C. 296; *Furr v. Johnston,* 140 N.C. 157; (553) *Joyner v. Roberts,* 114 N. C. 389. And, on the record and facts in evidence, we concur also in his Honor's ruling that in this instance no reasonable inquiry was made. We have held in several well considered cases that where a matter of this kind necessarily depends upon inquiry, the register of deeds must seek his information from persons known by him to be reliable, or, if unknown, identified and approved by some reliable person known to be reliable. Assuredly so when, as in this case, such sources of information are open to him and readily accessible.

This test of responsibility, laid down by *Associate Justice Connor* in *Trolinger v. Buroughs,* 133 N.C. 312, as the proper construction of the statute and the fair deduction of the cases interpreting the same, was again formally stated by the same learned judge in *Furr v. Johnston,* 140 N.C. 157, and has been repeatedly approved and applied by the Court in sustaining recoveries for this penalty. *Gray v. Lentz, supra; Joyner v. Harris, supra; Morrison v. Teague,* 143 N.C. 186 *Agent v. Willis,* 124 N.C. 29; *Cole v. Laws,* 104 N.C.651.

In illustration of the position, it was held in *Morrison v. Teague, Associate Justice Brown* delivering the opinion, that "In an action against a register of deeds to recover the penalty under Revisal, sec. 2090, for issuing a marriage license contrary to its provisions, where

the uncontradicted evidence showed that the register took the word of the prospective bridegroom and his friend, neither of whom he knew, as to the age of the young lady, and made no further inquiry of any one, the court should have given the plaintiff's prayer for instruction that as a matter of law defendant failed to make reasonable inquiry as to the age of plaintiff's daughter."

And in *Cole v. Laws, supra:* "When a register of deeds issues a license for the marriage of a woman under 18 years of age without the assent of her parents, upon the application of one of whose general character for reliability he was ignorant, and who falsely stated the age of the woman without making any further inquiry as to his sources of information: *Held,* that he had not made such reasonable inquiry into the facts as the law required, and he incurred the penalty for the neglect of his duty in that respect."

And in *Joyner v. Harris:* "It is not a reasonable inquiry by the register of deeds as to the age of the prospective bride which will relieve him of the penalty of Revisal, sec. 2083, forbidding the issuing of a license for the marriage of a woman under 18 years of age without the consent of the person designated by the statute, for him to rely solely upon the answers of those whom he did not know but merely trusted because of their manner and appearance, their information as to the age of the woman appearing to depend only upon what she had (554) told them, and when by the exercise of reasonble care and diligence means of obtaining reliable information could have been made available, *Cole v. Laws,* 104 N.C. 651; *Morrison v. Teague,* 143 N.C. 186, cited and applied."

In the cases cited for defendant *Walker v. Adams,* 109 N.C. 481; *Bowles v. Cochrane,* 93 N.C. 398, and others, all of them so far as examined, except *Harcum v. Marsh,* 130 N.C. 154, the register acted upon information of parties known to him who professed also to be cognizant of the facts and where there was no reason for him to suspect the truth of their statements. The case of *Harcum v. Marsh,* to which we were also cited by defendant, has been disapproved in subsequent decisions as not being a helpful guide to the true interpretation of the statute. *Gray v. Lentz, supra; Trolinger v. Boroughs, supra.*

Recurring to the testimony, it appears that this was a run-away match where a license was issued by defendant for the marriage of plaintiff's daughter, residing with him at the time, and who was only 16 years of age; where no consent of any kind had been given and the father did not know or have any reason to believe that the young man had been paying his daughter attention likely to result in marriage; that on the occasion in question a party of four men came to his home in an automobile about 6 oclock P.M., after office hours, and ap-

plied for license for the marriage of Floyd Kincaid, one of the party, to plaintiff's daughter, Nona Thelma, not present; that the defendant practically issued the license on the statements of prospective husband and his young friend calling himself G. D. Daniels, neither of whom was known to the register; that the witness Swicegood, who was known to the register, told him that he did not know the girl nor know her age, and that he did not know the witness Daniels; that he knew Kincaid and did not know anything against him. It further appeared that the father lived at Cooleemee, a village in Rowan County, near the Davie County line, and had done so for 20 years past, accessible by telephone, and no effort was made to communicate with the father or any of the girl's relatives. The witness Swicegood, recalled by the court, stated that the register came to the door and called the witness in and asked him if he knew the parties applying for license, and that the witness replied that he knew Kincaid but did not know the girl or the other witnesses and there was no trouble that witness knew of, and defendant having testified that Swicegood told him he did not know the girl and that defendant "did not telephone Cooleemee or any other place, and did not ask the sheriff about it; that he did not think it was his duty to make any inquiry other than taking their oath and having them sign the same; that he made no further inquiry except taking the oath of Mr. Kincaid and Mr. Daniels."

It has been often shown in our decisions on the subject that (555) this requirement of reasonable inquiry is not merely a formal matter, which is met by taking the oaths of the husband or other parties unknown to the register, but it is expressive of a sound principle of public policy designed to protect immature persons from hasty and ill-advised marriages, made without the consent of their parents or guardians or those having properly the care over them.

Speaking to the question in *Agent v. Willis supra, Montgomery, J.*, said: "To all persons who believe that the welfare of human society depends largely on the family relation and that the contract of marriage should be defended by careful and just laws for the purpose of guarding against legal impediments and to prevent the marriage of those under a certain age when the parties are presumed to be unable to contract, the duty of the register of deeds, the officer in our State charged with the duty of issuing marriage licenses, seems most important and most solemn. That officer must exercise his duties carefully and conscientiously and not as a mere matter of form."

On careful consideration of the facts in evidence, we are of opinion that the cause has been correctly tried and judgment in plaintiff's favor should be affirmed.

Cited: Lemmons v. Sigman, 181 N.C. 240.

(556)

J. C. COLE ET AL. V. T. F. BOYD ET AL.

(Filed 24 April, 1918.)

1. Mortgages—Purchases by Mortgagee—Fraud—Presumptions—Burden of Proof—Issues—Pleadings.

Where the mortgagee takes by absolute deed a part of the mortgaged land from his mortgagor, fraud or duress is *prima facie* presumed, and in the latter's suit to redeem, the mortgagee must allege and show that he paid full price and without oppression, and upon his failure to do so, no issue as to such matter is raised.

2. Mortgages—Purchase by Mortgagee—Registration—Vendor of Mortgagee.

A purchaser for full value after registration of the mortgage from a mortgagee who has since taken an absolute deed from his mortgagor, acquires no superior right to the land than his grantee had.

3. Mortgages—Mortgagee—Outstanding Title—Additional Security.

An outstanding title to lands afterwards acquired by the mortgagee is only an additional security to the mortgage debt.

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

Exceptions in the record not set out in appellate's brief, or in support of which no reason or argument is stated or authorities cited, will be taken as abandoned by him on appeal to the Supreme Court. Rule 34.

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

An instruction based upon the findings of the jury upon unconflicting evidence is not objectionable as peremptory.

APPEAL by defendants from *Long, J.,* at September Term, 1917, of RICHMOND.

The plaintiffs, as the jury find, are the heirs at law of Tony Cole, who died intestate in December, 1906, seized and possessed of a tract of 185 acres near Hamlet, N. C., which he had mortgaged in sundry mortgages to the defendant Boyd. While this relation of mortgagor and mortgagee existed, Boyd obtained a fee-simple deed from Cole for 100 acres of the land covered by the mortgages. Boyd sold 10 acres of the land which he held under mortgage from Cole to his codefendant, Gor-

don, who purchased from mortgagee with notice of the mortgage. These facts are admitted in the answer by the defendants.

The court submitted four issues, the first two of which were whether the plaintiffs were the heirs at law of Tony Cole, to which the jury responded "Yes." The court submitted also these issues:

3. Did the defendant Gordon purchase the 10-acre tract described in the complaint with notice that the defendant Boyd was mortgagee of said land from Tony Cole, as alleged in the complaint?

4. Did the relation of mortgagor and mortgagee exist between Tony Cole and the defendant T. F. Boyd from 12 February, 1902, to the death of Tony Cole in December, 1906, as alleged in the complaint?

To both of these issues the jury also responded "Yes." Upon said verdict the court adjudged that the plaintiffs were entitled to possession of the land upon payment of the amount due upon said mortgage and referred the case to Fred W. Bynum, Esq., referee, to state an account of the balance due on said mortgage and to employ a competent surveyor to make a plat of the land embraced in said mortgages, with the boundaries thereof, and upon the confirmation of said report and the payment of the amount ascertained to be due thereon, the defendants should reconvey said property to the plaintiffs, heirs at law of the mortgagor. From said judgment the defendants appealed.

Manning & Kitchin and Walter R. Jones for plaintiffs.
Morrison & Dockery and E. A. Harrill for defendants.

CLARK, C. J. The brief of the defendants states as follows: "The court submited certain issues to the jury with reference to the relationship of the plaintiffs to their alleged intestate, and gave instructions to the jury thereon. We will not discuss any of these rulings assigned as errors, because the case is necessarily disposed of, in our opinion, by the errors assigned upon the third and fourth issues submitted to the jury." The brief thereupon sets out issue 3, whether the de- (557) fendant Gordon purchased the 10-acre tract described in the complaint with notice that the defendant Boyd was mortgagee of said land from Tony Cole, as alleged in the complaint, contending that said issue was not sufficient to dispose of the case.

The brief further sets out the fourth issue: "Did the relation of mortgagor and mortgagee exist between Tony Cole and the defendant Boyd from 12 February, 1902, to the death of Tony Cole in December, 1906, as alleged in the complaint?"

The defendants objected to the submission of the foregoing issue and assigned it as error, but assign no reason for the objection to either

issue. In the brief, they contend that the purchase of land by a mortgagee from his mortgagor is not void as a matter of law, and that a deed from a mortgagee to a third party for land purchased from his mortgagor is not invalid, because the mortgage was upon record at the time the mortgagee executed the deed to such third party.

The brief further states that "there are many exceptions and assignments of error, none of which the defendants desire to abandon; but after full reflection, we think the case may be disposed of upon the sufficiency of the issues submitted and instructions to the court."

The brief submits no argument or authorities upon any other proposition. Rule 34 of this Court provides: 'Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated, or authorities cited, will be taken as abandoned by him." This has been often cited and upheld by the Court.

The jury have found that the plaintiffs were heirs at law of Tony Cole, the deceased mortgagor. It is admitted that Boyd was mortgagee, and that while such mortgagee he bought the land in question from the mortgagor, taking a conveyance therefor, and that he conveyed 10 acres thereof to his codefendant Gordon, who took said conveyance with the mortgage at the time on record. It is not denied that the mortgage has never been canceled.

If the defendants desired any further or different issues submitted, or any other instructions than those given, it was their duty to have so asked the court.

As the case stands, upon the ground chosen by the defendants in the brief, the controversy practically presents the question whether, when a mortgagee takes a conveyance of the mortgaged property from the mortgagor, the burden is upon the defendants to allege and prove that he bought for full value and without any influence or oppression exercised against the mortgagor.

The answer does not allege that Boyd bought of the mortgagor for full value and without fraud or oppression, and he having tendered no issue to that effect the judgment of the court directing a statement of the account and a reconveyance by the mortgagee upon the payment of the balance found to be due on the mortgage debt is correct, the amount paid for such conveyance being simply a credit to be entered upon the debt.

(558)

It is well settled that when a mortgagee purchases the equity of redemption or takes in an outstanding title, the defendant holds the title as additional security for any indebtedness secured by the mortgage.

When the mortgage is admitted or shown, the burden is upon the mortgagee to allege and to show that he took a conveyance of the land

from the mortgagor for full value, and that there was no oppression or undue influence. In such case, "Once a mortgage always a mortgage" applies, and as the mortgagor is "in chains" the court will not throw upon him the burden of proving that the transaction was inequitable, but the burden is upon the mortgagee to allege and show that the purchase was for full value, and that no advantage was taken of the mortgagor.

The exceptions not discussed in the appellant's brief are deemed waived. The appellants' brief rest their defense entirely upon "the errors assigned" upon the third and fourth issues.

The contention of the defendant is that while the purchase of land by a mortgagee is *prima facie* evidence of duress or fraud, that the Court has never held that such deed is void except when the mortgagee buys the property at public sale. This is not controverted, but the burden was upon the defendant to rebut the presumption by showing the transaction was free from fraud or oppression, and that the price paid was fair and reasonable. *McLeod v. Bullard,* 86 N.C. 210; *Jones v. Pullen,* 115 N.C. 471.

But for the denial in the pleadings that the plaintiffs were the heirs of Tony Cole, the court might well have ordered the reference to state the account. The plea that Boyd claimed under the Phillips' deed could not avail the defendants in view of the admission that Boyd was mortgagee at the time he took said deed.

The mortgage of record includes the 10 acres sold to Gordon. Boyd testified that there was a balance due him on the mortgaged debt and the registration was notice to Gordon. *I, James v. Gaither,* 93 N.C. 358; *Harper v. Edwards,* 115 N.C. 246. He took the land in the same plight and condition as Boyd held it. It was not discharged from the lien of the mortgage and he acquired no better title than Boyd possessed.

The conveyance from the mortgagor to the mortgagee was not void, but the burden was upon the defendants to show that the price paid was fair and reasonable and that the transaction was free from fraud or oppression. In *McLeod v. Bullard,* 86 N. C. 210, *Smith, C. J.,*
held that when the mortgagor conveys his equity of redemption (559)
to the mortgagee but later brings an action to state an account
and to cancel the deed, the burden of proof is upon the mortgagee to show by evidence other than the deed itself that the transaction was fair; that he paid full value in order to rebut the presumption of law that the conveyance was fraudulent—a mortgagee being included in the class of trustees to whose dealing with their *cestuis que trustent* the presumption is applied.

This case has often been cited since. In one of them, *Jones v. Pullen,* 115 N.C. 472, the Court held: "Where a mortgagee with power of

sale deals directly with the mortgagor and purchases from him the equity of redemption, there is by reason of the trust relation a presumption of fraud which, as decided in *McLeod v. Bullard, supra* may, be rebutted by showing the transaction was free from fraud or oppression and that the price paid was fair and reasonable, in which case the mortgagor can not avoid the sale." The opinion in this case is by *Shepherd, C. J.,* and is like that in *McLeod v. Bullard,* a very full and complete discussion of the subject saying: "This is an inflexible rule and not because there is but because there *may be* fraud."

The mortgage in this case contained a power of sale, if that made any difference. The mortgagee dealt directly with the mortgagor and took a conveyance of the land, *i. e.,* he bought the equity of redemption. In *Cauley v. Sutton,* 150 N.C. 327, *Walker, J.,* says: "We have held that if the mortgagee pays off an encumbrance or buys any outstanding title superior to his own, he can not hold it for his own benefit, but the act inures to the benefit of him whom he holds as trustee." And further: "If he buys at a sale made in a prior mortgage, he does not acquire the title for his own personal benefit, but merely removes an encumbrance and the charge of it as a prior lien, upon the property itself; and this is so because he cannot take advantage of his position to the injury of those whose interests are committed to his protection. *Taylor v. Heggie,* 83 N.C. 244." To the same purport, *McLeod v. Bullard,* 86 N.C. 210, approving on rehearing *S. c.,* 84 N.C. 516, which held "Where a mortgagee buys the equity of redemption, the law presumes fraud and the burden is on the mortgagee to show the *bona fides* of the transaction."

The burden of proof was upon the defendants, and they did not tender any other issues. Nor did they object to the issues tendered, nor did they assign any error in the submission of the third and fourth issues except a follows: "The defendants objected to the tender of the third and fourth issues. Objection overruled and defendants except." In their brief the defendants as a matter of argument contend that the third issue is not sufficient to dispose of the case and that the fourth issue was erroneous because the purchase by Gordon from Boyd was not void because the mortgage was on record.

(560) However, as we have seen, the third issue was sufficient to dispose of the case unless the defendants averred and proved to the satisfaction of the jury that the purchase was for full value and without fraud and oppression and they should have tendered an issue to that effect. The answer does allege that the land was conveyed to Gordon by Boyd for fair value. But there is no allegation that the conveyance from Cole to Boyd was for full and fair value and without fraud

and oppression. Upon the pleadings the issues submitted were those which arose upon the pleadings.

The instruction given by the court was not as contended by the defendants a peremptory instruction, but is as follows: "The jury is instructed that the relation of mortgagor and mortgagee is one of trust and confidence; that the mortgagee is trustee; that when a mortgagee buys a superior or paramount outstanding title—outstanding in some one else—he buys and holds the same for the benefit of the mortgagor and holds such title as trustee. And the court therefore instructs the jury that the purchase of the title of Robert Phillips by T. F. Boyd on 14 May, 1906, the relation of mortgagor and mortgagee then existing between T. F. Boyd and Tony Cole, then the purchase of such title inured to the benefit of Tony Cole, and T. F. Boyd still continued the trustee of Tony Cole for the said property and such of it as was not sold by both of them. Gentlemen, that is the law as I understand it. It has been the law all the time and I give you that instruction. I believe I have stated to you that the burden is on the plaintiff to satisfy you by the greater weight of the evidence and you will understand that it is only as to the fourth issue that upon all the evidence if you believe it, you will answer the issue 'Yes.' " This issue was as to whether the relation of mortgagor and mortgagee existed between Boyd and Cole down to the death of the latter.

As to the third issue, the court instructed the jury: "If you believe all the evidence in the case and find the Gordon tract, as it is called is included within the mortgage deed made by Cole to Boyd, then you will answer that issue 'Yes,' because registration of the deed would be notice to Gordon and everybody else as to what it purports to convey."

Upon consideration of all the exceptions, we find.

No error.

Cited: Forbes v. Harrison, 181 N.C. 464; *S. v. Lea,* 203 N.C. 25; *Harrelson v. Cox,* 207 N.C. 652; *Byrd v. Waldrop,* 210 N.C. 670; *Massengill v. Oliver,* 221 N.C. 134; *Atkinson v. Atkinson,* 224 N.C. 125, 126, 131.

(561)

LANIE LEHUE v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 22 May, 1918.)

1. Telegraphs—Money Orders—Stipulations—Principal and Agent—Banks—Negligence.

A stipulation printed upon an application for the transmission of money by telegraph, and signed by the applicant, that if the place for the payment of the money was not a money order office, the company should be allowed to employ a bank to make ultimate payment, as the agent of the sender without liability for the neglect of the bank, is a valid and reasonable one.

2. Same—Contracts.

Where the applicant for the transmission of a money order by telegraph has been correctly told by the agent of the company that it would be necessary for it to employ a bank for its ultimate payment, and he makes his application under the printed stipulations that the company would not be liable for the neglect of the bank which was made the agent of the sender for the purpose; and it appears that the company was not in default in performing its duties under the circumstances; *Held*, there has been no breach of contract by the telegraph company permitting a recovery against it for mental anguish.

3. Telegraphs—Torts—Damages—Mental Anguish.

In order to recover damages against a telegraph company for mental anguish for breach of a public duty in negligently failing to promptly transmit a money order by telegraph, the damages must reasonably and probably flow from the tort; and where the money is sent by the husband for the return home of his wife and another telegram is sent later to her announcing the death of her mother, which was unknown to the parties until then, mental anguish for her failing to receive the money in time to attend the funeral of her mother is not recoverable.

Action, tried before *Lyon, J.*, at October Term, 1917, of Wake, upon these issues:

Did the defendant negligently fail to pay to the plaintiff the sum of $11.45 within reasonable time, as alleged in the complaint? Answer: "Yes."

What amount of damages, if any, is the plaintiff entitled to recover? "$750."

From the judgment rendered defendant appealed.

Douglass & Douglass for plaintiff.

Albert T. Benedict, Pace & Boushall, Tillett & Guthrie for defendant.

BROWN, J. This cause was before this Court on demurrer to complaint and is reported in 174 N. C., 332. The demurrer was overruled

and the cause remanded for trial.

We allege to what is held in the opinion on the first appeal, (562) but we think the facts brought out fully on the trial present a different case from that alleged in the complaint.

It now appears that plaintiff's husband deposited the $11.45 with defendant at Raleigh between 7:30 and 8 A. M., 22 November. He informed the lady clerk that his wife, the plaintiff, was in Black Mountain without means and that he desired to transmit the money to her at once. The plaintiff's husband testified: "She asked me if my wife was known in Black Mountain and she said the money would have to go through the bank."

The husband then signed the application for the money order, which contained the following stipulation: "When the company has no office at destination authorized to pay money, it shall not be liable for any default beyond its own lines, but shall be the agent of the sendor, without liability and without further notice, to contract on the sender's behalf with any other telegraph or cable line, bank or other medium for the further transmission and final payment of this order."

Two very important facts are established:

1. The plaintiff's husband was informed that Black Mountain was not a money order office and that the money must be transmitted through a bank.

2. That at the time the plaintiff's husband did not know of his mother-in-law's death, neither did the wife, and consequently the defendant could have no knowledge of it.

It appears that the message was promptly sent and the money transmitted by Battery Park Bank of Asheville and received by the Commonwealth Bank at Black Mountain by 11:20 A. M. of November 22d. That bank at once mailed notice to plaintiff to call for the money. She failed to do so up to 2 P. M., when the bank closed. Plaintiff appeared next morning and received the money. It was 3:30 P. M., 22 November (after bank closed) that plaintiff received telegram announcing the death of her mother.

It is manifest that there was unreasonable delay upon the part of defendant in transmitting the money through its nearest money order office at Asheville to the bank of Black Mountain. The reason plaintiff did not receive the money before the bank closed was because the bank notified her by mail, as it usual, to call for the money and she failed to receive notice in time to call before the closing hour.

That the plaintiff cannot recover damages for her alleged mental anguish for a breach of contract is quite plain. No such damage could

have been within the contemplation of the parties when the contract was made. At that hour neither the husband nor his wife knew of the death of her mother. She did not learn of it until 3:30 P.M. that
(563) day.

The plaintiff, however, bases her right to recover *ex delicto*. To justify this plaintiff must show that the defendant has violated a public obligation it owed to her and that the damages suffered are "such as were *reasonably probable* under the relevant facts existent at the time of tort committed." This case, 174 N.C. 332.

We fail to see in the evidence any breach of duty. The defendant had the right to establish certain offices as money order offices, and also to refuse to establish other offices as money order offices. Black Mountain was not a money order office, and there is no suggestion that there was any obligation upon the defendant to establish a money order office there, and particularly in the winter time, when as matter of general knowledge, Black Mountain is but a small town and the receipts wholly inadequate to enable the company to make money order payments.

In accepting the message, both the plaintiff's husband and the defendant understood that the payment was to be made through a bank, and at the time the money was accepted in Raleigh the plaintiffs' husband expressly agreed that if the ultimate destination was not a money order office, then the telegraph company might employ a bank as the agency to complete the delivery, and that the bank would in such a case be the agent of the plaintiff, and the defendant would not have any liability for the acts of the bank.

The stipulation printed in the money order application signed by the husband contains a distinct provision that if the place at which the money was to be paid was not a money order office, then the company should be allowed to employ a bank to make the ultimate payment and that the company would not be liable for the acts or neglect of the bank. The bank was made the agent of the sender for the further transmission of the money beyond the defendant's money order offices.

There is nothing unreasonable or against public policy in this. The defendant did not undertake to contract against its own negligence, but only to provide a means which the sender, if he chose to do so, could avail himself of for transmission of money beyond defendant's lines. In this there appears an analogy between this case and the case where a telegraph company is called upon to deliver an ordinary message at a point beyond its lines, when it is compelled to use a telephone company. All of the courts, including our own, have held that where these public service corporations are not able to make the ultimate delivery them-

selves, they have the right to limit their liability to their own lines. 6 Cyc., 479, and cases cited.

In a leading case, where this subject is fully discussed, the Supreme Court of Tennessee said: "The other provision embodied in this regulation is that the telegraph company limits its liability to losses occurring on its own lines. This has usually been treated as an offer of special terms. As such, it constitutes, with the assent of the em- (564) ployer of the company, a valid contract. This provision is clearly just and reasonable. In the absence of a partnership relation between them, one telegraph company has no more authority over another company than an individual has. A telegraph company should be entitled, therefore, to contract specially with one who wishes to employ it that it shall not be liable for loss occasioned by the act of a connecting company."

But perhaps the most conclusive case is the recent decision of *Telegraph Co. v. Carter,* 156 S. W., 333, where the Court said:

"No obligation rested upon appellant to accept a message for points beyond its own line, and where it had no office or facilities for delivery. 37 Cyc., 1664, par. 9; *Tel. Co. v. Hargrove,* 14 Tex. Civ. Ap., 79. It is likewise true that it is absolved from liability for default or negligence occurring on its connecting line resulting in injury to appellee."

Speaking with reference to such stipulations, it is in effect said in Cyc., 37 1992, par. 6, that such stipulations are reasonable and valid, and will protect the initial carrier against liability for negligence on the part of any other company to which the message is necessarily transferred, citing a line of cases in note 70 thereunder in support thereof. See, also, Jones on Telegraph, where the same doctrine is announced, section 446.

The plaintiff's husband accepted the defendant's services to transmit the money with full knowledge that it had no money order office at Black Mountain and that he must use the services of a bank, *acting as his agent,* to get it to his wife.

Assuming for the argument's sake that there was a breach of public duty by defendant in failing to deliver the money promptly, under the facts plaintiff cannot recover mental anguish damages for the reason that at the time the tort was committed under the relevant facts then existent, such damages could not be reasonably probable to flow from the tort.

Neither the husband, wife or defendant knew that the mother was dead and how could it be within the bounds of reasonable probability

that her failure to receive the money sent for another purpose would cause her mental suffering.

The motion to nonsuit is allowed.

Reversed.

(565)

WEAR-WELL PANTS COMPANY v. ANNIE E. WEST.

(Filed 22 May, 1918.)

Evidence—Contracts—Principal and Surety—Judgments.

The plaintiff's attorney having obtained three judgments for goods sold and delivered, had execution issued on all of them, whereupon the defendant gave a written offer of guarantee of payment if the executions were withdrawn, upon certain terms, which were accepted by the attorney in writing, mentioning specifically all three of the judgments with amount of each. The defendant testified that she was aware at the time that there were three judgments and executions, and her testimony on the trial that she did not understand that she guaranteed one of them, was improperly admitted.

APPEAL by defendant from *Lane, J.*, at December Term, 1917, of BUNCOMBE.

This action is for recovery of $90 and interest on a written guarantee by defendant for payment of a judgment recovered by plaintiff against McDowell & Reynolds. Mark W. Brown, attorney for creditors, obtained judgment on 4 December, 1916, before a magistrate against McDowell & Reynolds in favor of the plaintiff for $90, and at the same time two others in favor of Fleishman, Morris & Co. for $348.63. Executions were issued on all three. When the sheriff was about to close debtors' place of business, the defendant (who was sister in law of McDowell) sent E. B. Atkinson to see the attorney for judgment creditors "in reference to defendant guaranteeing the payment of the judgments which Mark W. Brown had procured before J. D. Dermid, Justice of the Peace, so as to have said executions withdrawn."

The defendant threupon wrote a letter to said Brown 4 January, 1917, as follows: "If you will extend the judgments that you hold against McDowell & Reynolds for such terms—say they make four (4) payments (naming 4 February, 4 March, 4 April, and 4 May) if this is satisfactory to you I will see that these payments are made as per agreement. MISS ANNIE E. WEST."

On the next day said M. W. Brown wrote the defendant accepting her gurantee, mentioning specifically all three judgments with the

amounts and asking that if she did not understand that she was to pay these judgments in installments on the dates mentioned, to let him know. To this the defendant made no objection. On 6 February said Brown wrote her a note again naming all three judgments specifically and stating that unless $100 was sent him at once he would institute suit. To this the defendant replied: "I sent you today $41.50 on first payment of judgments against McDowell & Reynolds. I will ask you to extend time for payment of the remainder until the 12th."

The defendant testified that she did not understand that she (566) was guaranteeing this judgment as well as the other two, but on cross-examination stated she knew that three judgments had been taken by Brown before the justice of the peace at the time she wrote him the guarantee on 4 January; that she does not know why she did not except this judgment.

From verdict and judgment in favor of defendant the plaintiff appealed.

Mark W. Brown for plaintiff.
Vonno L. Gudger for defendant.

CLARK, C. J. It was error to admit the testimony of the defendant that she did not understand she was guaranteeing this judgment in the written guarantee she sent Brown, for she testified that she knew there were three judgments held by Brown, all taken at the same time, and it was to procure the holding up of the levy of the executions upon these judgments that the guarantee was given.

The court also erred in refusing to charge as prayed by the plaintiff, "If the jury believes all the evidence in this case, it will answer the issue 'Yes, $90 and interest.' "

It is elementary that a written agreement can not be changed, altered, or varied by a contemporaneous parol agreement, and in this case, the defendant does not even allege nor put in evidence such parol change of the contract, but merely says that she "did not understand" that she was guaranteeing all three judgments.

There were other errors, but it is not necessary to discuss them.

New trial.

BLACK MOUNTAIN RAILROAD COMPANY ET AL. v. OCEAN ACCIDENT AND GUARANTEE CORPORATION.

(Filed 22 May, 1918.)

Principal and Surety — Indemnity Companies — Contracts — Independent Contractors—Judgments—Payment.

The directors of a railroad company contracted with its promoter holding nearly all of its stock for the construction of a short connecting line, who in turn contracted with a partnership composed of himself and his superintendent for its construction, and took a policy in the defendant company in the name of the partnership to guarantee the turning over of the road to the railroad company free from all claims for damages. Judgment was obtained against the railroad company for injury to the contractor's employee upon the ground that it could not relieve itself of such liability by contract, the defendant guarantee company having been notified and taken charge of the suit. *Held*, the defendant was fixed with knowledge and was liable for the amount of the recovery; and the original contractor, having allowed the amount in settlement with the railroad company, is entitled to recover it under the defendant's policy as a liability which "arose by operation of law."

BROWN, J., dissenting; WALKER, J., concurring in the dissenting opinion.

APPEAL by defendant from *Carter, J.*, at January Term, 1918, (567) of McDOWELL.

Pless & Winborne, H. G. Morrison, and J. J. McLaughlin for plaintiff.

A. Hall Johnstan, F. W. Catlin, and A. S. Barnard for defendant.

CLARK, C. J. Stripped of unnecessary details, the following are the facts: The plaintiff railroad company was chartered in 1910 for the construction of a railroad from Boonford through Yancey County. The promoter and organizer of the railroad company was Charles L. Ruffin. The six directors, each holding one share of stock, contracted with said Ruffin to build said railroad, he receiving in payment the entire capital stock except said six shares. Ruffin subsequently contracted with Ruffin & Harris, a partnership composed of himself and his superintendent, J. H. Harris, to build a short branch line. Said Harris besides his usual salary, was to receive the profits over certain prices agreed upon for the work to be done. Ruffin contracted with the railroad company to turn over the road free from all claims for damages. He took out a policy in the name of Ruffin & Harris to insure them against payment of damages sustained by employees while building said branch line.

Ruffin seems to have been the Pooh Bah of the enterprise—nearly the whole thing.

An employee, Gus Forney, being injured, recovered $5,000 through his guardian Watson against the railroad company for such damages (*Watson v. R. R.*, 164 N.C. 176), this Court holding that though the damages were sustained by the negligence of an independent contractor, it being a dangerous employment, the railroad company was also liable therefor.

Subsequently the railroad company, having paid the judgment, brought this action against the defendant, claiming to be subrogated to the rights of said Ruffin against the accident company by reason of the damages which it had paid by reason of the negligence of the contractor Ruffin. The complaint and summons were amended to make Charles L. Ruffin a coplaintiff and to allege, which was not denied, that Ruffin had reimbursed the company for said loss by (568) having the $5,000 deducted from the sums due him by the railroad company, and Ruffin asks recovery against the defendant upon the policy upon the ground that the amount recovered by Watson as guardian against the railroad company was a liability which, in the language of the policy, "arose by operation of law." this Court having held that the railroad company was liable on account of the negligence of the contractor, and the defendant having been notified had taken charge of the action brought by Watson, guardian of Forney, and had defended till judgment, and on appeal in this Court, and was thereby fixed with knowledge and liability for the amount of such recovery. *R. R. v. Accident Corp.*, 172 N.C. 637.

The strength of the defendant's contention is that it did not agree to save Ruffin & Harris from liability to the railroad company, and especially did not agree to be responsible on Ruffin's contract to hand over the railroad to the corporation free from liability for damages to employees.

This ignores the fact that the railroad company was held liable solely because of the negligence, as found by the jury, of the subcontractors and that, irrespective of any contract between Ruffin and the railroad company and of any claim for subrogation, that the railroad company having paid for the damages caused by the negligence of the subcontractors, Ruffin having reimbursed the railroad company had a right to recover such amount upon the policy issued by the defendant to Ruffin & Harris because he was the member of the firm, who paid the loss, and besides, Harris, upon the record, seems to have been only a nominal member. At any rate Ruffin's receipt to the defendant on payment by it to him of the judgment in this case will be a protection

against any possible action by Harris, for the subcontractors Ruffin & Harris are indebted to Ruffin, as the contractor in chief, for the payment by Ruffin to the railroad and the receipt by the railroad to Ruffin is a valid debt against Ruffin & Harris, even if Ruffin were not a member of said partnership.

In *R. R. v. Accident Corp.*, 172 N.C. 637, the previous appeal in this case, it was said: "When the suit was brought in which this recovery was had by the employee, the defendant took part in making the defense," and further: "It is immaterial that the indemnity was taken out in the name of Ruffin & Harris, for as one of the partnership he is responsible to the railroad company for the loss and can require the indemnity company to make the loss good." Since then Ruffin has paid the railroad company the damages, which had been recovered by the employee out of the railroad company, and Ruffin is now of course entitled to recover said amount out of the indemnity company.

Affirmed.

BROWN, J., dissenting: I am of opinion that the legal conclusions of Mr. Robert L. Ryburn, who has made a very clear and
(569) comprehensive report in this case, are correct upon the facts as found by him and as modified by the judge.

It is admitted that the policy was issued to Ruffin & Harris, a copartnership, and contracts "to indemnify the assured against loss from liability imposed by law upon the assured on account of bodily injuries, etc."

The policy contains the following clauses:

"Right of Action Against Corporation.—E. No action for the indemnity against loss provided for in section 1 of the insuring agreements of this policy shall lie against the corporation, except for reimbursement of the amount of loss actually sustained and paid in money by the assured, in full satisfaction of a judgment, duly recovered against the assured, after final determination of the litigation, nor unless brought within two years after such final judgment shall have been paid.

"L. No change in the agreements, conditions, or statements of this policy, either printed, signed by the general manager of the corporation, nor shall notice to or knowledge possessed by any agent or any other person be held to waive, alter, or extend any of such agreements, conditions or statements."

It is unnecessary to consider the right of the plaintiff railroad company to be subrogated to the rights of Ruffin & Harris under the policy as Charles L. Ruffin, one of the copartners is a party plaintiff to this

action and the case may be considered from the standpoint of his right to recover.

It is admitted that the payment made to the railroad company by Ruffin was in settlement of the sum paid by the company in discharge of the judgment that Forney obtained against the railroad company. Forney, although injured in the service of Ruffin & Harris, sued the railroad company and obtained judgment against it exclusively upon the ground that the work was inherently dangerous and responsibility could not be shifted. He never obtained judgment against Ruffin & Harris or either of them.

The payment by Ruffin to the railroad company was purely voluntary and was in no sense in discharge of a liability imposed by law upon Ruffin & Harris, or either of them.

What is meant by "liability imposed by law" is shown by the provisions of the policy itself and it means a liability imposed and evidenced by a final judgment at the end of the litigation. By the express stipulation of the parties as set out in their contract, the defendant contracted to protect Ruffin & Harris only from liability imposed by law on them, and neither Ruffin nor Harris could maintain an (570) action against the defendant under the policy until a judgment had been duly recovered against them and after final determination of the litigation, and they had actually sustained a loss and paid the same in money, in full satisfaction of such a judgment.

If a suit had been brought against Ruffin & Harris, and either Ruffin or Harris had voluntarily paid any amount in settlement of the suit, the amount so paid could not be recovered from this defendant, and this being so, neither of them can upon any reasonable basis hold the defendant for an amount which was paid on a judgment rendered against a third party. As stated, all payments made by Ruffin were on judgments rendered against the Black Mountain Railway Company, for which he considered himself liable utnder the contract between him and it.

In *Kelly v. London Guarantee & Accident Co.*, 97 Mo. App., 625, in passing on a policy of indemnity issued to a copartnership, the Court says:

"We are of opinion that where the contract of indemnity is to indemnify for the loss occasioned by accidents to employees of a partnership, for negligence of the partnership, in order to render an insurer liable, the accident must happen to the employee while engaged in work for the partnership and by reason of the negligence of the partnership and that this must be made to appear by the judgment of the proper court."

In an action on a policy of indemnity containing a clause identical with the one quoted, this Court held: "It is necessary for the plaintiff

to show that he has sustained the loss he seeks to recover in his action against an indemnifier against loss, and not alone that a judgment has been obtained against him for an injury to an employee covered by the bond." *Lowe v. Fid. & Cas. Co.*, 170 N.C. 445.

In order to recover, plaintiff Ruffin must show a final judgment against himself establishing that Forney was injured in the service of the copartnership and that he has paid such judgment. This he has failed to do.

There is no protense that this requirement of the policy has ever been waived. In fact, it could not be waived or abrogated except in the manner pointed out in Section L above quoted.

Cited: Newsome v. Surratt, 237 N.C. 300.

A. W. BILLINGS v. WILLIAM WILBY.

(Filed 22 May, 1918.)

1. Contracts—Telegrams—Offer and Acceptance—Request for Formal Contract.

A subcontractor for constructing a sewer telegraphed an offer to another, offering him a certain price per running foot to do the work, who unconditionally accepted by telegram, adding "Send contract signed at once": *Held,* the telegrams constituted a definite and binding contract, unaffected by the fact that the request for a more formal contract had not been complied with.

2. Same—Confirmation—Inquiry—Instructions—Trials.

Where a definite and binding contract for constructing a sewer has been made by offer and acceptance by telegraph, evidence that the contractor again telegraphed his acceptance with the further words, "Wire at once if you accept" my proposition, does not indicate his purpose to abandon any of his rights under his contract or to reopen the question; and where his evidence denies the sending of the later telegram, it is proper, under any view of the evidence, as in this case, for the court to instruct the jury to answer the issue in the affirmative if they "believe the evidence and find the facts to be as testified by the witness and disclosed by the documents produced in evidence."

ACTION, tried before *Carter, J.*, at October Term, 1917, of (571) WILKES.

The action was to recover damages for breach of an alleged contract conferring on plaintiff the right to construct the pipeline for a sewer from the new Federal building in Wilkesboro, N. C. On denial of

the contract and any and all liability thereunder, the jury rendered the following verdict:

1. Did defendant enter into a contract with plaintiff A. U. Billings to employ said Billings to cut the ditch and lay the sewer line at the price of 40 cents per running foot, as alleged in the complaint? Answer: "Yes."

2. Was the plaintiff able, willing, and ready to do and perform the work according to contract? Answer: "Yes."

3. Did defendant breach said contract as alleged in the complaint? Answer: "Yes."

4. What damages, if any, are plaintiff entitled to recover of defendant? Answer: "$220."

Judgment on the verdict and defendant excepted and appealed, assigning for error chiefly a refusal to nonsuit plaintiff and the instruction of his Honor on the first issue as follows: "You are instructed that if you believe the evidence and find the facts to be as testified by the witnesses and described by the documents produced in evidence, you will answer the first issue 'Yes.'"

Hayes & Jones for plaintiff.
Fairley & Hendren for defendants.

HOKE, J. There was evidence on the part of the plaintiff tending to show that plaintiff, a contractor of extended experience and engaged at the time in "grading off the foundation" for the new (572) Federal building at Wilkesboro, N. C., on 16 February, 1916, received a letter from William Wilby, defendant, then at Selma, Ala., and who had the subcontract for the plumbing and laying the sewer line, inviting a proposition from plaintiff for cutting the ditch and laying the line, etc., according to survey and specifications which had been already made by the government; that on 13 January, 1916, plaintiff replied by telegram from North Wilkesboro as follows:

"Will put in sewer line according to specifications for $500, you furnish pipe and material North Wilkesboro. Wire at once is you accept this. (Signed) A. U. BILLINGS."

On same date defendant sent by wire a night letter as follows:

"Forty cents per running foot is best I can do, I furnish pipe and you cement. I can do it myself for less than this, but want it put in before my man comes. If I cannot get it for the above amount, will wait and put it in myself.

(Signed) WILLIAM WILBY."

To this plaintiff replied by telegram at 10:40 A. M., 14 January:

"Night letter received. Will accept. Send contract signed at once."

That plaintiff was ready, able, and willing to do the work and had the hands and tools there for the purpose, and on the night before he was to begin, which was several days after plaintiff's last message, plaintiff received a telegram from defendant to the effect that he would advise plaintiff in a day or two about the work; that defendant never did advise plaintiff further about it, but soon thereafter undertook the work himself, etc.; that plaintiff's damage in the loss of the contract was about $250.

On matters relevant to the issue, defendant introduced his own deposition to the effect "that he was plumber resident in Selma, Ala., and had a subcontract for installing the plumbing and sewer for the building, and, in addition to the telegrams already in evidence, there was attached to his disposition two other telegrams in terms as follows, one purporting to be from plaintiff to defendant, dated 18 January, 3 P.M.:

"I accept your sewer proposition. Wire at once if you accept mine. Start work at once in the morning. (Signed) A. U. BILLING:."

(573) And another from defendant to plaintiff:

"Will advise you within next few days regarding sewer proposition. (Signed) WILLIAM WILBY."

In reference to the additional telegrams attached to the deposition and purporting to be from plaintiff, "I accept your sewer proposition. Wire at once if you except mine. Start work in morning,' plaintiff recalled, testified that he did not send nor authorize any one else to send such a telegram. On perusal of this evidence, we are clearly of opinion that a definite contract to let the work in question was constituted between these parties by the telegram of plaintiff, dated 14 January, in reply to defendant's night letter and in terms: "Night letter received: will accept. Send contract signed at once," and this result is not affected by the closing words of the message, "Send contract signed," etc.

This, by correct interpretation, meaning merely that it was the desire and preference of the plaintiff that the agreement they had made should be written out and formally signed by the parties, and it is the recognized position here and elsewhere that, when the parties have entered into a valid and binding agreement, the contract will not be avoided because of their intent and purpose to have the same more formally drawn up and executed and which purpose was not carried

out. *Gooding v. Moore,* 150 N.C. 195; *Teal v. Templeton,* 149 N.C. 32; *Sanders v. Pottlizer Bros. Trust Co.,* 144 N.Y. 209; Clark on Contracts, 2 Ed., 29, and authorities cited.

In *Moore's case, supra,* it was held that "when parties to an oral contract contemplate a subsequent reducing of it to writing as a matter of convenience and prudence and not as a condition precedent, it is binding on them through their intent to formally express the agreement in writing was never carried out."

And in 144 N. Y., *supra,* "If the correspondence and telegrams between the parties contain all the details of a contract, it is enforcible though they intended that their agreement should be formally expressed in a single paper which, when signed, should be the evidence of what already had been agreed upon."

This being the correct position, we must approve his Honor's charge on the first issue that, "if the jury believe the evidence and find the facts to be as testified by the witness and disclosed by the documents produced in evidence, you will answer the first issue 'Yes.' "

The parties having entered into definite contract by the message from the plaintiff of date 14 January, the additional message introduced by the defendant, even if genuine, evinces no purpose to abandon any rights he had acquired or to reopen the question of what had been done between them, and if it were otherwise, the charge of his Honor, when considered in reference to the testimony and the conditions (574) presented, could only mean and was clearly intended to mean that if the parol evidence given by plaintiff to the effect that he had never sent this telegram or authorized any one else to do so, should be accepted by the jury and the fact so found, such message should not be allowed to affect the determination of the issue.

On the record, we find no error in the charge or in the refusal of the motion to nonsuit, and the judgment below must be affirmed.

Cited: Wilkins v. Cotton Mills, 176 N.C. 80.

(575)

M. P. C. YOWMANS v. THE CITY OF HENDERSONVILLE.

(Filed 28 May, 1918.)

1. Municipal Corporations—Cities and Towns—Streets and Sidewalks—Surface Waters—Negligent Construction—Damages.

A municipal corporation is not ordinarily responsible in damages for the increase of water upon an abutting owner in regard to the flow and

disposal of surface water incident to the grading and pavements of its streets, acting in pursuance of legislative authority, unless there has been negligence on its part which caused the damages complained of.

2. Same—Dedication of Streets—Powers Conferred.

The right of a municipality to change the grade of its streets and improve them according to modern and generally approved methods passes to the municipality in the original dedication and may be exercised by its authorities as the good of the public may require, subject to the condition that it be exercised with proper skill and caution; and if, in a given case, or as it may affect the property of some abutting owner, there is a breach of duty in this respect causing damage, the municipality may be held responsible.

3. Municipal Corporations—Cities and Towns—Surface Waters—Negligence—Damages—Compensation.

While municipal corporation may ordinarily pave and grade their streets without liability for an increase of surface water naturally falling on the lands of a private owner, where the work is properly done, they are not allowed, from this or other cause, to concentrate and gather such water into artificial drains and throw them on the lands of an individual owner in such manner and volume as to cause substantial injury to same without making adequate provision for its proper outflow, unless compensation is made, and for a breach of duty in this respect an action will lie against them.

4. Same—Trespass—Nuisance—Contributory Negligence.

An injury to the land of an abutting owner on the street of a municipality by the negligence of the city in failing to provide a proper outflow for the surface waters it had concentrated and discharged on the land from the grading and pavement of its street is in the nature of a trespasser nuisance, and the doctrine of contributory negligence does not always in strictness apply.

5. Municipal Corporations—Cities and Towns—Surface Waters—Drains—Connecting Pipes—Liability—Storms.

In this action against a municipality for concentrating the surface water in grading and paving its street upon the land of an abutting owner to his damage, there was evidence tending to show that the city had placed a subsurface drain on the plaintiff's land, running beneath his dwelling, insufficient to carry off the water, and on the other hand that the injury was solely caused by insufficient and improperly laid connecting drain pipes placed by the plaintiff to carry off the water from his remaining land. The damages sought were caused by the rising of water in plaintiff's dwelling, etc.: *Held*, the defendant's liability depended chiefly upon whether the injuries sustained were likely to result and did result under and from defendant's negligence in placing an insufficient subsurface drain pipe, under the conditions presented, with regard to whether the defendant had made adequate provision for the surface water under all

ordinary rains and storms likely to occur, whether the injuries complained of were entirely caused by plaintiff's own default in negligently laying his connecting drains.

6. Municipal Corporations—Cities and Towns—Surface Waters—Negligence—Measure of Damages.

Where a municipal corporation is liable in damages to the land of an owner abutting upon the street, caused by its negligence in failing to provide a sufficient drain to carry off the surface waters, a recovery may be had of such as may have directly resulted from the defendant's wrong, and all consequential damages which could reasonably be expected to occur, and did occur, under the conditions existing at the time.

7. Municipal Corporations — Surface Waters — Negligence — Damages — Duty to Minimize.

Where a municipality has damaged the land of an abutting owner upon the street by reason of its failure to construct an adequate drain pipe to carry off the surface waters from the street, such owner is not required to minimize his damages by running a counter drain, or incur substantial expense in the protection of his property when it is largely experimental in its nature and might result in incurring liability to a lower proprietor.

Action, tried before *Lane, J.*, and a jury, at Spring Term, 1917, of HENDERSON.

The action was to recover damages to plaintiff's house and lot abutting on Fourth Avenue in Hendersonville, N. C., claimed to have been caused by wrongfully diverting water upon the same by defendants, engaged in grading and paving the streets of the town. There was also allegations with supporting evidence, on the part of plaintiff, that defendant in such work had wrongfully and negligently concentrated the surplus water of the streets and thrown same upon plaintiff's lot, causing damage to the lot and the house situate thereon.

On the part of defendant, there was denial of any wrongful (576) diversion of water or any wrongful or negligent concentration of water, etc., and allegations that any damage suffered by plaintiff was caused by her own wrong and negligence in so laying drain pipes on her lot that the flow of water upon same was obstructed, causing the damage complained of.

On issues submitted, the jury rendered the following verdict:

1. Was plaintiff damaged by the city of Hendersonville in diverting water upon her premises, as alleged in the complaint? Answer: "Yes."

2. What damage has plaintiff sustained by reason of the diversion of the water? Answer: "$800."

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

A. C. Jones, Staton & Rector, and Smith & Shipman for plaintiff.
E. W. Ewbank for defendant.

HOKE, J. There were facts in evidence on the part of plaintiff tending to show that she owned and occupied a residence lot in the city of what was formerly the auditorium lot, and before the acts complained of the natural flow of surface water in that vicinity was across the rear of the lot from east towards the southwest corner of the same; that professing to act under powers conferred by legislative charter, the authorities of the town at different times had so graded Fourth Avenue, and later graded and paved this and other connecting avenues and streets of the town, that large quantities of water were diverted from their natural flow in and upon plaintiff's lot, causing damages to same.

The evidence of plaintiff further tended to show that defendant, through its officers and agents, had concentrated the water of the street and conveyed the same upon plaintiff's lot by subsurface drains or pipes running under plaintiff's residence, and defendant, by its wrongful diversion of water and by bithulithic pavements upon its streets and avenues, had so increased and accelerated the volume of surface water so conveyed to plaintiff's lot that it overcharged the pipes provided for draining off the same, causing said pipes to burst, flooding the lower story of plaintiff's house and causing great damages to same; that plaintiff repeatedly complained to the town authorities and made appeals that they would make some provision for her protection, and such appeals were refused, defendant claiming that they were not charged with any duties in reference to plaintiff's lot and had no right of way thereon, and, on repeated and continuous damages suffered,

(577) plaintiff stopped up the pipes leading under her residence, causing the water to back out in the public streets, etc., when defendants, to relieve the situation, put a large drain pipe around the side of plaintiff's house and which seems, for the present at least, to have relieved the conditions presented.

The evidence on the part of defendant was to the effect that they had not diverted any water on to plaintiff's lot which did not naturally flow there, but on the contrary, the action of the authorities in grading and paving the streets had relieved plaintiff's lot of much of the water that formerly flowed over her property; that defendant had not built or placed the subsurface pipes running under plaintiff's lot and was in no way responsible for their condition; that defendant was not guilty of any negligence in the matter, but the pipes as laid or adopted by the town and so running under plaintiff's house and lot were adequate for carrying off the water without appreciable harm, and would have done

so but for plaintiff's own wrong in extending these pipes from the back of her house about 80 feet to the rear of her lot, and which were laid with insufficient fall, and so negligently that same were filled up and to such an extent that the water was backed up into plaintiff's house, causing the damage complained of.

Upon this, a general statement of the principal facts relevant to the inquiry, his Honor in effect, charged the jury that if in grading and paving the streets the defendant, through its officers and agents, had diverted upon plaintiff's property more water than would naturally flow there, causing damage, the plaintiff would be entitled to recover.

Such a principle has been approved here in determining the proprietary rights of individuals or public-service corporations both in reference to natural watercourses and surface waters when collected into artificial drains, etc. *Barcliff v. R. R.*, 168 N. C. 268; *Briscoe v. Parker*, 145 N. C. 14; *Mizzel v. McGowen*, 125 N. C. 439), but in regard to the flow and disposal of surface water incident to the grading and pavement of streets, a difference rule is recognized, and a municipality, acting pursuant to legislative authority, is not ordinarily responsible for the increase in the flow of water upon abutting owners unless there has been negligence on their part causing the damage complained of. The right to change the grade of the streets and to improve the same, according to modern and generally approved methods, passed to the municipality in the orignal dedication and may be exercised by the authorities as the good of the public may require. It is held in this jurisdiction, however, that the right referred to is not absolute, but is on condition that the same is exercised with proper skill and caution, and if, in a given case, or as it may affect the property of some abutting owner, there is a breach of duty in this respect, causing damage, the municipality may be held responsible.

This rule of liability laid down by the Court in *Meares v.* (578) *Wilmington*, 31 N. C. 73, has been many times approved in this State and is in accord with well-considered authority in other jurisdictions. *Hoyle v. Hickory*, 167 N.C. 619-620; *Harper v. Lenoir*, 152 N.C. 723; *Dorsey v. Henderson*, 148 N.C. 423; *Jones v. Henderson*, 147 N.C. 120; *Churchill v. Commissioners*, 48 Neb., 87; *Evansville v. Decker*, 84 Ind., 325; *Chalkley v. City of Richmond*, 88 Va., 402; *Perry v. City of Worcester*, 6 Gray, 544; 4 Dillion on Municipal Corporations (5th Ed.), sec. 1735.

On the record therefore, we must hold that there was error in the ruling of his Honor that defendant was liable for diverting water upon plaintiff's land, incident to the grading and paving of the streets, without regard to the manner in which it may have been done.

In further consideration of the facts in evidence, it is very generally held here and elsewhere that while municipal authorities may pave and grade their streets and are not ordinarily liable for an increase of surface water naturally falling on the lands of a private owner, where the work is properly done, they are not allowed, from this or other cause, to concentrate and gather such waters into artificial drains and throw them on the lands of an individual owner in such manner and volume as to cause substantial injury to the same and without making adequate provision for its proper outflow, unless compensation is made, and for breach of duty in this respect an action will lie. *Patoka Township v. Hopkins*, 131 Ind., 142; *City of Evansville v. Decker*, 84 Ind., 325; *Miller v. Morristown*, 47 N.J. Eq., 62; *Field v. West Orange*, 46 N.J. Eq. 183; VI McQuillan Municipal Corporations, secs. 2710-2711. And cases in our own Reports are in full recognition of the principle. *Davis v. Smith*, 141 N.C. 108; *Porter v. Durham*, 74 N.C. 767, etc.

While our Court, as shown, has referred the right to recover in actions of this character to the general principles of negligence, these injuries being in the nature of trespasser nuisance (4 Dillion, sec. 1735), the doctrine of contributory negligence as administered in this jurisdiction may not always in strictness be applied and on the facts as now presented, we are of opinion that the question of liability between these parties should be determined on this or some equivalent issue, whether defendant has wrongfully turned its surface water on plaintiff's property, causing damage to same as alleged. And, under appropriate instructions applied to the facts and the principles of law heretofore stated, the question of defendant's responsibility should be made to depend chiefly on whether, having gathered and concentrated the surface water into artificial drains or sewers, it turned same on plaintiff's property in such manner and such volume that the injuries complained of were likely to result, and did result, under and from the conditions presented. If so, the issue should be answered "Yes."

(579) If, however, the defendant, in the exercise of due care, had made adequate provsion for the surface water under all ordinary rains and storms likely to occur, and the injuries complained of were entirely caused by plaintiff's own default in negligently laying her pipes from her lot to her back fence then there should be no recovery, and the issue should be answered "No."

If the issue on liability is answered for plaintiff, then she is entitled to recover "All direct damages resulting from defendant's wrong and all consequential damages which could be reasonably expected to occur, and did occur, under conditions existent at the time." *Bowen v. King*, 146 N.C. 385-390, the opinion in the case quoting with approval from

Hale on Damages, pp. 34 and 35, as follows: "This last author, in substance, says that wrongdoer is liable for all damages which are the proximate effects of his wrong, and not for those which are remote. That direct losses are necessarily proximate, and compensation therefor is always recoverable. That consequential losses are proximate when the natural and probable effect of the wrong."

It was urged for defendant that though plaintiff may have suffered injury, her damages should be slight for the reason that, at small expense, she could have relieved her property from any and all effects of the wrong. The general principle is fully recognized with us that, in case of contract broken or tort committed, the injured party should do what reasonable care and business prudence requires to minimize the loss. *Hocutt v. Telegraph Co.*, 147 N.C. 193; *Bowen v. King*, 146 N.C. 385; *Tillinghast v. Cotton Mills*, 143 N.C. 268; *R. R. v. Hardware Co.*, 143 N.C. 54. But it has been also decided that one who has been injured by a wrong of this character is not compelled to counter drain or incur substantial expense in protection of his property where such a course is largely experimental in its nature and might result in incurring liability to a lower proprietor. *Roberts v. Baldwin*, 155 N.C. 276; *S. c.*, 151 N.C. 407; *Caldwell v. R. R.*, 171 N.C. 365.

For the error indicated there must be a new trial of the cause, and it is so ordered.

New trial.

Cited: Shaw v. Greensboro, 178 N.C. 429; *Elam v. Realty Co.*, 182 N.C. 603; *R. R. v. Lumber Co.*, 185 N.C. 233; *Mills v. McRae*, 187 N.C. 709; *Eller v. Greensboro*, 190 N.C. 718; *Gore v. Wilmington*, 194 N.C. 456; *Monger v. Lutterloh*, 195 N.C. 279; *Medlin v. Wake Forest*, 195 N.C. 862; *Hall v. Trust Co.*, 200 N.C. 737; *Oettinger v. Kinston*, 203 N.C. 846; *Broadhurst v. Blythe Bros. Co.*, 220 N.C. 472; *Troitino v. Goodman*, 225 N.C. 416.

GUY KIRKMAN v. THEODORE SMITH.

(Filed 28 May, 1918.)

1. Estates — Contingent Limitations—Heirs—Children—Statutes—Interpretation—Death of First Taker.

The statute of 1827, now Revisal, sec. 1581, providing that every contingent limitation by deed or will, made to depend upon the dying of any

person without heirs or heirs of the body, etc., shall be held and interpreted a limitation to take effect when such person shall die, not having such heir, etc., changed the law as it was interpreted prior to 1829, as to perpetuities, and the Statute is not only a law validating limitations of this character, by referring the "death without heir or issue" to a fixed and definite time, but is also regard as a rule of interpretation by which the estate of the first taker is to be affected with the contingency until his death, unless it clearly appears upon the face of the deed or will that an earlier period was intended by the testator for the first estate to become absolute.

2. Same—Intent—Vesting of Estates.

On devise of an estate to M. for life, then to G and K., and if they should die without bodily heirs, then over, the creation and existence of the life estate, without more, does not, of itself, affect the statutory rule of construction as to estates in remainder, and the contingency affecting such estates will continue to affect the same till the death of the first takers in remainder. Revisal, sec. 1581.

3. Same—Defeasible Fee—Deeds and Conveyances.

A devise to M. "to be hers her lifetime" and then to G. and K., and if they should die without any bodily heirs, "then said land shall go back to the Flow heirs," after the death of M. and K., it is *Held*, that G., who is alive, married and having living children, has a fee-simple title to the land, defeasible upon his dying without children, and he cannot convey a perfect title thereto.

ACTION, heard on demurrer to complaint before *Long, J.*, at (580) Spring Term, 1918, of MECKLENBURG.

On matter relevant to the question presented, the complaint alleged that defendant had entered into a written contract to purchase of plaintiff a tract of land of 132 acres at the price of $4,000, or to buy one-half at $2,000, if plaintiff could only make a valid title to that half; that the title offered by plaintiff depends upon the clause in the will of D. W. Flow, executed in 1893, and facts relevant to the question 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 joining my home tract; to be 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. I also give to my daughter, Margaret G. Kirkman, three hundred dollars."

(d.) That Marvin Kirkman died intestate in the year 1903, he then being a young man only eighteen years of age, unmarried, and left no issue or lineal descendants.

(e.) That Margaret G. Kirkman died on the second day of February, 1918, intestate.

(f.) That Guy Kirkman, this plaintiff, is now thirty-one years of age, and has a wife and two children, 8 and 10 years of age, respectively.

Defendant demurred on the ground that, on the facts as (581) stated, plaintiff could not make a valid title.

Judgment sustaining demurrer and plaintiff excepted and appealed.

Thaddeus A. Adams for plaintiff.
Cansler & Cansler for defendant.

HOKE, J. The question of title between these parties was presented to the Court on appeal in a former case, and it was held that, under the terms of the will and the relevant facts then existent, the estate held and title offered by Guy Kirkman was only a defeasible fee and the contract, therefore, which stipulated for a perfect title, could not be enforced. *Kirkman v. Smith,* 174 N.C. 603. This opinion having been certified down and judgment entered and the life tenant having in the meantime died, the parties contracted and plaintiff instituted the present suit, contending that the death of said life tenant had so affected plaintiff's estate that a good title could now be made, but we are of opinion that on the record the position cannot be sustained.

Prior to the act of 1827, it was very generally recognized that in a devise to one in fee with limitations over, if the first taker die without heir or heirs of his body or issue, in terms importing an indefinite failure of heirs or issue, the limitation over on such contingency was held to be too remote and void under the rule against perpetuities.

The position, though enforced at times with great reluctance by the judges, was considered too strongly entrenched and fortified by precedent to be disturbed by judicial action, but operating, as it did not infrequently, to frustrate the intention of the testator and destroy the interests of meritorious claimants, the General Assembly, in 1827, enacted a statute, Revisal, sec. 1581, that as to all deeds and wills executed on and after 15 January, 1828, "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 issues of the body, or without children or offsprings 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."

In various authoritative cases construing this statute, it has been established that it is not only a law validating limitations of this character by referring the "death without heir or issue" to a fixed and definite time, but it should also be regarded as a rule of interpre-
(582) tation by which the estate of the first taker is to be affected with the contingency until his death unless it clearly appears on the face of the deed or will that an earlier period intended by the testator for the first estate to become absolute. *Kirkman v. Smith,* 174 N.C. 603; *Springs v. Hopkins,* 171 N.C. 486; *Rees v. Williams,* 165 N.C. 201; *S. c.,* 164 N.C. 128; *Harrell v. Hagan,* 147 N.C. 111; *Sain v. Baker,* 128 N.C. 256; *Buchanan v. Buchanan,* 99 N.C. 308.

True, it is fully recognized with us that in case of ambiguity permitting construction, the law will favor the early vesting of estates, and that ordinarily the first taker is to be regarded as the primary object of the testator's bounty and, construing wills in reference to these principles, we have also repeatedly held that in certain instances an earlier period should be fixed upon for the contingent estate to vest, as in *Whitfield v. Douglass, ante,* 46; *Bank v. Johnston,* 168 N.C. 314; *Dunn v. Hines,* 164 N.C. 113.

But, in these cases, the ruling was made by reason of terms and limitations in the will having some proper bearing or qualification on the estate or interest of the first holder, and none of them, so far as examined, will sanction or uphold the position that in wills or deeds coming under the provision of the statute, such a result will be affected by a vested and preexisting life estate in another. On the contrary, many of the cases directly hold that this of itself and without more will not interfere with the full operation of the statutory rule; that a dying without issue shall be referred to the death of the first holder of the estate affected by the contingency. *Wichard v. Craft,* present term; *Hobgood v. Hobgood,* 169 N.C. 485; *Elkins v. Seigler,* 154 N.C. 374; *Perrett v. Byrd,* 152 N.C. 220. And so, in the present instance, there is nothing whatever which shows or tends to show that an earlier period was intended other than the mere fact that a vested life estate is first given to Margaret G. Kirkman.

The case of *Hilliard v. Kearney,* 45 N.C. 221, cited and much relied on by plaintiff, involved the construction of a will bearing date in 1775, and expressly exempted from the effect of the statute. In so far as wills subject to the statute are concerned, it has been restricted in its effects to the question actually decided in that case, to wit, that the quality of survivorship annexed to a devise to five tenants in common should terminate at the death of the devisor when expressed in the singular number, and there was nothing in the clause or elsewhere in the

will to show that a succession of survivorships was intended or that the existence of the contingency should extend beyond such death. *Buchanan v. Buchanan, supra; Harrell v. Hagan, supra.*

While there is much valuable learning in *Hilliard v. Kearney, and the* case is therefore often cited, there is doubt if it is in any way authoritative as to wills or deeds subject to the statutory rule of (583) interpretation and, as suggested in the argument of the defendant, the other decision of like kind cited by plaintiff are either cases of wills bearing date prior to the statute or in the two or three since that time, they have been disapproved on the express ground that the Court had not been sufficiently advertent to the change wrought by the law as a rule of interpretation. See *Baker v. Sain,* 128 N.C. 256.

And in the recent case of *Rider v. Oates,* 173 N.C. 569, also cited for plaintiff, the decision was made to rest on the ground that the deed of trust in express terms provided that the estate to the grantor's children should become absolute, "shall vest absolutely at the death of his widow." And that this was not changed by a subsequent limitation in the deed that in the event of all the children dying without issue, the said property shall descend to the brothers and sisters, and construing these provisions together and so as to give each its proper effect, the true intent and meaning of the deed was that the property should go to these brothers and sisters only if all of his children died without issue before the estate brought directly within the statute: "That the deed itself fixed the earlier period for the termination of the contingency."

There is no error and the judgment sustaining the demurrer is Affirmed.

Cited: Patterson v. McCormick, 177 N.C. 455, 456; *Love v. Love,* 179 N.C. 117; *Goode v. Hearne,* 180 N.C. 479; *Pratt v. Mills,* 186 N.C. 398; *Mountain Park Institute v. Lovill,* 198 N.C. 648; *House v. House,* 231 N.C. 221, 226.

W. H. FORE v. SYLVA TANNING COMPANY ET AL.

(Filed 28 May, 1918.)

1. Removal of Causes—Courts—Jurisdiction.

When a verified petition for removal of a cause from the State to the Federal Court, accompanied by a proper bond, has been aptly and duly

filed in the former court, with averment of facts sufficient to require a removal under the law, the jurisdiction of the State court is at an end, without authority to pass upon or decide the issues of fact so raised, but only to consider and determine the sufficiency of the petition and the bond.

2. Same—Diversity of Citizenship—Joinder—Petition—Sufficiency.

Where a plaintiff has used a resident and nonresident defendant for a joint wrong, the cause of action, as a legal proposition, must be taken and construed as the complaint presents it, and, in such cases, on motion to remove the cause to the Federal court, by reason of the alleged fraudulent joinder of the resident defendant, the right to removal does not arise from general allegation of bad faith or fraud on the part of plaintiff, however positive, but the relevant facts and circumstances must be stated with such fullness and detail and be of such kind as to clearly demonstrate or compel the conclusion that a fraudulent joinder has been made.

3. Same—Corporations—Resident Employees.

The plaintiff joined a nonresident defendant corporation, its resident general manager and other employees, in his action as parties defendant to recover damages for a personal injury, and alleged with particularity that the negligent act complained of arose from the dangerous condition of the track under the supervision and control of the general manager, on which, through the negligent running of its train by another employee, a car had been derailed and thrown against a brick building within which he was engaged in the course of his duties to the nonresident corporation, causing the wall of the building to fall, to his injury: *Held*, a petition to remove the cause to the Federal court for the fraudulent misjoinder of the resident defendants with only general averments of their fraudulent joinder in the action, is insufficient to raise the issues of fact, and the cause is properly retained in the State court. *Rea v. Mirror Co.*, 158 N.C. 24, cited and distinguished.

ACTION, heard on motion to remove the cause into the Fed-
(584) eral courts by reason alleged fraudulent joinder of resident defendants, before *Shaw, J.*, at October Term, 1917, of JACKSON.

There was judgment in denial of the motion and defendant company excepted and appealed.

Walter E. Moore and Alley & Leatherwood for plaintiff.
C. C. Cowan for defendant.

HOKE, J. We have held, in numerous cases on this subject, that when a plaintiff had sued resident and nonresident defendants for a joint wrong, the cause of action, as a legal proposition, must be taken and construed as the complaint presents it and, in such cases, on motion to remove the cause to the Federal court by reason of the alleged fraudu-

lent joinder of the resident defendants, the right to removal does not arise from general allegations of bad faith or fraud on the part of the plaintiff, however positive, but the relevant facts and circumstances must be stated with such fullness and detail and be of such kind as to clearly demonstrate, "compel the conclusion" that a fraudulent joinder has been made. *Hollifield v. Telephone Co.*, 172 N.C. 714; *Cogdell v. Clayton*, 170 N.C. 526; *Pruitt v. Power Co.*, 165 N.C. 416; *Smith v. Quarries Co.*, 164 N.C. 338-55; *Lloyd v. R. R.*, 162 N.C. 485; *Rea v. Mirror Co.*, 158 N.C. 24; *Hough v. R. R.*, 144 N.C. 692.

In *Hollifield v. Telephone Co., supra*, it was held: "Where a nonresident defendant seeks to remove a cause to the Federal court upon the ground of diversity of citizenship, and alleges in his petition that a resident defendant was fraudulently therein joined to prevent the removal, before the State court is under any duty or obligation (585) to surrender its jurisdiction there must be specific allegation of the facts constituting the alleged illegal or fraudulent joinder, and it is not sufficient to charge generaly or by indefinite averment that the joinder is or was intended to be in fraud of the nonresident defendant's rights."

And like ruling was made in *Smith v. Quarries Co.* and *Lloyd v. R. R., supra*. Speaking to the subject in the last cited decision, the Court said: "On this question the authorities are to the effect that when viewed as a legal proposition the plaintiff is entitled to have his cause of action considered as he has presented it in his complaint (*R. R. v. Miller*, 217 U.S. 209; *R. R. v. Thompson*, 200 U.S. 206; *Doughtery v. R .R.*, 126 Fed., 239), and while a case may in proper instances be removed on the ground of false and fraudulent allegation of jurisdictional facts, the right does not exist nor is the question raised by general allegation of bad faith, but only when, in addition to the positive allegation of fraud, there is full and direct statement of the facts and circumstances of the transaction sufficient, if true, to demonstrate "that the adverse party is making a fraudulent attempt to impose upon the court and so deprive the applicant of his right of removal." *Rea v. Mirror Co.*, 158 N.C. 24-27, and authorities cited, notably *Kansas City R. R. v. Herman*, 187 U.S. 63; *Foster v. Gas and Electric Co.*, 185 Fed., 979; *Shane v. Electric Ry.*, 150 Fed., 801; *Knutts v. Electric Ry.*, 148 Fed., 73; *Thomas v. Great Northern*, 147 Fed., 83; *Hough v. R. R.*, 144 N.C. 701; *Tobacco Co. v. Tobacco Co.*, 144 N.C. 352; *Ill. R. R. v. Hutchins*, 121 Ky., 526; *Sou. R. R. v. Gruzzle*, 124 Ga., 735.

"True, it is now uniformly held that when a verified petition for removal is filed, accompanied by a proper bond, and same contains facts sufficient to require a removal under the law, the jurisdiction of the

State court is at an end. And in such case it is not for the State court to pass upon or decide the issues of fact so raised, but it may only consider and determine the sufficiency of the petition and the bond. *Herrick v. R. R.*, 158 N.C. 307; *Chesapeake v. McCabe*, 213 U.S. 207; *Wecker v. Natural Enameling Co.*, 204 U.S. 176, etc. But this position obtains only as to such issues of fact as control and determine the right of removal, and on an application for removal by reason of fraudulent joinder, such an issue is not presented by merely stating the facts of the occurrence showing a right to remove, even though accompanied by general averment of fraud or bad faith, but as heretofore stated, there must be full and direct statement of facts, sufficient, if true, to establish or demonstrate the fraudulent purpose. *Hough v. R. R.*, 144 N.C. 692; *Tobacco Co. v. Tobacco Co.*, 144 N.C. 352; *Shane v. Ry.*, 150 Fed., 801."

(586) And, as showing that we have correctly interpreted the decisions of the Federal Courts controlling on this subject, in the recent case of *Chesapeake and Ohio Ry. v. Cockrell*, 232 U.S. 146, *Associate Justice Van Devanter*, delivering the opinion said: "So when in such a case a resident defendant is joined with the nonresident, the joinder, even though fair upon its face, may be shown by a petition for removal to be only a fraudulent device to prevent a removal, but showing must consist of a statement of facts rightly engendering that conclusion. Merely to traverse the allegations upon which the liability of the resident defendant is rested or to apply the epithet 'fraudulent' to the joinder will not suffice. The showing must be such as compels the conclusion that the joinder is without right and made in bad faith."

Considering the record in view of these established principles, we are of the opinion that the claim of fraudulent joinder of the individual resident defendants has not been sufficiently alleged by the petitioner and its application for removal has been properly denied.

The basic facts of plaintiff's injury set forth in the complaint with great fullness and detail are to the effect that, in January, 1917, plaintiff, a resident of North Carolina and an employee of defendant company, was engaged in the performance of his duties in one of defendant's buildings at Sylva, N. C., his special work being to haul tanbark in company's carts from the sheds into the said mill building; that one of the tracks of the defendant company ran close by the side of said building, where plaintiff was at work and said track and roadbed had been allowed to become and remain in a dangerous and threatening condition, caused chiefly by leaky pipes and sewers running over and under said tracks; that, on the occasion in question, a train of the company heavily loaded with wood was backed along said track in a careless

manner by defendant's employees in charge of same, when at the point described, owing to the unsafe and dangerous condition of the track and the negligent manner in which the said train was operated, a car became derailed, was thrown against the brick and stone wall of the building where plaintiff was doing his work, causing same to fall upon plaintiff, inflicting serious injuries from which he is now a cripple and permamently disabled; that these injuries were caused by the joint wrong and negligence of the defendant company, a foreign corporation, and of its resident employees and codefendants, E. L. McKee, president, superintendent and general manager of defendant company, who, in the complaint, is alleged to have had immediate charge, supervision, management and control of the hands and laborers employed in and around said plant, with power and authority to employ and discharge such hands and laborers, and of the method, manner and ways in which the several departments of said plant were conducted and operated, of the upkeep, repairing, and maintenance of the aforesaid (587) sidetracks, spurs, and switches, and the running and operation of said cars and steam locomotives"; Wade C. Hill, foreman and superintendent, having immediate charge, supervision and control of engine and train crews and of the movement of its trains, etc., and also of its track crew and force employed to keep the track in safe and sound condition; Carse Bumgarner, track foreman, invested by the company with the immediate supervision and management and duty of keeping up and repairing said tracks; Robert Cordell, the engineer engaged as employee of defendant in operating said engine at the time when the negligent operation of the train was the alleged cause in part of plaintiff's injury; and the three remaining defendants named, assisting in the operation of said train, and whose duties and negligent breach thereof are also alleged. Having stated the connection of these individual and resident defendants, with cause and source of plaintiff's hurt, a detailed description of his injuries is set forth and judgment demanded for the joint wrong of the company and its resident employees connected with the wrong.

While the petition for removal contains positive allegation of fraudulent purpose on part of plaintiff and very full denial of liability on the part of defendants or any of them, the allegations bearing on the question of fraudulent joinder are very meager and entirely insufficient to justify the Court in holding, from the facts stated, that such fraudulent joinder has been made or attempted.

In reference to E. L. McKee, there is, as stated, full denial of liability on his part and of any connection with the acts of negligence complained of. It is admitted, however, that this defendant is president of

the company. It is not denied that he is superintendent and general manager, and, while it is averred that his duties as president were chiefly in the office of the company, there are no facts or circumstances set forth showing that, as president and general manager he is not guilty of negilgent default, causing the injury as charged in the complaint. And in reference to the other defendants, the only allegation bearing on the question of fraudulent joinder are as follows: "That none of the other defendants were responsible for or connected with, as your petitioner is informed and verily believes, any of the acts of negligence complained of in the complaint, but were in truth and in fact joined as parties defendants to prevent removal of this cause to the Federal court, and that as your petitioner verily believes this is indicated by the particularity with which the plaintiff alleges the citizenship of each of the other defendants in his said complaint."

The position and conduct of all of these defendants, as stated in the complaint, are set forth as general averments in denial of liabil-
(588) ity of these defendants, but affording no data designed and calculated to inform and aid the court to a right decision on the question of fraudulent joinder.

We were referred by counsel to the cases of *Rhea v. Mirror Co.*, 158 N.C. 24, and *Wecker v. Nat. Enameling Co.*, 204 U.S. 176, as authorities in sufficient support of defendant's position. "In the *Rhea case* a suit against a foreign corporation and a resident employee, after alleging fraudulent joinder in positive terms and with a full statement of the facts and circumstances of the occurrence, the petition averred that the resident defendant was an employee holding only a clerical position in the office, having no connection with plaintiff or his duties and was not on the premises when the injury occurred."

"And in *Wecker's* case, after denial of liability and averment of fraud, in an affidavit annexed to the petition and as part of same, it appeared that the resident defendant held only a subordinate position as draughtsman in the company's office where he did his work under the immediate direction of a superior, and that he had no relationship whatever with the injury or the cause of it, and upon these allegations the court very properly held that, if established, they were sufficient to disclose a case of fraudulent joinder requiring a present removal and that, under the decisions apposite, if plaintiff desired to challenge the truth of the averments, he must do so on motion to remand or other proper procedure in the Federal court." *Rhea v. Mirror Co.* and authorities cited.

In our case, however, the facts and circumstances of the injury are set forth very fully in the complaint, stating the duties of the resident

defendants and showing the natural connection of said defendants and their employment and service at the time with the cause of plaintiff's injury, and these duties and this relationship are not challenged with specific allegations of fact in reference to the same, but are met only by general averments in denial of liability, inadequate and insufficient to establish fraudulent joinder or to raise an issue in reference to the same. There is no error and the judgment denying the application is

Affirmed.

*Cited*s *Motors Company v. Motor Company,* 180 N.C. 620; *Morganton v. Hutton* 187 N.C. 739; *Johnson v. Lumber Company,* 189 N.C. 83; *Swain v. Cooperage Co.,* 189 N.C. 533; *Crisp v. Lumber Co.,* 189 N.C. 736; *Crisp v. Fibre Co.,* 193 N.C. 81; *Cowart v. Lumber Co.,* 194 N.C. 788; *Givens v. Manufacturing Co.,* 196 N.C. 380; *Hurt v. Manufacturing Co.,* 198 N.C. 4; *Trust Co. v. R. R.,* 209 N.C. 311; *Clevenger v. Grower,* 211 N.C. 243; *Edwards v. R. R.,* 212 N.C. 64; *Mills v. Mills,* 230 N.C. 291.

F. N. JOHNSON v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 28 May, 1918.)

1. Telegraphs — Interstate Messages — Mental Anguish—Federal Law—Federal Decisions.

A recovery from a telegraph company on an interstate message for mental anguish alone is governed by the Federal decisions and statutes, and thereunder is not allowed.

2. Same—Pleadings—Demurrer—Nominal Damages.

Where the complaint in an action alleges damages for mental anguish arising from the negligence of a telegraph company in transmitting or delivering an interstate message, and also payment for the message in controversy, the toll paid for the message is at least recoverable, and a demurrer is bad. In this case the element of damages upon allegations of physical suffering are not passed upon appeal from judgment erroneously sustaining demurrer to complaint.

ACTION, tried before *Lane, J.*, at April Term, 1918, of MACON.

After the jury was impaneled and the complaint and answer read, the defendant moved for judgment upon the pleadings. (589)

The court rendered judgment dismissing the action. Plaintiff excepted and appealed.

J. F. Ray, T. J. Johnston, and P. B. D'Orr for plaintiff.
Merrimon, Adams & Johnston for defendant.

BROWN, J. The complaint alleges, in substance, that on 30 May, 1916, plaintiff, a resident of Franklin, N. C., was in the town of Kingsport, Tenn., at work temporarily as a carpenter; that his wife died and his daughter on the morning of 30th May sent him a telegram to Kingsport notifying him that his wife died that morning; that the telegram was sent by defendant and reached Kingsport about 11 o'clock a.m. same day; that the defendant negligently failed to deliver said telegram after it reached Kingsport until after 6 p.m.

In consequence of this great delay in the delivery of the telegram, plaintiff, avers he was unable to leave Kingsport on the regular passenger trains during the day, but had to leave on a freight train at midnight, and was greatly delayed in reaching Franklin, N. C., that his wife's body was partially decomposed.

The plaintiff claimed damages for the mental anguish suffered in consequence of the great delay and also finding his wife's body in such condition.

As the telegram was an interstate telegram, the plaintiff cannot recover for the mental anguish. This subject is fully discussed by *Mr. Justice Walker in Norris v. Telegraph Co.*, 174 N.C. 94 where the authorities are cited. In that case it is said: "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." See, also, *Askew v. Tel. Co.*, 174 N.C. 261, and cases cited; *Western Union Tel. Co. v. Brown*, 234 U.S. 542; *James v. Tel. Co.*, 162 U.S. 650.

The plaintiff alleges that he suffered damages other than mental anguish. He avers that, as the proximate result of defendant's negli-

(590) gence, he was compelled to sit up at the station until past midnight and take a freight train, which was without seating accommodations and unadapted to passenger service, in consequence of which plaintiff suffered great physical discomfort and injury.

Plaintiff further avers that in consequence of defendant's negligence he was compelled to walk from Dillsboro to Franklin at night over a rough mountain road, whereby his strength was completely exhausted —so much that he became unconscious on the road.

It may be that under these various allegations of physical suffering the plaintiff may be able to offer proof of some injury the direct or proximate result of defendant's breach of duty. We will not undertake to pass on the matter until the evidence is in and the facts found.

It is evident that plaintiff is entitled to recover the 65 cents he paid for the telegram when delivered to him, together with costs of action, as defendant admits in its answer by tendering judgment for the same.

Therefore, his Honor erred in dismissing the action.

We think the complaint states a cause of action, but as to what damage the plaintiff may be entitled to recover can best be determined when the evidence is in and the facts found.

We think the court erred in dismissing the action.

New trial.

Cited: Hardie v. Telegraph Co. 190 N.C. 47; *Lamm v. Shingleton,* 231 N.C. 15.

H. R. SNIDER v. JACKSON COUNTY.

(Filed 28 May, 1918.)

1. Schools—Counties—Taxation—Statutes—Constitutional Law—Approval of Electors.

The building and maintenance of its schools is not a necessary county expense, and an act which authorizes a tax levy for those purposes without provision requiring the submission of the question to the qualified voters of the territory or district is invalid.

2. Same—Constitutional in Part—Indivisible Scheme.

Where a statute provides for an annual appropriation by a county for the maintenance and support of a school, to be collected by a special tax levy, taking certain public buildings of the county for the purpose and referring to the provisions of a prior act for its government generally, it manifests one indivisible scheme for the purpose of establishing the school, and its several provisions must stand or fall together as to the constitutional requirements.

APPEAL from order of *Shaw, J.*, at chambers, 20 July, 1917, from JACKSON.

This action is brought by plaintiff, a resident and taxpayer of Jackson County, to restrain the Board of County Commissioners from issuing bonds, levying special taxes, and pledging the credit of the county to the establishment of a farm-life school in said (591) county. The ground upon which the application for an injunction is based in that election has been held, as required by law, authorizing the board to incur the indebtedness and to levy the tax.

The court, *Shaw, J.*, presiding in Superior Court of Jackson County, continued the injunction to the final hearing. Defendant appealed.

Coleman C. Cowan for plaintiff.
Walter E. Moore and Felix E. Alley for defendants.

BROWN, J. The act of the General Assembly of 1917 undertook to provide for the establishment of a farm-life school at Webster, in the county of Jackson. The act, among other things, provided that the old courthouse and jail in the town of Webster and certain lands, a part of the county home farm, be conveyed by the commissioners to the trustees of the farm-life school. The act also required the commissioners to levy an annual tax sufficient to raise $2,500 for the yearly maintenance of the school.

The act of 1917 also adopted and made a part of its enactment, as applicable to said farm-life school chapter 84 of the Public Laws of 1911, section 6, of which later act required that there shall be provided by bond issue, or otherwise, as equipment for such schools a school building, with recitation rooms, laboratories and apparatus necessary for efficient instruction, etc., dormitory buildings with suitable accommodations for not less than 25 boys and 25 girls, barn and dairy buildings with necessary equipment, a farm of not less than 25 acres of good arable land. Said act of 1911 provided for an election on the question of a bond issue and the necessary taxation for the purposes indicated.

It is manifest that the act of 1917 is one indivisible scheme enacted for the purpose of establishing a farm-life school in the county of Jackson. The several provisions of it must stand or fall together. They are not severable and distinct, and it is clear that the constitutional provisions would not have been enacted without the presence of those that are unconstitutional. *Claywell v. Comrs.*, 173 N.C. 657, citing Employers' Liability Cases, 207 U.S. 463-501, and others.

The act of 1917 contains this provision: "Sec. 5. That the Board of Commissioners of Jackson County shall appropriate annually the sum of $2,500 for the maintenance and support of said school, and to that end they are authorized to levy a special tax," etc.

There is no provision that this tax shall be submitted to the approval of the qualified voters at an election. We have held in an unbroken line of cases that schools and school buildings are not necessary
(592) expenses of a municipal corporation. A special tax for hte support of public schools to be levied and collected in the counties, cities and towns of the State, under the Constitution of this State, must be approved by a majority of the duly qualified voters of the territory

within which the tax is to be levied. Neither has a municipal corporation the right to issue bonds to build schoolhouses or otherwise aid public education without such approval. *Moran v. Comrs.*, 168 N.C. 289; *Gastonia v. Bank*, 165 N.C. 567; *Hollowell v. Borden*, 148 N.C. 255; *Wharton v. Greensboro*, 146 N.C. 356, and many other cases.

Under these decisions, the controlling provision of the act of 1917 is void, as no such tax can be levied without the approval of a majority of the qualified voters of Jackson County; and there is no machinery provided in the statue for submitting the matter to a vote at an election. The special tax is essential to the maintenance of the school, and without it the entire purpose of the act must fail.

Section 6 of the act of 1917 provides: "That the said Jackson County Farm-life School shall be controlled and governed as set forth in chapter 84, Public Laws of 1911, which said act shall be applicable to the establishment and government of said farm-life school, and all the provisions of said chapter 84, Acts of 1911, are in full force and effect and applicable to said Jackson County Farm-life School, except as the same is modified by this act."

This adds nothing to the validity of the act of 1917. The purpose of the latter act was to establish a farm-life school and levy a special tax without submitting the matter to the arbitrament of a vote, and, as we have seen, this cannot be done.

The act of 1911 contains certain administrative provisions for the government of farm-life schools generally, and it was desired that such provisions and regulations should apply to this particular school, and that is the reason for referring to it and, as far as applicable and inconsistent, incorporating them in the act of 1917.

No special tax can be levied and no bonds issued under the act of 1911, by its express terms, without the approval of a majority of the qualified voters.

We are of opinion, for the reasons given, that the act of 1917 is inoperative and invalid as a whole.

Affirmed.

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C. C. MULL AND WIFE, M. L. MULL v. LOUISVILLE AND NASHVILLE RAILROAD COMPANY.

(Filed 28 May, 1918.)

Demurrer—Pleadings—Parties—Misjoinder—Fires—Railroads.

Where the owner of the equitable title to lands in possession thereof sues to recover damages thereto for the negligent burning thereof by the defendant railroad company, and alleges in the complaint ownership and possession, an amendment setting out his equitable ownership and making the holder of the legal title a party defendant is not objectionable for misjoinder of parties and causes of action; and where no answer is filed by the new party, and the trust is not denied, the defendant cannot be heard to complain.

ACTION, tried before *Shaw, J.*, at November Term, 1917, of CHEROKEE, upon these issues:

1. Is the plaintiff M. L. Mull the beneficial owner of the land described in the complaint, as alleged in the complaint? Answer: "Yes."

2. Was said land burned and injured by reason of the negligence of the defendant, as alleged in the complaint? Answer: "Yes."

3. What damage, if any, is the plaintiff M. L. Mull entitled to recover of the defendant L. and N.R.R. Co. by reason of said injury? Answer: "$300."

From the judgment rendered, defendant railroad company appealed.

Witherspoon & Witherspoon for plaintiff.

Marshall W. Bell for defendant railroad company.

BROWN, J. The assignments of error relate exclusively to the ruling of the court overruling a demurrer interpreted to an amended complaint. The original complaint alleged that the *feme* plaintiff was the owner and in possession of the land alleged to have been burned by the negligence of the defendant company. This allegation was denied.

The plaintiff was allowed to file an amended complaint setting out her title, and also to make S. W. Lovingood a party defendant. The amended complaint sets out facts which show that the legal title to the land is in S. W. Lovingood, but that the equitable title as well as the actual possession is in *feme* plaintiff.

The defendant company demurred for misjoinder of parties and misjoinder of causes of action. The defendant Lovingood filed no answer. We think the demurrer was properly overruled.

The purpose of the action was to recover damages for negligently burning plaintiff's land. The title to it was put in issue by the

(594) answer.

It was proper to amend the complaint by setting out the equit-

able title of plaintiff, as well as to make Lovingood, who held the legal title in trust for her, a defendant.

No answer was filed by Lovingood and the trust was not denied. The plaintiff had a right to recover upon the strength of her equitable title, and it was the better practice to set it out in the complaint. *Geer v. Geer,* 109 N.C. 680; *Murray v. Blackledge,* 71 N.C. 492; *Skinner v. Terry,* 134 N.C. 305; *Farmer v. Daniel,* 82 N.C. 152.

The defendant company cannot be heard to complain because Lovingood was made a defendant, as he filed no answer, raised no issue, and is bound by the judgment for damages against defendant company.

Affirmed.

Cited: Matthews v. Lumber Co., 187 N.C. 652.

H. A. OSBORNE AND W. J. FLOWE *v.* SOUTHERN RAILWAY COMPANY.

(Filed 28 May, 1918.)

1. **Carriers of Goods—Live Stock—Negligence—Evidence—Questions for Jury—Trials.**

   In an action against the carrier for damages for the destruction of a shipment of live stock by fire, a *prima facie* case is made out when the plaintiff shows the receipt of the cattle for transportation and their non-delivery.

2. **Carriers of Goods—Negligence—Sparks—Origin—Circumstantial Evidence.**

   It may be shown by circumstantial evidence that a spark which caused the plaintiff's cattle to be destroyed by fire while being transported by the defendant carrier originated from the defendant's locomotive.

3. **Carriers of Goods — Negligence — Bills of Lading — Contracts — Live Stock.**

   Under the provisions of the "Cummins' " Amendment, a common carrier may not stipulate in its bill of lading for exemptions from liability for damages to a live-stock shipment caused by its own negligence.

4. **Carriers of Passengers—Live Stock—Attendant—Negligence—Evidence—Questions for Jury—Trials.**

   A carrier transporting live stock is not held to the same absolute liability to the attendant in the car, a passenger, as it is to the owner of the cattle, for damages arising from the destruction of the car by fire; but it is *Held,* the evidence in this case was sufficient to be submitted to the jury on defendant's liability to the attendant, in his action.

OSBORNE *v.* R. R.

APPEAL by defendant from *Lane, J.*, at January Term, 1918, of HAYWOOD.

This is an action by plaintiff Osborne for the destruction by fire of seven head of high-grade Guernsey cattle, while in transit on de-
(595) fendant's road, and the plaintiff Flowe sues for damages because of injuries sustained in the same fire, he being in the car with the cattle as a caretaker.

These cattle were shipped in October, 1916, from Canton, N. C., to the Raleigh, N. C., Fair, where they were exhibited and on return were burned by the car taking fire near Lexington, N. C.

By consent the two actions were consolidated and tried together. From the verdict and judgment in favor of both plaintiffs the defendant appealed.

Alley & Leatherwood, E. C. Ward, and J. B. Smathers for plaintiffs.
Martin, Rollins & Wright for defendant.

CLARK, C. J. The defendant states in his brief that the only question presented is whether there was sufficient testimony of negligence to be presented to the jury.

There was evidence that the defendant permitted the car in which the cattle had been loaded on their return trip to remain on the yards in Raleigh 25 hours, thereby greatly depleting the water supply provided for the use and protection of the cattle and of their caretaker, the plaintiff Flowe, who testified that the water was entirely exhausted before he reached Greensboro on the night of 22 October; that he had no opportunity to replenish the water supply at Greensboro, and did not know where to get water, nor how long he would be there; that on leaving Greensboro he laid down and went to sleep opposite the door, with his head away from the engine; that the eastern door of the car was closed, and the other door was about one-third open; that when he woke up the fire, presumably from a spark from the engine, was burning slightly in the straw bedding near his head; that he tried to smother the flames with his jacket, but could not put them out because of the draft caused by the motion of the train, and there was no water in the barrel at the time; when he found it impossible to put out the fire, he passed through the flames and swung himself outside the car, holding by the top of the door while the train was going 30 to 40 miles an hour.

There was also evidence that the defendant was negligent in placing the car in which these cattle were loaded the second car from the engine, and in front of a long train of cars, instead of at the rear of the train, The witness further testified that he had scattered 3 or 4 bales of

straw in the car as bedding for the cattle and that one of the doors of the car was open about 18 inches; that the car as thus loaded was inspected by the defendant's agent at Raleigh and again by its conductor at Greensboro, who made no objection, and the defendant was thus fixed with knowledge of the inflammable matter in the car, and the danger of placing the car so near the engine. He also testified that he filled up the barrel with water in Raleigh to water the (596) cattle and as protection against fire, but it was exhausted by the long detention at Raleigh, and in the trip to Greensboro. The defendant's conductor testified that there were 22 cars in the train at the time of the accident and that the car in which the cattle were loaded was the second car from the engine. The Rule Book of the defendant, section 786, in evidence, directs yardmasters and train crews that "cars containing live stock should be placed in the rear of the train, and immediately ahead of the caboose."

There was also evidence tending to show that the defendant was negligent in failing to equip its engine on this train in which plaintiff Osborne's cattle were burned to death and upon which plantiff Flowe was injured, with a safe and suitable spark arrester. It is true the engineer, Holt, testified that the spark arrester was in good condition the next day, but this left it a matter of fact for the jury whether it was in good condition on the night of the fire.

As to the plaintiff Osborne, it is the duty of the common carrier, irrespective of contract, to safely carry and deliver all goods delivered to it. If the goods are lost or damaged the burden is on the carrier to prove facts that would relieve it from liability. The plaintiff made out a *prima facie* case when he showed the receipt of the cattle for transportation and their nondelivery. *Mitchell v. R. R.*, 124 N.C. 239. The origin of the fire may be established by circumstantial evidence, and it was not necessary that any witness should testify that he saw the sparks coming from the engine. There was no evidence tending to show any other origin, which, besides, was a matter of defense. *McMillan v. R. R.*, 126 N.C. 725; *Williams v. R. R.*, 140 N.C. 623; *McRainey v. R. R.*, 168 N.C. 571.

The bill of lading in this case expressly excepted from the restrictive clauses the laibility of the carrier for negligence. Even if this had not been done, the carrier would have none the less been liable for negligence under the "Cummins" amendment, which restored the law that a carrier could not stipulate for exemption from liability for damages occasioned by its own negligence.

While there is not the same absolute liability for safe carriage of a passenger as there is in regard to the safe transportation of freight, the

evidence of negligence as above recited was sufficient to submit the case to the jury in regard to personal injuries sustained by the plaintiff Flowe. In *Barnes v. R. R.*, this Court said, *Allen, J.*: "Proof that the plaintiff was injured in the manner described while a passenger on the train of the defendant is itself some evidence of negligence. 5 R.C.L., 74; *Marable v. R. R.*, 142 N.C. 557; *Glesson v. R. R.*, 140 U.S. 445." This last case is quoted freely in *Barnes v. R. R.* and is conclusive.

We think that in submitting the case to the jury there was

No error.

Cited: Fuller v. R. R., 214 N.C. 652.

(597)

A. W. HICKS ET AL. V. W. D. WOOTEN.

(Filed 22 May, 1918.)

1. Clerks of Court—Appeal and Error—Judgments—Executions—Appellant's Duty.

While it is the clerk's duty to act primarily and send up an appeal from his judgment refusing plaintiff's motion for leave to issue execution under a dormant judgment, Revisal, sec. 620, it is the duty of the appellant to take the necessary and proper legal measures to put the case before the judge if the clerk fails to act.

2. Same—Laches—Inexcusable Neglect.

Where a plaintiff's motion for leave to issue execution on a dormant judgment has been denied by the clerk, Revisal, sec. 620, and he appeals therefrom in open court and defendant waives notice, and he remains inactive for two months thereafter, and then finding that his appeal has not been sent up to the judge owing to the failure of the clerk to do so, he has it sent up, the fact that the settlement by the judge thereof has not been returned to the clerk within the statutory time puts him upon notice that there has been an unreasonable delay, and the appeal should be dismissed on the ground of his inexcusable laches. Revisal, secs. 610, 611, 612, 613.

3. Homestead—Judgments—Execution—Clerks of Court—Dormant Judgments—Motions—Statutes.

The homestead is only a right of exemption given the debtor in his land which is set apart to him and freed from execution during its continuance (Revisal, sec. 685), and where it has been laid off to him under execution of judgment, the judgment creditor may not have leave to issue execution against the homestead upon a dormant judgment against the homestead insured in a valid deed of trust by motion under the provisions of the Revisal, sec. 620.

HICKS *v.* WOOTEN.

4. Deeds and Conveyances—Registration—Judgments—Execution—Homestead—Clerks of Court.

A deed to lands in trust for the benefit of creditors, reserving the homestead rights of the grantor, and duly recorded, is not affected by the lien of judgment of one of the creditor's subsequently obtained; and where the homestead has been allotted under execution of the judgment and not set aside under reservation of the deed, the judgment creditor is not entitled to have another execution issued to revive his judgment, by his motion under Revisal, sec. 620, either as against the land embraced in the deed or included in the homestead set aside to the judgment debtor. Revisal, sec. 685.

HOKE, J., concurs in result.

APPEAL by plaintiff from judgment rendered by *Stacy, J., at chambers*, 14 August, 1917; from NEW HANOVER.

Motion before Clerk of the Superior Court of New Hanover County, under Revisal, sec. 620, for leave to issue execution on a judgment entitled as above and rendered at January Term, 1891, of said court. Before this judgment was taken, the defendant W. D. Wooten (598) and his wife had conveyed his real and personal property to Joel Hines by a general assignment for the benefit of his creditors, dated 26 October, 1889, and duly registered on the same day in Columbus County, where the grantors resided and the property was situated.

In the said deed of assignment, W. D. Wooten excepted his right of homestead, stating in the deed that "said homestead is not hereby conveyed or intended to be conveyed"; and again in another part of the deed, "which said homestead and personal property exceptions are to be laid off and assigned to him, the said W. D. Wooten, from the above mentioned real and personal property, as by the laws of North Carolina he is entitled to," they having been excepted from the operation of the deed.

In declaring the trust for the benefit of his creditors, he directs the trustee to take possession of the property and effects assigned to him and to sell the same, "after the above exemptions shall have been allotted according to law," etc. There was no allotment of a homestead by the trustee, but in February, 1891, the judgment of plaintiffs was docketed in the Superior Court of Columbus County and execution issued, thereon, under which, on 21 July, 1891, the homestead of W. D. Wooten was allotted in the lands described in the deed of trust to Joel Hines, and the allotment was duly filed in the office of the clerk of the Superior Court and also duly registered at the same time. There was no levy made under the execution as there was no excess.

Joel Hines, the trustee, died and J. B. Schulken was appointed trustee in his place, and all of the preferred debts secured by the deed of

trust having been paid, except the one due to the plaintiff of $684.37, and which on 27 February, 1914, amounted to $1,659.33, the trustee J. B. Schulken, conveyed the land described in the deed of trust to J. G. McCormick in consideration of the cancellation of said indebtedness. It also appears that on 17 February, 1914, W. D. Wooten and wife conveyed the homestead to the said J. G. McCormick, the two deeds of J. B. Schulken and W. D. Wooten and wife conveying all interests in the land conveyed by the deed of trust.

It appears further that a part of the lands was held by W. D. Wooten and W. H. Wooten as tenants in common, and that on 14 March, 1896, they executed to each other deeds for a certain part of the same, to be held in severalty, thereby severing the tenancy in common, and took possession of their several parts thereof.

This motion for leave to issue execution upon the judgment was made on 30 March, 1916, and the defendant, among other things, set up the statute of limitations, relying on the lapse of three and ten years since the issuing of the last execution on 1 May, 1891. The mat-
(599) ter was heard by the clerk upon the motion and plea, and on 3 December, 1916, the clerk decided and adjudged that the statute was a bar to any relief under the motion, and thereupon denied the motion and further adjudged that defendant go without day and recover his costs of the plaintiff.

The judgment of the clerk contained a statement of the facts upon which it was based, and was shown to counsel at the time it was prepared and copies thereof given to the parties. No exceptions were filed thereto at that time, nor for more than ten days after the judgment was signed or filed, and nothing was done by either party except the giving of notice of appeal by plaintiffs and acceptance of same or waiver of notice by defendant until on or about 10 February, 1917, when the clerk sent the papers to the judge.

When the mater came up before the judge at that time the defendant entered a special appearance and moved to dismiss the appeal because the same had not been perfected in accordance with Revisal, secs. 610, 611, 612, and 613. The case was continued by the judge, with consent of the parties, until 4 August, 1917, and again until 8 August, 1917, with leave to file affidavits. The plaintiffs filed no affidavits, and the judge found that the affidavits of defendant stated the facts correctly, the same being embodied substantially in this statement so far as material. He thereupon adjudged that plaintiff's appeal had not been perfected and prosecuted according to the statute, and dismissed the same with costs, but he also adjudged that if this was not true, the case was against the plaintiff on its legal merits and, upon the facts, he

affirmed the judgment of the clerk and final judgment was entered accordingly.
Plaintiffs then appealed to this Court.

Luther A. Blue, J. Bayard Clark, and Woodus Kellum for plaintiffs.
Schulken, Toon & Schulken and J. G. McCormick for defendant.

WALKER, J., after stating the case: The judge decided correctly on both grounds. It appears that within three days after the appeal was taken from his judgment the clerk prepared a statement of the case, signed the same and exhibited it to the parties, and there was no objections filed by them. Nothing else was done by the clerk or the appellants until more than two months thereafter, that is, on 10 February, 1917, when, at the request of appellants, the papers were sent to the judge. The defendant moved to dismiss the appeal, and this motion was granted. An examination of the statute will show that if the papers had been sent to the judge at the time fixed by the statute (Revisal secs. 610 to 613), they should have been returned to the clerk with the order of the judge within twenty days afterwards, or certainly by 24 December, 1916, and as they were not filed by that time, plaintiffs should have known that there was an annual delay, and (600) have ascertained the cause of it. Instead of doing this, they did nothing after they had appealed until 7 February, 1917.

The law requires litigants to be diligent in the protection and prosecution of their rights in the courts. If the judgment was not returned by the judge at the expiration of the time fixed by the statute, the appellant should have taken steps then, if not earlier, to have learned the cause and asked for the proper remedy. He will not, and should not, be permitted to lie by and let the case take care of itself. He paid absolutely no attention to the requirements of the statute, and surely did not give the case that attention which a man should give to his important business. Many appeals have been dismissed when there was greater care and diligence. It is the clerk's duty to act primarily and send up the case, but if he fails to act it then becomes the duty of appellant to be active and to take such legal measures as the law allows to put the case before the judge, by motion for a rule on the clerk to send the case up, or by *recordari* or *certiorari*, as may be appropriate. In other words, if the clerk does not perform his duty, the appellant must be careful to see that he does, otherwise there will be interminable delays to the prejudice of a proper, orderly and speedy administration of justice.

In *Sigmon v. R. R.*, 135 N.C. 181, the *Chief Justice* says that the statute, as to appeals, would not have been passed if experience had not

demonstrated that its provisions were necessary for the prompt and orderly dispatch of business. And, further, that "it is the duty of the appellant to see to it that the requirements as to the appeal are complied with." And it was held in *Pitman v. Kimberly,* 92 N.C. 562, and *Bailey v. Brown,* 105 N.C. 127, that when the judge fails to settle a case on appeal within the time fixed by law, it is the duty of the appellant to act for the purpose of expediting its settlement, as he will not be heard to place all the blame on the judge. It is his duty to have the record sent up, and not the clerk's and upon it to move for such relief as will cause the judge to settle the case that it may be certified to this Court. The appellant must do more than merely enter his appeal and give notice, as he does not "take an appeal," if this is all he does, as was said by *Justice Ruffin* in *Wilson v. Seagle,* 84 N.C. 110. He further remarked: "So that from first to last he is the chief actor in the whole matter, and without his active agency his appeal cannot be perfected." Any diligent person would have known long before the month of February had come that there had been a failure to send up the case to the judge, or that there was unnecessary delay. It is evident that it was intended that the review of the clerk's decision should be prompt and somewhat summary as only twenty days were allowed for the whole procedure. The cases we have cited, and many others
(601) of a like kind in our Reports, show that unnecessary delays will not be tolerated in such matters. See *Bullard v. Edwards,* 140 N.C. 644; *Stroud v. W. U. Tel. Co.,* 133 N.C. 253.

Our conclusion is that appellant was guilty of inexcusable laches, and that his appeal was properly dismissed.

But we are further of the opinion that if the appeal were not dismissed, the judge was right in his ruling as to the merits. The deed of trust was executed before the plaintiff's judgment was taken and docketed, and there is no attack made upon the deed for fraud or other cause. It therefore passed to the trustee all of defendant's property except that specially excepted, and the part thus excepted was only the defendant's homestead and no other interest in the land, all of which, with the exception noted, passed to the trustee for the benefit of W. D. Wooten's creditors. The homestead is only a right of exemption of the property which is set apart to the debtor from the claims of creditors. *Joyner v. Sugg,* 132 N.C. 580. This definition of it has been approved in *Roberson v. McDowell,* 133 N.C. 182; *Rodman v. Robinson,* 134 N. C. 505; *Davenport v. Fleming,* 154 N.C. 291; *Dalrymple v. Cole,* 156 N.C. 353 *(S. c.,* 170 N.C. 102), and many other cases.

The question presented in this case was substantially decided in *Kirkman v. Peden,* 173 N.C. 460, and in *Davenport v. Fleming, supra,*

In the first of these cases *(Kirkwood v. Peden)*, it is said: "The only reason for keeping a judgment in full force and effect during the existence of the homestead is to subject the reversionary interest to its payment when homestead expires, as such interest cannot be sold under execution during the life of the homestead. In *Bruce v. Nicholson*, 109 N.C. 202, it was said: 'The lien only attaches and secures the right of the creditor to have the judgment debt paid out of the proceeds of the sale of the property made under the ordinary process of execution or other proper process or order of the court. The lien extends to and embraces only such estate, legal or equitable, in the real property of the judgment debtor or may be sold or disposed of at the time it attached.' Therefore, where the judgment debtor has conveyed the reversionary interest before the judgment lien attaches, there is no reason to preserve the judgment in force beyond the statutory period, as has been declared in several decisions of this Court."

And in *McDonald v. Dickson*, 85 N. C. 253, it was said: "Even then (after the allotment of the homestead) the cessation of the statute is only as to debts affected by such allotment, that is, as to judgments docketed in the county where the homestead is situate, and solely with reference to their liens upon the reversionary interest in such lands. As to every debt, except judgments docketed, and for every purpose except that of enforcing their liens upon the reversionary interest after the falling in of the homestead interest, the statute runs and (602) may become a bar." The same was held in *Morton v. Barber*, 90 N.C. 401, and other cases cited and quoted from in *Kirkwood v. Peden, supra*. That case presents the question so fully and clearly, in all of its bearings, that we refrain from any renewal of the discussion, as it would be needless. The point is that the running of the statute of limitations is not suspended, because as to all the debtor's property or interests in property, except the homestead, the creditor could at any time proceed by execution or otherwise to enforce payment of his judgment, but here the debtor had conveyed all such property interests before the plaintiffs' judgment was rendered subject to his homestead, on which the plaintiffs acquired no lien, and against which he could not run his execution. There was no reversion, so called in him, which he could subject to the payment of his judgment after the expiration of the homestead, and , therefore, no reason for suspending the statute in order to preserve his rights, for he had none. The judgment is simply not protected by the Revisal, sec. 685. It was docketed after the execution of the deed of trust, and all of the debtor's property had passed to the trustee, except the homestead, which was not subject to its lien, or to an execution issued upon it.

Reference is made by defendant's counsel to *Kelly v. McLeod,* 165 N.C. 382, and *Campbell v. White,* 95 N.C. 344, in regard to another feature of this case, which it is not necessary to consider, but he evidently overlooked the fact that the Court was, in those cases, dealing with transactions which occurred long before chapter 429, Laws 1905, was enacted. Plaintiff's interest in the land in one of those cases was worth only $475, but the question becomes inmaterial in this case, as it is decided on other grounds.

We can find no reason for disturbing the judgment.

No error.

Cited: Byrd v. Nivens, 189 N.C. 624; *Sneed v. Highway Commission,* 194 N.C. 48; *Madison County v. Coxe,* 204 N.C. 64; *McLawhorn v. Smith,* 211 N.C. 518; *Williams v. Johnson,* 230 N.C. 344.

W. W. BARBER v. THE WILLIAM ABSHER COMPANY ET AL.

(Filed 22 May, 1918.)

1. Courts—Evidence—Findings—Trials—Verdicts.

The findings of fact by the trial judge where a trial by jury has been waived by the parties is as conclusive upon them as a verdict upon the evidence.

2. Bills and Notes—Negotiable Instruments—Endorsers—Dishonor—Notice—Statutes.

An endorser of a negotiable instrument is entitled to notice of dishonor under our statute, and upon failure to do so his liability thereon is discharged. Revisal, sec. 2239.

3. Bills and Notes—Negotiable Instruments—Limitation of Actions—Payment—Endorsers.

A payment on a promissory note to repel the bar of the statute of limitations must be made by one of the same class of liability thereon; and a payment by the maker does not continue the right of action against the endorser thereof.

4. Same—Mortgages.

Where the endorsers of a promissory note thereafter take a mortgage on the maker's lands to secure them as such, without further liability for the payment of the debt, they do not thereby change their relationship as endorsers only, and a payment made on the note by the maker does not affect the running of the statute of limitations in the endorser's favor.

APPEAL by plaintiff from *Carter, J.,* at the October Term, (603) 1917, of WILKES.

This is an action on a note executed by the defendant, the W. M. Absher Company, a corporation, and indorsed by the defendants, F. D. Forrester and J. H .Johnson. The Absher Company makes no defense.

The defendants Forrester and Johnson rely on the defenses of failure to give them notice of dishonor and the statute of limitations.

A jury trial was waived and his Honor found the following facts:

"1. That W. M. Absher Company, on 21 April, 1910, executed the following note to W. W. Barber, to wit:

"$800—One year after date, with interest from date, we promise to pay to W. W. Barber or order eight hundred dollars, for value received—interest due and payable semiannually.

THE W. M. ABSHER CO. (Seal)
H. O. Absher, Pr. & Treas.

"2. That defendants F. B. Forrester and J. H. Johnson endorsed their names in blank on the back of said note before its delivery to W. W. Barber.

"3. That there was no notice of dishonor given to J. H. Johnson and F. D. Forrester.

"4. That the summons in this action was issued and delivered to the sheriff of Wilkes County on 27 July, 1915.

"5. That more than three years elapsed after the maturity of said note prior to the beginning of this action.

"6. That the maker of the above note made the following payments on the dates named as follows: $48 interest to 21 April, 1911; May, 1912, or. $48; May, 1913, or, $48; May, 1914, or, $48.

On 20 July, 1912, the Absher Company executed a mortgage to the defendants Forrester and Johnson by which was conveyed (604) a tract of land in which there is the following provisions:

"This mortgage is given to secure the parties of the second part for endorsing a note of $1,000 executed on 20 July, 1912, by the W. M. Absher Company, payable one year after date to J. H. Carrigan, and is intended to and does cover any endorsements now made or may hereafter be made by all or any one of the above named parties of the second part."

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

Finley & Hendren and Squires & Whisnant for plaintiff.
Hayes & Jones for defendant.

ALLEN, J. The findings of fact by the judge, a jury trial being waived, are as conclusive as the verdict of a jury *(Matthews v. Fry,* 143 N.C. 384), and we must therefore deal with the legal questions presented by the appeal, accepting as being established that the defendants Forrester ad Johnson signed the note issued on as endorsers; that no notice of dishonor has been given to either of them; that more than three years elapsed after the maturity of the note before this action was commenced; that the payments on the note were made by the maker, and upon these facts it is clear that these defendants are discharged from liability on account of failure to give notice of dishonor, and that the cause of action is bared as to them by the statute of limitations, unless the acceptance of the mortgage of 20 July, 1912, changes their relationship to the debt.

The statute (Revisal, sec. 2239) provides that notice of dishonor must be given to the drawer and each endorser, and any drawer or endorser to whom such notice is not given is discharged," and following the statute, it was held in *Perry v. Taylor,* 148 N.C. 362, that failure to give notice of dishonor discharged the endorser from further liability.

It is also settled that a payment, to have the effect of repelling the statute of limitations, must be made by one in the same class, and that a payment by the maker does not continue the right of action against the endorser.

"To give this effect to the act of one, there must be a community of interest and a common obligation among them. They must be obligors in a bond, makers of a promissory note, drawers or acceptors of a bill, or joint endorsers of either. An admission, direct or involved in the act of payment by one of either class, under the same measure of responsibility, becomes the legal act of all that class, but does not revive the liability of others of a different class. Thus if one of several joint acceptors promises to pay as directed in the statute, or makes a (605) payment, his associate acceptors are bound by what he does; but the drawers are not, because there is no such common interest and responsibility as gives legal force to the act, and so of other classes who may be bound in like manner." *Wood v. Barber,* 90 N.C. 80.

To the same effect, see *Le Duc v. Butts,* 112 N.C. 461; *Houser v. Fayssoux,* 168 N.C. 2.

In the last case the Court says: "It is true that it is well settled in this State that a payment by the principal on a note before the bar of the statute operates as a renewal of the debt as to himself and also to the sureties on the note. At one time this was true as to endorsers like-

wise, as an endorser was regarded as a surety. *Green v. Greensboro College,* 83 N.C. 449; *Garrett v. Reeves,* 125 N.C. 529. . . .

"While the law remains the same as to a surety, and a payment by the principal will operate as a renewal of the debt as to the surety, who is regarded as a maker of the note, an endorser is no longer so regarded.

"There is a broad and well recognized distinction between a surety and an endorser, as is pointed out clearly in *Le Duc v. Butler,* 112 N.C. 461, in which case it is said: 'Part payment of a note by the payee, who has endorsed it, will not repel the bar of the statute of limitations as against the maker, the statute confirming the act, admission, or acknowledgment, as evidence to repel the bar, to the associated partners, obligors, and makers of a note.' "

The plaintiff, conceding these positions to be sound, contends, however, that the execution of the mortgage of 20 July, 1912, to secure the defendants on their endorsement, has changed the status of the parties, and that now they are principals and not entitled to notice of dishonor, and that the payment made prevents the bar of the statute of limitations, and he relies on the case of *Denny v. Palmer,* 27 N.C. 610, as an authority sustaining this view.

We have given careful consideration to the reasoning and the decision in the case cited, and are of opinion that it is an authority for the defendants, and not against them.

In the *Denny* case Rawlins and Coleman were largely indebted to various parties, and there were several endorsers for them on different notes, among them the defendant Palmer. In 1837 they executed a deed of trust to secure the payment of their debts, and in 1842 the debts remaining unpaid, the defendant Palmer, being dissatisfied with the delay in disposing of the trust property and with having his security in common with so many other persons, proposed, and it was finally agreed by the bank, Rawlins and Coleman, the trustees, and Palmer, that the trustees should reconvey to Rawlins and Coleman certain real estate in Danville, Richmond, and Greenbrier County, in Virginia, estimated as of the value of $8,180, that Rawlins and Coleman should give new notes endorsed by Palmer for the said debts (606) (which had been suspended about five years), pay off the arrears of interest and thereafter keep active the new notes by paying the discount every 60 days, and from time to time pay installments until the debts should be fully paid; and that Rawlins and Coleman should convey the said estates and others to one William Lynn, of Danville, in trust to indemnify the said Palmer as endorser, and to secure the payment of the said notes, so to be given, and any others that might be given in renewal of them.

On the maturity of these last notes there was failure to give Palmer notice of dishonor, and upon the trial the judge presiding charged the jury "that the mere fact of the insolvency of the makers of the notes, and the further fact that the defendant had taken the deed of trust of their property as an indemnity, did not dispense with notice to the defendant of the default of the makers, in order to charge him as endorser."

This charge was affirmed on appeal, and the conclusion reached by the Court is that the acceptance of an indemnity or security by the endorser does not dispense with notice unless the endorser has, as a consideration for the security, assumed the payment of the debt. "Such an obligation (the Court says) we conceive to be the true test of the endorser's being entitled or not entitled to notice," and it was held that the endorser was discharged from liability on account of the failure to give notice, although the deed in trust was made to secure the payment of the notes on which was his endorsement, and to protect him as endorser, and this is the question now before us, as the defendants have not assumed payment of the debts except by reason of their endorsement.

No question is raised by the appeal as to the right of the plaintiff to proceed against the land conveyed in the mortgage under *Ijames v. Gaither,* 93 N.C. 358.

Affirmed.

Cited: Dillard v. Mercantile Co., 190 N.C. 227; *Lancaster v. Stanfield,* 191 N.C. 346; *Wrenn v. Cotton Mills,* 198 N.C. 91; *Trust Company v. York,* 199 N.C. 627; *Franklin v. Franks,* 205 N.C. 97; *Waddell v. Hood, Comr.,* 207 N.C. 253; *Williams v. Automobile Company,* 207 N.C. 310; *Bank v. Stokes,* 224 N.C. 86.

N. A. BOND ET AL. AND N. E. HICKS ET AL. V. CAROLINA, CLINCHFIELD AND OHIO RAILWAY COMPANY.

(Filed 22 May, 1918.)

1. Appeal and Error—Instructions—Railroads—Fires—Negligence.

Where an action to recover damages against a railroad company for negligently setting out fire to the damage of plaintiff's lands, both from the pleadings and evidence centers solely on the question of whether the fire started on the defendant's foul right of way or otherwise from an independent source, and the issue has been answered in defendant's favor,

a charge of the court which fails to give the plaintiff the benefit of the presumption of the origin of the fire (*Currie v. R. R.*, 156 N.C. 423) is unobjectionable.

2. Railroads—Fires—Rights of Way—Negligence—Burden of Proof.

Where fire damages to plaintiff's lands are sought in an action against a railroad company, and there is no allegation or evidence that it was caused by a defective engine, or that it negligently operated, but only that it was caused by a foul right of way, the burden of proof is on the plaintiff to show that it was caused by the negligence alleged.

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

Where a phase of negligence is submitted under the judge's charge to the jury prejudicial to the appellee only and unsupported by allegation and evidence, it will not be considered as reversible error to the appellant on appeal.

APPEAL by plaintiffs from *Ferguson, J.*, at the October Term, 1917, of RUTHERFORD. (607)

This is an action by Gladys Bond and husband, N. A. Bond, and N. E. Hicks and husband H. Z. Hicks, against Carolina, Clinchfield, and Ohio Railway, to recover damages of the defendant for the burning over of plaintiff's land, and the destruction of timber alleged to have been caused by the negligence of the defendant. The cases were consolidated and tried together at the October Term, 1917, of Rutherford Superior Court, as the same fire burned over the lands of the plaintiffs in each case. The plaintiffs filed similar complaints touching the origin of the fire, and the cause of same, and the allegation of the plaintiffs was "That on the 15th day of April, 1916, the defendant ran its trains and engines over its track and along the lands of plaintiffs in a negligent manner, and negligently permitted sparks to be emitted from said engine, which sparks were allowed to fall upon the lands of plaintiffs adjacent to the defendant's right of way, and on said right of way, and to set fire to the combustible materials thereon," and the plaintiff's further alleged "that the defendant had permitted and allowed inflammable material to be and remain on its right of way at the point where the railroad passes over and along plaintiffs' lands, which said inflammable materials were set on fire by sparks falling from one of defendant's engines passing over its right of way, or otherwise, on the 15th day of April, 1916."

There was a further allegation as to the damages to plaintiffs' land by burning over a large number of acres for the plaintiffs in each case, and the destruction of growing timber, wood and other property, and the impoverishing of the plaintiffs' lands.

The defendant denied the allegations of its negligence, and alleged that the fire originated elsewhere, and that it was in no wise re-
(608) sponsible for the origination or spread of the fire or the burning of the timber on the lands of the plaintiffs.

Upon the trial of the cause, the plaintiffs offered evidence to sustain the allegations contained in the complaint, several witnesses testifying that one of defendant's trains passed over the track at the point where the lands of plaintiffs were situated, and that immediately prior to the passing of the train there was no fire in that vicinity, and that in a few minutes after the train passed the right of way, which had grown up in broom-sedge, and at this season of the year was old and dry, and in an inflammable condition, was seen to be burning. Witnesses also testified that the engine of the train passed by the witnesses who were situated close to the railroad track as it approached the lands of the plaintiffs, and was emitting live coals and sparks, and that some of these fell on the witnesses, and burning the clothing, and they further testified that following the passage of the train they noticed smoke arising on the right of way of the railroad track at the point adjacent to plaintiffs' lands, and upon investigation found that the fire originated within twelve feet of the railroad track and had burned off the right of way and on to plaintiffs' lands, and it was further in evidence that the railroad right of way at this point was 100 feet on each side of the track. Witnesses further testified that the sparks emitted from the engine were large live coals and sufficiently large and hot to ignite the inflammable material on the right of way, or elsewhere that they might fall.

The evidence of the defendant was to the effect that the fire originated one-fourth of a mile from the railroad—possibly from a blockade distillery—and was seen at that point several hours previous to the passage of its train, and the defendant offered evidence tending to show that the fire did not reach its right of way until several hours after the passage of its train, and that it spread to its right of way from the lands adjacent thereto.

The defendant admitted the title of plaintiffs to the lands in controversy, which had been denied in the answer.

The defendant offered no evidence as to the condition of its engine, and no evidence as to its spark arrester being in good condition, and no evidence as to the manner of the operation of its train on the day in question.

The judge charged the jury as follows:

"The burden is on the plaintiffs, gentlemen of the jury, to prove by the greater weight of the evidence that their lands were burned over by

fire which escaped from the defendant's engine, or train, and if they fail in that respect that would be the end of the case, and it would be your duty to answer the first issue 'No.'

"(a) But the burden is on the plaintiffs further to satisfy you (609) —even if you find that the fire did burn over plaintiffs' land thrown from the defendant's engine, or train—by the greater weight of the evidence, that that was the result of the negligence of the defendant in failing to do a duty which the law requires of it. One of those duties which the law requires is that it shall keep its right of way clear from rubbish and inflammable matter, and if it fails to do so and by reason of the condition of the right of way fire from the train ignites on the right of way, it would be attributable to the negligence of the defendant and the defendant would be answerable for any damage which might result. The defendant is required to keep a proper spark arrester so as not to allow live coals and red-hot cinders to escape from the engine which are calculated to set the woods on fire, and if the fire got out from a defective engine in that respect, it would be negligence on the part of the defendant" (b)

To so much of the foregoing charge as it included between (a) and (b) the plaintiffs excepted.

"Have the plaintiffs satisfied you from the evidence, by the greater weight of the evidence, that the fire originated and came from the defendant's engine or train?

(c) "And if so, have they satisfied you from the evidence, by the greater weight of the evidence, that it caught from the right of way, and the right of way was foul? If so, it would be your duty to answer the first issue 'Yes.' But if they have failed to do so, it would be your duty to answer it 'No.' (d)

To so much of the foregoing charge as is included between (c) and (d) the plaintiffs excepted.

(e) "If you shall find from the evidence, by the greater weight of the evidence, that the fire was caused by reason of a defective spark arrester one which allowed sparks to escape from the engine sufficiently lighted or heated to set fire wherever they would strike; if you should find that it was dry and the sparks from the engine lit on the land of the defendant, or on the right of way, and spread from that over the plaintiffs' land, and you find from the greater weight of the evidence, it would be your duty to answer the first issue 'Yes.' If you fail to so find as to either, it would be your duty to answer it 'No.' " (f)

To so much of the foregoing charge as is included between (e) and (f) the plaintiffs excepted.

"It is contended by the plaintiffs that there was no fire along the railroad a few minutes before the train passed; they argue that smoke

was seen to rise directly after the train passed and that the passenger train going along was emitting sparks which burned when they struck anything, and that fire was discovered to be along the right of (610) way and burning from the railroad into the woods. That is the contention upon the part of plaintiffs, and the plaintiffs urge in their contentions that you should so find that the right of way was foul, and that these sparks falling upon the right of way and inflammable matter, broomsedge, spread out over the lands.

"The defendant contends that you could not so find from the evidence. The defendant contends that it was shown you from evidence which it asks you to believe that fire was seen to be burning and smoke rising some quarter of a mile from the railroad early in the day, between 8 and 9 o'clock, and that that continued to spread out over the woods and in the direction where this fire was, and that parties passing along there as late as 3 and 4 o'clock saw no fire on the right of way, and that the fire was 240 feet from the right of way. The defendant insists that it has produced evidence, which it asks you to believe, that there was a blockade still running in that neighborhood not a great distance from the railroad right of way the day before and that fire broke out at 8 or 9 o'clock in the morning, and the defendant insists that you ought to find from the evidence that that was the fire which burned over the lands, and not the other.

"You are the sole judges of the credibility of the witnesses and of the weight to be given to their testimony. If you shall find from the greater weight of the evidence that this land of the plaintiffs—it is admitted it was the same fire—was burned over by the negligence of the defendant, it would be your duty to answer the first issue 'Yes,' then fix the damages. But if you fail to so find, it would be your duty to answer it 'No.' If you answer the first issue 'Yes,' you will then find the damages."

The jury returned the following verdict:

1. Were lands of the plaintiffs burned over by the negligence of the defendant as alleged in the complaint? Answer: "No."

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

Ryburn & Hoey for plaintiffs.

H. G. Morrison, J. J. McLaughlin, F. D. Hamrick, and Pless & Winborne for defendant.

Allen, J. We have set out the allegations of negligence, the evidence offered to support these allegations, and the charge of the Court, for the purpose of showing that the real controversy between the plain-

tiffs and the defendant was as to the origin of the fire, the plaintiffs contending that sparks fell from the engine of the defendant on combustible matter of its right of way and was thence communicated to the lands of the plaintiffs, and the defendant contend- (611) ing that the fire came from an illicit distillery operated off the right of way of the defendant by parties unknown.

There is no allegation of a defective engine or spark arrester, and no suggestion of negligent operation except in the third paragraph of the complaint where it is alleged that the defendant ran its trains in a "negligent manner," without specifying in what the negligence consisted, and this is followed in the same paragraph by the allegation that the negligence was in permitting sparks to fall on conbustible matter.

And when we turn to the evidence for the defendant it is directed solely to the origin of the fire.

There is no evidence tending to prove that there was no combustible matter on the right of way of defendant, and nothing to exculpate the defendant if the fire came from its engine.

We are, therefore, constrained to hold that the only question in controversy on the first issue was whether the fire which burned over the lands of the plaintiffs came from the engine of the defendant or from the illicit distillery, and when so considered, the charge, if otherwise objectionable in failing to give the plaintiffs the benefit of the presumption arising from proof of the origin of the fire, as in *Currie v. R. R.*, 156 N.C. 423, is unobjectionable, as the jury has found the fact against the plaintiffs.

Again, there being no allegation of a defective engine, the burden was on the plaintiffs, as his Honor charged, to establish the negligence relied on, the accumulation of combustible matter on the right of way. *Moore v. R. R.*, 124 N.C. 338; *McMullan v. R. R.*, 126 N.C. 725.

The charge as to the spark arrester was without evidence to support it, the evidence being that the fire started on the right of way, if it originated from the engine of the defendant, but of this the plaintiff cannot complain, as it gave them the benefit of having the jury consider in their favor a phase of negligence without allegation or proof, which might impose a liability on the defendant.

No error.

Cited: Nichols v. Trust Company, 231 N.C. 160.

P. S. WHISNANT v. V. V. PRICE, ADMINISTRATRIX OF C. C. GETTYS.

(Filed 22 May, 1918.)

1. Usury—Executors and Administrators.

No action for usury will lie against the estate of a deceased person unless such has been received by the deceased in his lifetime; and the penalty is not enforcible against it for such as may only have been received by his personal representative in administering his affairs after his death, but only against the administrator in his personal character.

2. Judgments—Bills and Notes—Collateral Security—Cash Payments—Principal and Surety.

In an action against an administrator to cancel a note, the plaintiff had given to the intestate, it appeared that the intestate debt to another payment of plaintiff's debt to another, and had taken the note secured by a mortgage as collateral security, together with a certain sum of money. The intestate paid the debt, applying the money thereto, *Held*, a judgment was properly ordered in the defendant's favor for the difference between the amount of the cash payment and the actual amount of the indebtedness which the intestate had paid.

WALKER, J., dissenting in part, CLARK, C. J., concurs in the dissent.

APPEAL from *Ferguson, J.*, at October Term, 1917, of RUTH-(612) ERFORD, upon exceptions to referee's report.

The court reformed the report in some respects, made finding of fact, and rendered judgment. Both parties excepted and appealed.

H. C. Elliott and R. S. Eaves for plaintiff.
W. C. McRovie and Quinn, Hamrick & Harris for defendant.

PLAINTIFF'S APPEAL

BROWN, J. This action is brought to secure the cancellation of two notes, one for $1,500 and one for $900, given by plaintiff to C. C. Gettys, defendant's intestate, and secured by mortgage on plaintiff's lands. The plaintiff prays "for an accounting; for judgment for such penalties as may be due him on account of usurious interest charged and paid; the cancellation of his papers now held by the estate of the said C. C. Gettys," etc.

The only question presented on plaintiff's appeal relates to the receiving of usurious interest by the administrator after the death of the intestate, C. C. Gettys. It is admitted that no usurious interest was received by Gettys during his lifetime on either of the notes. Counsel for plaintiff admit they are unable to find any authority in this State to the effect that an intestate's estate can be penalized for usury

charged and received by the administrator and they cite none from other States.

The uniform rule is that no action will lie against a personal representative of a deceased person except upon some claim which existed against the deceased in his lifetime. For a claim or demand accruing wholely in the time of the administration, the administrator is liable only in his personal character.

The Court of Appeals of New York considered the subject in *Fellows v. Longyon,* 91 N. Y. 324, and declared substantially that if usurious interest is charged by a guardian, an action will not lie (613) against the wards' estate, but that the same must be brought against the guardian individually. There is a good reason for this law. . . . The estates of infants and persons who have no control or management thereof are always under the control of the court, and the administrator or executor being an officer of the court, it is their duty in every way to preserve the estate and abide the law, and a failure to do so is a *devisavit* for which the administrator and his bondsmen only are liable.

In *Malone v. Davis,* 67 Cal., 279, the Court uses the following language: "Nothing is better settled than that an executor or administrator is not answerable in his official character for any cause of action that was not created by the act of the decedent himself. In actions against the personal representative on his own contract and engagements, though made for the benefit of the estate, the judgment is *de bonis propriis,* and he is, by every principle of legal analogy, to answer it with his personal property." 30 Cyc., 1090; *Eustace v. Johns,* 38 Cal., 3.

Upon plaintiff's appeal, we conclude that the assignments of error cannot be sustained.

DEFENDANT'S APPEAL

The defendant excepts because the judge refused to render judgment for the full amount of the $1,500 note with interest thereon from its date, December, 1910. The court rendered judgment for $838 on that note with interest, and also for the full amount of the $900 note and interest, less the credits recited in the eighth finding of the referee's report, which were payments made as interest to the administrator.

We see no error in this ruling, and it is not necessary to invoke the principle laid down in *Churchill v. Turnage,* 122 N.C. 426, and in *Owen v. Wright,* 161 N.C. 129, to support it, as the usurious interest was not received by the intestate but by his administrator.

The facts are that plaintiff owed one Ponder a debt which the defendant's intestate agreed to settle for plaintiff. To secure him, plaintiff

paid the intestate $455 in cash, and as security deposited with him the $1,500 note and mortgage. The Ponder debt turned out to be $1,293, which the intestate paid for plaintiff, using the $455 for that purpose. This left the sum of $838 due the intestate by plaintiff, with interest.

Under the ruling of the court the estate of the intestate is credited with all the payments made to the administrator since intestate's death. It is admitted that nothing was ever paid to him. We see nothing in this of which defendant can justly complain.

Affirmed.

(614) WALKER, J., dissenting in part: I agree that plaintiff cannot recover the penalties for usury. The administrator and not intestate received the usurious interest, and the latter's estate is not responsible for what the administrator did after his death. It was the personal act of the administrator, and not done in his representative capacity so as to charge the estate with liability. *Devane v. Royal,* 52 N.C. 426; *Tyson v. Walston,* 83 N.C. 91, in the second of which cases it is said that "no executor can be subjected in his representative capacity on any demand created or originated wholly after the death of his testator or intestate." The principle stated in *Devane v. Royal, supra,* has been reiterated by this Court and that case cited with approval, and as recently as *Craven v. Munger,* 170 N.C. 424, and *Cropsey v. Markham,* 171 N.C. 43. The act of receiving the excessive interest is necessary to subject any one to the payment of the penalty for usury, but I do not agree that the defendant is entitled to recover any interest on the debt. In order to incur a forfeiture of interest, it is only necessary that it be *charged or reserved.* As the notes contained a reservation of unlawful interest, they became noninterest-bearing, and any payments made upon them should have gone to the reduction of the principal, as they were not in law credits on the interest. *Smith v. B. & L. Asso.,* 116 N.C. 73-102; *Cheek v. B. & L. Asso.,* 126 N.C. 242. It is said in *Smith v. B. & L. Asso., supra:* "The court properly held, in the very words of the statute, that the defendant had forfeited all interest upon the debt. In legal effect 'the contract is simply a loan of money bearing no interest,' and all payments are to be credited on the principal *(Moore v. Beaman,* 112 N.C. 558; *Ward v. Sugg,* 113 N.C. 489; *Fowler v. Trust Co.,* 141 U.S. 384, 406), and in addition if the lender accepted such payments of usurious interest the borrower is given a right of action to recover back double the amounts thus extorted within the two years before action makes the charging or contracting for usury a forfeiture of all interest, and in addition its actual acceptance is visited with the penalty of recovering back twice the

amount paid." In the accounting to ascertain what is due, therefore, no credit should be given for any interest, and all payments should be applied in reduction of the principal, and the clear balance resulting from this settlement is all to which defendant is entitled to recover.

So far as the opinion of the Court conflicts with the views expressed by me in *Owen v. Wright,* 161 N.C. 129, and *Corey v. Hooker,* 171 N.C. at p. 232, it does not have my concurrence. If defendant is allowed to have judgment for the debt, the statute, which denies a recovery of interest, applies. *Cuthbertson v. Bank,* 170 N.C. 531.

Cited: Best v. Utley, 189 N.C. 364; *Snipes v. Monds,* 190 N.C. 192.

(615)

J. W. HOLLINGSWORTH v. SUPREME COUNCIL OF THE ROYAL ARCANUM.

(Filed 28 May, 1918.)

1. **Fraternal Orders—Mutual Insurance—Assessments—Statutes—Royal Arcanum.**

Fraternal and assessment orders of another State, having by its charter the right to issue certificates of insurance for the benefit of its members and without profit is, since the amendments of 1899, governed by its own laws, rules and regulations, as authorized by the State of its origin; and since that amendment a raise of an assessment by the Royal Arcanum, under a purely mutual plan, necessary to protect its policies and made in accordance with its constitution and by-laws without discrimination, and referred to in the applications and policies, is valid. Revisal, sec. 4791; *Wilson v. Order of Heptasophs,* 174 N.C. 634, cited and distinguished.

2. **Same—Constitutional Law.**

Under the full faith and credit clause of the Constitution of the United States, Act IV, sec. 1, the question of whether an assessment upon a policy of life insurance in a fraternal order or the benefit of its members and issued without profit can be raised when necessary for the protection of its policyholders is one to be determined under the laws or decisions of the State of its incorporation, and the Royal Arcanum, being a Massachusetts corporation, the law of that State permitting it to be done is controlling.

3. **Fraternal Orders — Mutual Insurance — Assessments — Policies—Contracts.**

The provision in a policy of insurance of the Royal Arcanum, after stating the premium rate, providing for periodical payments of the same amount "so long as the membership continued," is not a contract, but a regulation subject to the society's constitution and by-laws binding upon

its members as to the raising of the assessment when necessary to the protection of its policies or to its continued existence for the purpose contemplated by its charter.

4. Contracts — Fraud — Misrepresentations—Insurance—Assessments—Fraternal Orders.

A misrepresentation to avoid a contract must have been made fraudulently, and where one has accepted a life insurance policy in a mutual fraternal order upon representation by its agent that the assessments could not be increased from that therein set out, and both under the application and policy, the company would have such right under certain conditions set out in its charter and by-laws, and the insured was a man of intelligence who could have probably informed himself, and had the means of information at hand, but kept the insurance in force, with knowledge of the facts, until it had become necessary to raise the assessment for the protection of the policyholders, which was done in accordance with law, he may not then avoid the policy on the ground that he had been fraudulently induced to take the policy by the misrepresentation of the agent, and refusing to pay the increase recover the amount he may therefore have paid.

ALLEN, J., did not sit.

(616) ACTION, tried before *Carter, J.*, and a jury, at October Term, 1917, of CATAWBA.

The action was brought to recover the sum of $420, with interest, it being the total of plaintiff's monthly dues as a member of the defendant order from 30 May, 1902, until 1 December, 1916, which were paid by him to it during said time.

Plaintiff based his right to recover upon the ground of fraud in procuring him to become a member of the order in 1902, the fraud consisting in the false representations of the defendant's soliciting agent as to the amount of dues to be paid by him each month during the continuance of his membership; and as a second ground of recovery, that if the contract between them is valid, the defendant has committed a breach of the same by increasing the rate of monthly payment from $2.40 to $4.65.

The defendant denies the allegations of fraud and avers as to the other ground of recovery that it had the lawful right to increase its rate of payment for each month, as will appear hereafter.

These two questions will be considered in their reverse order, the first question now being the one in respect to the breach of the contract. The record is large and we will only state, and as briefly as possible, the salient facts of the case.

Under the authority conferred by the general laws of Massachusetts, to organize fraternal beneficiary corporations, in 1877, there was issued

to designated persons a certificate of incorporation under the name of the Supreme Council of the Royal Arcanum. By the constitution and by-laws, referred to in the certificate, the corporation became what is known as a fraternal association under the lodge system. Its principal objects, as stated, were:

1. To unite fraternally all white men of sound bodily health and good moral character, who are socially acceptable and between 21 and 55 years of age.

2. To give all moral and material aid in its power to its members and those dependent upon them.

3. To educate its members socially, morally and intellectually; also to assist the widows and orphans of deceased members.

4. To establish a fund for the relief of sick and distressed members.

5. To establish a widows' and orphans' benefit fund, from which, on satisfactory evidence of the death of a member of the order who has complied with all its lawful requirements, a sum not exceeding $3,000 shall be paid to his family or those dependent on him, as he may direct.

There was power conferred by the constitution and by-laws to subsequently amend the same in the manner therein provided. The general governing power of the order was vested in the Supreme Council, and the administration of its affairs, under the supervision of (617) such council, was entrusted to the officers named in the constitution. Authority was given to the Supreme Council to sanction the organization of local lodges or councils, upon whom were conferred certain powers not in any way conflicting with the constitution and by-laws of the order, and the members of such local lodges or councils were required to be members of the order and were subject to the duties and responsibilities which resulted from that relation and enjoyed also the resulting benefits.

Pursuant to the constitution, under due authority, there was organized in the State of North Carolina, at Louisburg, a local lodge or council, known as the Tar River Council, No. 1875, of the Royal Arcanum. In 1901, James W. Hollingsworth, the plaintiff, first joined the local council as one of its original members; but the next year, that is, in 1902, he made application for another benefit certificate, increasing the amount of his insurance from one thousand to three thousand dollars.

The material terms of plaintiff's application for a benefit certificate were as follows:

"I direct that in case of my decease all benefit to which I may be entitled under the Royal Arcanum be paid to Lula M. Hollingsworth,

related to me as wife, subject to such future disposal of the benefit as I may in the future direct, in compliance with the laws of the order; . . . that I will, and they (my beneficiaries) shall, conform to and abide by the constitution, laws, rules and usages of said council or order now in force or which may hereafter be adopted by the same."

Thereupon the benefit certificate which has been sued on in this case was issued to the plaintiff, and is known as Exhibit A in the record. Among other things, it provides as follows:

"This certificate is issued to James William Hollingsworth, a member of Tar River Council, No. 1875, of the Royal Arcanum located at Louisburg, N. C., on evidence received from said council that he is a contributor to the Widows' and Orphans' Benefit Fund of this order . . .and upon condition that such member comply in the future with the laws, rules and regulations now governing the said council and fund or that may hereafter be enacted by the Supreme Council to govern said council and fund. . .These conditions being complied with, the Supreme Council of the Royal Arcanum hereby promises and binds itself to pay out of its Widows' and Orphans' Benefit Fund to Lula M. Hollingsworth, wife, a sum not exceeding $3,000, in accordance with and under the provisions of the laws governing said fund, . . . provided that said member is in good standing in this order at the time of his death."

At the bottom of this certificate was written the words: "I accept this certificate on the conditions named therein. James W. Hol-
(618) lingsworth."

In plaintiff's application for membership and benefit certificate there is no statement as to the amount of monthly assessments which the plaintiff was required to pay. Both the application for membership and the benefit certificate expressly provide that the member shall comply with all the laws of the order, and particularly "with the laws, rules and regulations now governing the said council and fund (Widows' and Orphans' Benefit Fund), or that may hereafter be enacted by the Supreme Council to govern said council and fund."

The assessment rates were fixed by the general laws of the order, and the way a member ascertained what amount of assessment he was to pay was not by referring to his benefit certificate, but by examining section 430 of the general laws of the order, which governed the Widows' and Orphans' Benefit Fund and which fixed the amount of assessment rates paid by the members of the order. As shown above, these general laws were expressly made a part of the contract.

The plaintiff, in 1901, first applied for and received a certificate for $1,000, and the next year, on his further application, it was increased

to $3,000, and his monthly assessment was accordingly fixed at $2.40, which was the proper amount for his then attained age. The rates of assessment were fixed by the general laws, and these laws were themselves subject to be changed or modified in the manner prescribed. By subsection 3 of section 430, which was in force at the time the plaintiff became a member, the general law prescribed that the applicant should pay the amount fixed for his age, "and the same amount on each assessment thereafter whilst he is a member of the order." In other words, it was assumed at the time these rates were fixed that they would be sufficient, and that the member would pay during his entire membership the same rate that he paid at the time of joining the order. But more of this hereafter.

Article VI of the general laws of the Royal Arcanum contains the laws applicable wholly to this Widows' and Orphans' Benefit Fund, and section 430 (it being the section fixing the rates of assessment), which was introduced in evidence by the plaintiff, is part of these general laws governing this fund.

This Widows' and Orphans' Benefit Fund is diminished from time to time by payments to the widows and orphans upon the death of members, and the only way the fund can be replenished is by assessments upon the members. The amounts paid in as assessments were not allowed to be diverted to any other purpose, and the defendant order had no other assets out of which to meet the payment of these benefit certificates, except the aforesaid fund.

It appears that the salaries of officers and other expenses of the order are paid otherwise than from the widows' and orphans' fund—
that is, by a system of per capita taxes having no connection (619)
with the widows' and orphans' fund; and it further appears that
in respect to its expenses, the affairs of the order have been prudently and economically administered.

In 1905 it was found that the Widows' and Orphans' Benefit Fund would not be sufficient to pay the losses for which it was created at the then rate of assessments fixed by the order, that is, estimated at the attained age of the member at the time of his entrance into the order, and this solution, if not improved, threatened bankruptcy or the dissolution of the order.

In 1905 the Supreme Council at its session made two important changes in the general laws:

1. It provided several different tables of rates which were to be applied to the different plans or options as they might be selected by the members. For the purpose of this case, it is only necessary to allude to two of these options:

(a) Under one of them a member was required to pay a certain rate up to the age of 65 years, and then at that age the rate was increased considerably.

(b) Under another option, a member was required to pay the same rate throughout life.

The last option referred to offered a plan of identically the same character as had already obtained prior to 1905 in the order—that is, the rates were expected to remain the same throughout life.

2. The second important action taken by the Supreme Council in 1905 was that all the members of the order were required to pay new assessment rates as of the age attained by each member on 1 October, 1905, instead of continuing to pay upon the rates fixed as of the time that the member joined; and this was true no matter which option was selected by the member.

Under the action taken in 1905, it was open to the members to select any one of the several options above referred to, yet if such member did not indicate which one of the options he desired to take, he was automatically put upon that table of rates which required him to pay a certain rate up to 65 years of age, and then increased his rates very much higher at 65 years.

Following the raise in rates in 1905, there were vigorous objections on the part of the members, upon the ground not only that the plans adopted in 1905 were illegal, but that the new rates then adopted were excessive and would raise more revenue than was necessary; however, it turned out that the raise in rates in 1905 was not high enough, and the executive officers of the defendant order began to realize in the year 1912 that deficit created in the Widows' and Orphans' Benefit Fund on account of the excess of payments over receipts was very
(620) large.

It appears from the testimony of Mr. Hoag, who was Supreme Secretary of the order continuously from 1901 to 1917, and even after that time, and was well informed as to its financial operations and its general management, that from 1911 to 30 September, 1916, the disbursements exceeded the receipts more than $3,200,000, the receipts being $36,394,389.13 and the disbursements $39,572,529.34, and that in this State the members, since the organization of the order up to 31 December, 1916, had contributed to the Widows' and Orphans' Benefit Fund $2,368,824.92, and out of that amount there has been paid to members $2,730,306.47, leaving a deficit on this State's transactions of $361,481.55. At this juncture in its affairs, the order employed two actuaries of reputation and experiences to examine its records, books

and papers, and recommend for the future management of the order a scheme of assessments which would enable it to live within its means. In order to understand their report, as specially applicable to this case, we state substantially the testimony of the two actuaries taken in the cause:

Until 1898, the assessments paid by members, from which the death benefits were derived, were certain sums dependent upon the age of the member at the time of receiving his certificate which sums remained the same as the years went by. These sums were paid to meet assessments as members died, and the amount for the first year would equal the cost to the corporation of the insurance of these members. But as the members grew older the risk of their death increased, and as their payments remained constant, and as there was at no time a payment of any surplus beyond the amount required to meet losses, the payments by members of long standing were not nearly enough to equal the cost of their insurance to the corporation. So the only way in which the amounts required to meet losses could be obtained was from the payments made by new members. In 1898 the by-laws were amended so as largely to increase the payments to be made by all members, and to require the payments monthly. These amendments went into effect on 1 August, 1898, and it appears that no objection thereto has ever been made by any member of the order. These payments, while much larger than those required by the original by-laws were upon the same relative basis; that is, the increase upon all was in the same proportion, and they were all determined by the age of the member when he received his certificate, and were not to be afterwards changed as a member grew older. When these amendments were made, it was thought that the increase would provide for the future payments called for by the certificates, and that an adequate emergency fund would be created from this income. Under these amendments there was a surplus in 1898 from the excess of receipts above payments amounting to more than $455,000, and afterwards there was annually a steadily dimin- (621) ishing surplus from the same cause to and including the year 1903. In the year 1904 the payments exceeded the receipts and there was a large deficit ($271,540.50). Before the session of the Supreme Council in May, 1905, the executive committee caused mortality tables of the order to be prepared and made extended investigations and studies with the aid of competent actuaries to devise some method, through a change of by-laws, which should enable the corporation to meet its obligations to members. The actuaries prepared for them new tables, each the mathematical equivalent of the others, the first being the regular rates, and three others optional alternatives. These founded upon

the payment by the order of the maximum value of each certificate and the payment of a rate adequate, without further modification or additional assessment, to pay the certificate at the maturity. Competent actuaries testified that the old plan of assessments was faulty, according to the assumptions made by actuaries and that the order could not meet the maximum face value of its certificate permanently under it; that upon their assumptions, a change was expedient, or necessary; that the plans proposed and adopted were mathematically correct; that if the members paid the amounts fixed in these tables the order could continue to pay the maximum face value of its certificates at their maturity; that such amounts are no higher than necessary for this purpose, and that they fairly and equitably apportion among the members their contributions to the Widows' and Orphans' Benefit Fund, taking into consideration their age and risk. The actuaries went into much detail of statement as to the condition of the order, showing its inevitable and imminent insolvency unless the proposed change was adopted, and that the order was actuarially if not commercially insolvent.

It appears from this testimony that the general plan as to the raise of rates in 1916 was identically the same as that in 1905; that is to say, in 1916 just as in 1905, all of the rates were increased and all of the members were placed upon rates as of their ages attained on 1 December, 1916.

It appears in the case that the Supreme Council is made up of certain high officers of the order, who are *ex officio* members, and of delegates elected by the great councils, the latter being composed of delegates chosen by the subordinate councils, such as the one to which the plaintiff belonged; in other words, the organization is like a republic and its laws are made by delegates elected by the members. At the meeting of the Supreme Council in 1916, when the change of which the plaintiff complains was made, the councils (grand and local) in this State were represented by three members, or delegates, Dr. J. Howell Way, Harvey B. Craven, and S. M. Brinson, all of whom voted in favor of the new rates adopted at the meeting of 1916.

(622) The defendant was duly authorized to do business in this State when the plaintiff became a member of the order and when the assessments were made.

The following are the extracts from our statutes which are pertinent to the case:

Revisal, sec. 4806, being Acts of 1899, ch. 54, sec. 2, as amended by Acts of 1901, ch. 705, sec. 1, is as follows: "All contracts of insurance on property, lives, or interests in this State shall be deemed to be made

therein; and all contracts of insurance, the application for which is taken within this State, shall be deemed to have been made within this State, and shall be subject to the law thereof."

Revisal, sec. 4791 (Acts of 1899, ch. 54, sec. 84, amended by Acts of 1903, ch. 438, sec. 9): "All contracts must be in accord with charter and by-laws. Every policy or certificate or renewal receipt issued to a resident of this State by any corporation, association, or order transacting therein the business of insurance upon the assessment plan, shall be in accord with the provisions of the charter and by-laws of such corporation, association, or order, as filed with the Insurance Commissioner. And it shall be unlawful for any such domestic or foreign insurance company or fraternal order to transact or offer to transact any business not authorized by the provisions of its charter and the terms of its by-laws or through an agent or otherwise to offer or issue any policy, renewal, certificate or other contract whose terms are not in clear accord with the powers, terms and stipulations of its charter and by-laws."

Revisal, sec. 4792: "Every domestic insurance company, association, or order doing business on the assessment plan shall collect and keep at all times in its treasury one regular loss assessment sufficient to pay one regular average loss."

Revisal, sec. 4793: "If any such corporation or association or order shall at any time fail or refuse to comply with the provisions of the two next preceding sections, or section 4713, the Insurance Commissioner shall forthwith suspend or revoke all authority to such corporation, association, or order, and of all its agents or officers to do business in this State, and shall publish such revocation in some newspaper published in this State."

Revisal, sec. 4794: "Nothing in the general insurance laws, except such laws as apply to fraternal orders, shall be construed to extend to benevolent associations incorporated under the laws of this State that only levy an assessment on the members to create a fund to pay the family of a deceased member and make no profit therefrom, and do not solicit business through agents."

Revisal, sec. 4795: "Every incorporated association, order, or society doing business in this State on the lodge system, with ritualistic form of work and representative form of government, for the (623) purpose of making provision for the payment of benefits in case of death, sickness, temporary or permament physical disability, either as the result of disease, accident or old age, and formed, and organized for the sole benefit of its members and their beneficiaries, and not for profit, is hereby declared to be a 'fraternal beneficiary order, society,

or association'; and such order, society, or association paying death benefits may also create, maintain, apply or disburse among its membership a reserve or emergency fund as may be provided in its constitution or by-laws; but no profit or gain shall be added to the payments made by a member."

Revisal, sec. 4796: "The fund from which the payment of benefits, as provided for in the next preceding section, shall be made and the fund from which the expenses of such association, order, or society shall be defrayed shall be derived from assessments or dues collected from its members. Such society or association shall be governed by the laws of the State governing fraternal orders, and shall be exempt from the provisions of all general insurance laws of the State, and no law hereafter passed shall apply to such societies unless fraternal orders be designated therein."

All of the above sections of the Revisal are taken from the Public Laws of 1899, ch. 54, as subsequently amended, the annotations appear in the original edition of the Revisal and in corresponding sections of Pell's edition.

The court submitted this issue to the jury:

What amount, if anything, is the plaintiff entitled to recover of the defendant? Answer: "Nothing."

The plaintiff requested the court to submit two other issues as follows:

1. Did the defendant falsely represent to the plaintiff that his monthly assessment would never be changed, but would remain the same as long as a member?

2. Was the plaintiff by said false representations induced to take out the contract of insurance?

The court refused to submit these issues, and plaintiff excepted. Judgment was entered on the verdict, and plaintiff appealed to this Court.

W. C. Feimister, R. R. Moose, and N. Y. Gulley for plaintiff.
Tillett & Guthrie and Howard O. Wiggins for defendant.

WALKER, J., after stating the case: It appears that a great corporation, managing and controlling important financial interests for hundreds of thousands of families, was conducting its business upon
(624) unsound principles, which if followed without change would ultimately lead to financial ruin. The first question is, Was the change adopted in excess of defendant's corporate powers, or in violation of the statute governing such corporations?

This case is not like any we have heretofore decided concerning fraternal orders or benefit societies. The law of this State was amended by Acts of 1899, ch. 54, so as to exempt such bodies from the operation of our general insurance law and to put them in a class by themselves, at least in many respects. The certificates in *Williams v. Order of Heptasophs,* 172 N.C. 787, was issued to the plaintiff 3 January, 1899, before the passage of the act of 1899, and that in *Wilson v. Order of Heptasophs* 174 N.C. 628, was issued in the year 1896, while the certificates in this case were issued in the years 1901 and 1902, and is, therefore, governed by the act of 1899, so far as our law is applicable to the case at all.

The writer of this opinion concurred in those two cases for the reason that, in his opinion, this Court had previously decided the question involved in a series of cases; and when the *Williams* and *Wilson* cases were before us, it had been well settled that the law of this State should control our decision under the statute as it then existed. But the changes in the statute applicable to this case, as evidenced by the act of 1899, present the question to us again in a very different light. The amendments of 1899 plainly reveal that the Legislature had come to the view that fraternal and assessment orders should be governed by their own laws, rules and regulations, as authorized by the State of their origin, except where inconsistent with our laws concerning such orders. We find nothing in those laws that prohibit raising the rates of assessment, as was done by the defendant in 1916.

This Court, in *Brenizer v. Royal Arcanum,* 141 N. C. 409, recognized this change in our law, and especially that such orders had been excepted from the provisions of our general insurance law, among which is found the section requiring that "all contracts of insurance" shall be subject to the laws of this State when the contract is made or the application for the insurance is taken therein. This provision is, therefore, not applicable to benefit societies; and this appears more clearly when we consider Revisal, sec. 4791, which requires that certificates of fraternal orders shall be drawn in accordance with the charter and by-laws of the society or corporation.

The manifest object of these provisions was to make contracts of fraternal orders uniform, so as to preserve that equality and fraternity which is the basic principle of such orders. The Legislature saw clearly that it would be destructive of the life of the order unless members, for instance, were assessed according to one and the same rule, instead of the assessments being laid in each State according to (625) its own rule, which, moreover, would produce an undue and unjust proportion of the burden as between the members, there being as

many different assessments as there are States. The affairs of the order could not be administered under any such scheme, as some members would not be willing, of course, to pay a greater assessment than others who derived the same benefit.

As we hold that there is no statute of this State which prohibited the increase of the assessment in 1916, the case is brought directly within the ruling of the Supreme Court of the United States when deciding a similar case in *Supreme Council of the Royal Arcanum v. Green*, 237 U.S. 531, where the question is exhaustively treated by *Chief Justice White*, the Court assuming jurisdiction of the case upon the ground that the Court of Appeals of New York, from which the case was brought by writ of error, had not given full faith and credit, as required by the Constitution of the United States, Art. IV, sec. 1, to the acts, records, and judicial proceedings of Massachusetts, the validitay of an assessment similar to the one made in 1916 being the question in that case. As the decision covers fully the point raised here, it will not be amiss to quote entensively from it, in order to show its broad scope, and how exactly and conclusively it decides every essential issue of law in this case, the facts of the two cases being substantially the same. *Chief Justice White* said there:

"It is not disputable that the corporation was exclusively of a fraternal and beneficiary character, and that all the rights of the complainant concerning the assessment to be paid to provide for the Widows, and Orphans' Benefit Fund had their source in the constitution and by-laws and therefore, their validty could be alone ascertained by a consideration of the constitution and by-laws. This being true, it necessarily follows that resort to the constitution and by-laws was essential unless it can be said that the rights in controversy were to be fixed by disregarding the source from which they arose and by putting out of view the only consideration by which their scope could be ascertained. Moreover, as the character was a Massachusetts charter, and the constitution and by-laws were a part thereof, adopted in Massachusetts, having no other sanction than the laws of that State, it follows by the same token that those laws were integrally and necessarily the criterion to be resorted to for the purpose of ascertaining the significance of the constitution and by-laws. Indeed, the accuracy of this conclusion is irresistibly manifested by considering the intrinsic relation between each and all the members concerning their duty to pay assessments and the resulting indivisible unity between them in the fund from which their rights were to be enjoyed. The contradiction in terms is apparent which would rise from holding on the one hand (626) that there was a collective and unified standard of duty and ob-

ligation on the part of the members themselves and the corporation, and saying on the other hand that the duty of the members was to be tested isolatedly and individually by resorting not to one source of authority applicable to all, but by applying many divergent, variable and conflicting criteria. In fact, their destructive effect has long since been recognized. *Gaines v. Supreme Council of the Royal Arcanum,* 140 Fed., 948; *Royal Arcanum v. Bradshears,* 89 Md., 624. And from this it is certain that when reduced to their last analysis, the contentions relied upon, in effect, destroy the rights which they are advanced to support, since an assessment which was one thing in one State and another in another, and a fund which was distributed by one rule in one State and by a different rule somewhere else, would in practical effect amount to no assessment and no substantial sum to be distributed.

"It was doubtless not only a recognition of the inherent unsoundness of the proposition here relied upon, but the manifest impossibility of its enforcement which led courts of last resort of so many States in passing on questions involving the general authority of fraternal associations and their duties as to subjects of a general character concerning all their members to recognize the charter of the corporation, and the laws of the State under which it was granted, as the test and measure to be applied. *Supreme Lodge, etc., v. Hines,* 82 Conn., 315; *Supreme Colony v. Towne,* 87 Conn., 644; *Palmer v. Welch,* 132 Ill., 141; *Grime v. Grime,* 198 Ill., 265; *American Legion of Honor v. Green,* 71 Md., 263; *Royal Arcanum v. Bradshears,* 89 Md., 624; *Golden Cross v. Merrick,* 165 Mass., 421; *Gibson v. United Friends,* 168 Mass., 391; *Larkin v. Knights of Columbus,* 188 Mass., 22; *Supreme Lodge v. Nairn,* 60 Mich., 44; *Tepper v. Royal Arcanum,* 59 N.J. Eq., 321; *S. c.,* 61 N.J. Eq., 638; *Bookover v. Life Asso.,* 77 Va., 85."

And, after referring to the principle and the cases cited to support it, the *Chief Justice* further says: "In fact, while dealing with various forms of controversy, in substance all these cases come at last to the principle so admirably stated by *Chief Justice Marshall* more than a hundred years ago *(Head v. Providence Insurance Co.,* 2 Cranch, 127 167) as follows: Without ascribing to this body, which in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes. To this source of its being, then, we must recur to ascertain its powers.' "

This same rule as to the destructive effect of assessments in (627) different amounts is also stated in *Royal Arcanum v. Brashears,*

89 Md., 624, as follows: "In a purely mutual association like the Royal Arcanum all members must be treated alike, for it would be destructive of the mutuality itself of the association if in suits against it the benefit certificate issued to a citizen of one State should be entitled to a more favorable construction than a similar certificate issued to a citizen of another State."

But, as we have seen, the Supreme Court of the United States has regarded the question involved as a Federal one, as it calls for the construction and application of Article 4, sec. 1, of the Constitution, and its decision upon the question is authoritative, and therefore binding upon us, even if we differed from its conclusion, which we do not. This being the case, it concerns us now to ascertain what is the law of Massachusetts in regard to this question. The defendant, in order to show what this law is, has introduced statutes of that State, a duly certified copy of the judgment roll of the highest court of that State, the Supreme Judicial Court, in *Reynolds v. The Royal Arcanum,* which is reported in 192 Mass., 150. It also introduced the testimony of two eminent and learned members of the bar of that State, and from all this evidence, it appears to have been held by the highest court of Massachusetts, which has continued as the law of that State to this day, as follows:

1. The Royal Arcanum (and other fraternal beneficiary societies as well) have the power to increase their rates.

2. They have not only the right and power to increase their rates, but to put the members upon a new and increased table of rates, which are fixed as of the ages attained by the members, at the time the new scale of rates was adopted.

It will be proper here to state substantially, and as briefly as possible, what was said by the Court in the *Reynolds case,* using for the most part its own language: "The assessments to be paid for death benefits in this case are provided for by the by-laws, while a promise in writing to pay a certain sum to a particular person is, as to that person, a matter outside of those corporate rules which may be expected to be changed by an amendment of the by-laws. This promise on one side is set over against the promise of the member on the other. The promise of the member is to do what may be called for by the by-laws then existing or that may afterwards be adopted. The promise of the corporation is stated expressly, without mention of the by-laws. The member occupied a dual position, as an insurer and the insured. As one of the association agreeing to provide for the payments that may become due to members, he agrees to be subject to the by-laws. As the insured person to whom a particuar sum of money is promised, he has

a right to stand on the terms of the promise. That the duties of members prescribed by the by-laws remain subject to modifica- (628) tion when a power of amendment is reserved has often been decided," citing *Loeffler v. Modern Woodmen*, 100 Wis., 79, and other cases.

"Most of the cases relied on by the plaintiffs, when rightly analyzed, turn on the distinction between an attempted amendment of the by-laws directly affecting the promise to the certificate holder as an insured person and an amendment affecting his duties as a member of the corporation bound to perform his part in providing means or otherwise as one of the association of insurers," citing *Hale v. Equitable Aid Union*, 168 Penn. St., 377, and many other cases.

"On principle and on the weight of authority, we are of opinion that there is nothing in this contract that prevents the corporation from amending its by-laws in a reasonable way, to accomplish the purposes for which it was organized, even though the change increases the payments to be made by certificate holders. Such changes necessarily involve some hardship to certain individual members, but the corporation, under the law, should do that which will bring the greatest good to the greatest number. The members who complain of its action are those who have had the benefit of insurance for themselves and their families for many years, at very much less than the cost of their insurance to the corporation. They have had the good fortune to survive, and therefore their contracts have brought them no money, but all the time they have had the stipulated security against risk of death. If now they are called upon to pay for future insurance no more than its cost to the corporation, they ought not to think it unjust."

The Reynolds decision was made, it is true, upon the raise of the rates in 1905 by the Royal Arcanum, but saving the date of the increase and the amounts, the question involved there as to the increase of the rates in 1905 is identical with that in this case, and, at least, in substance and in principle. There is no difference in law between the two, and a decision upon the one is directly applicable to a case arising upon the other. There is no difference between the *Reynolds case* and this one, which favors our present decision, and that is that while the laws of Massachusetts in 1905 permitted benefit societies to raise their rates above the existing level, in the same manner as was done in this case, the law in 1916 *commanded* that it should be done when necessary to meet its financial obligations. One was permissive merely, while the other was mandatory, and the latter was passed because it was apparent that the order could not be kept afloat in any other way.

It comes to this, therefore, that the highest Federal Court has declared that, under Article 4, sec. 1, of the Constitution, the question

must be determined by the law of Massachusetts to which courts
(629) in other States must give full faith and credit, and we have shown that the law of that State not only permits but requires that the rates shall be increased when the necessities of the order demand it. This is not unfair or unjust to any member. If it were not the law, the order could not long survive or remain a going concern, because it must soon perish for the want of sustenance, and if this should happen, the certificates, of course, would be of no value; and, instead of being what it was intended to be, a society for the protection of its beneficiaries against loss in the case of death of its members, under a cheap or inexpensive form of insurance, it would prove to be an expensive and uncertain form of insurance to them. The very nature of the enterprise shows the absolute necessity for having a fixed and uniform rate of assessment, with power to raise it to a higher level when the exigencies of the society require this to be done. The *Green* case was approved in *Supreme Lodge Knights of Pythias v. Mimms,* 241 U.S. 574 (60 L. Ed., 1179), where the rate of assessment was increased from $7.35 to $34.80, and justified under similar laws to those existing in the order of the Royal Arcanum in 1905 and 1916. See, also, *Knights of Pythias v. Smyth,* 38 Sup. Ct., 210.

The *Reynolds* case has been approved by the Supreme Judicial Court of Massachusetts in the following cases: *Hickey v. Baine,* 195 Mass., 446, at p. 452; *Proctor v. United Order Golden Star,* 203 Mass., 587, at p. 590; *Attorney General v. American Legion of Honor,* 206 Mass., 158, at p. 164; *Ulman v. Golden Cross,* 220 Mass., 442, at p. 427. These cases were decided between 15 May, 1907, and 1 March, 1915, both dates inclusive, so that they continue the law of that State, as we have stated it, down to a day since the commencement of this action, and one of the Assistant Attorney-Generals of Massachusetts having special charge of the insurance department's matter states that it was the law when he testified.

It may be well to state briefly the history of the case of *Green v. Royal Arcanum, supra,* in order to show how identical are the contentions of plaintiff in that case with those of the plaintiff in this case: Sometime after the raise in 1905, one Samuel Green brought an action against the Royal Arcanum in the Supreme Court of New York to enjoin the defendant from suspending him for failure to pay the new rates. In the lower court, the judge upheld Green's contention and enjoined the defendant from suspending Green on account of his failure to pay the new and increased rates adopted in 1905. In concluding the opinion (124 N.Y. Supp., 398), the Court said: "I also hold that although the defendant is a Massachusetts corporation, still, when it

comes into the State of New York, conducting business here under the supervision and permission of the State insurance department, contracts made here with residents of this State in councils organ- (630) ized and existing in this State and to be performed here are to be interpreted under the laws of the State of New York."

Upon appeal by defendant, the Appellate Division of the New York Supreme Court reversed the lower court, and held that the increase in rates in 1905 was valid (see 129 N.Y. Sup., 791). Thereupon Green appealed to the New York Court of Appeals and the Court of Appeals reversed the ruling of the Appellate Division and affirmed the ruling of the lower court, 206 N. Y., 591. In this opinion the New York Court of Appeals held three main propositions:

(1) That the reservation in the benefit certificate to the effect that the member should comply with all laws, etc., made in the future, did not authorize the Royal Arcanum to increase the rates of assessment in 1905.

(2) That plaintiff's contract rights are not affected by the fact that defendant is a Massachusetts corporation, because the contract was made in New York, and is to be controlled by the laws of New York.

(3) That the statutes of Massachusetts did not authorize the change made in 1905, because the change impaired plaintiff's vested rights, which the Massachusetts statute forbade.

After the adverse decision of the Court of Appeals of New York the Royal Arcanum sued out a writ of error from the Supreme Court of the United States upon the ground that that decision was violative of section 1, article 4, of the United States Constitution, in that it failed to give full faith and credit to the public acts and judicial proceedings of the State of Massachusetts. It was therefore required of the United States Supreme Court to decide whether the highest court in New York erred in holding that the contract rights of the parties under the benefit certificate were to be determined by the laws of New York or by the laws of Massachusetts, when the Royal Arcanum was chartered; secondly, whether the Massachusetts law authorized the Royal Arcanum to raise the rates in the manner in which they were raised in 1905. The United States Supreme Court clearly and emphatically held:

(1) That the New York Court erred in determining the rights and powers of the defendant by the New York law, and that the question of the power to raise the rates as raised in 1905 must, under article 4, section 1, of the Federal Constitution, be determined by the laws of Massachusetts.

(2) That the statutes of Massachusetts, particularly in the light of the *Reynolds* case construing those statutes, left no room for doubt that

the Massachusetts law governing fraternal beneficiary societies, did authorize the raise in rates made in 1905.

In the *Mims* case, *supra*, it was claimed that the society had demanded monthly dues in excess of its rights, and that the
(631) amendments to the by-laws increasing the rates of assessment were *ultra vires* and void. The by-laws governing the certificate, and enacted in 1884, provided that "each member of the endowment rank should continue to pay the same amount each month thereafter so long as he remained a member." In 1910, the by-laws were again amended so as to increase the plaintiff's monthly payments from $7.35 to $34.80, and required each member to pay as of his age attained in that year.

Justice Holmes, writing for a unanimous Court in that case, said: "Persons who join institutions of this sort are not dealing at arm's length with a stranger whose mode of providing for payment does not concern them, but only his promise to pay. They are joining a club the members of which have to pay any benefit that any member can receive. The corporation is simply the machine for collection and distribution. Its charter expressly provides by section 5 that it 'shall not engage in any business for gain; the purpose of said corporation being fraternal and benevolent.' It is manifest, therefore, that it would be a perversion of its purposes if, through some ambiguity of phrase, the necessary course of benefits were closed in favor of certain members, while their right to insist upon payment remained. The essence of the arrangement was that the members took the risk of events, and if the assessments levied at a certain time were insufficient to pay a benefit of a certain amount, whether from diminution of members or any other causes, either they must pay more or the beneficiary less. The only language in the certificate bearing on the matter pointed to possible changes, one condition being the payment of all monthly payments 'as required.' It was obvious and understood that, to pay a benefit, an increase in the assessment might be necessary. In our opinion the present charter, like the first, must be construed to authorize such an increase, and the clause in the law of 1884, relied upon, that the payments should continue the same so long as the membership continued, was not a contract, but was a regulation subject to the possibility inherent in the case. More than ambiguous words in an amendable law would be needed to establish a departure from the ground on which the relation of the parties obviously stood, and to create a privilege that attacked the corporation in its very life. . . . It is necessary to discuss the options that were offered in the alternative, but it is proper to remember that for many years the plaintiff had been insured, and although by what he

is not likely to regard as bad fortune, his beneficiary has not profited by it, she would have if he had died. As he happily lived, he has to bear the burdens incident to the nature of the enterprise into which he went open-eyed."

The same legislation was under consideration by the Supreme Court of the United States in the *Smyth* case, *supra*. In that case, at the time the member's certificate was delivered to him, he was also provided with a copy of the constitution and laws, which contained, (632) among other things, in article 4, this provision: "Each member . . . shall pay . . . a monthly assessment, as provided in the following table, and shall continue to pay the same amount hereafter as long as he remains a member of the Endowment Rank." Smyth originally paid a monthly assessment of $3 until 1894, when it was increased to $3.15, which he paid until 1901, when it was increased to $4.80, which he paid until 1910, when he received a notice of increase to $14.70. The decision of the case turned, as was said by the district judge (108 Fed., 963), on the power of the supreme lodge to increase the monthly payment of assessments from $4.80 to $14.70 per month. It appeared in the record that, at the time the increase of 1910 went into effect, a circular was delivered to the plaintiff saying: "These payments *do not increase* (the words 'do not increase' italicized) with increasing age, but always remain the same during the good standing of the member." 198 Fed., 990.

The United States Supreme Court called attention to article 4, above set forth, and said: "This provision, it is contended, because a part of the contract of insurance with the plaintiff, which could not be changed without his consent, and made unlawful any increase in his assessment. The defense is that power was given to the defendant by its charter to change its by-laws; that by provisions in his policy and his application for it, the plaintiff was notified and charged with knowledge of this fact; and that the increase of assessment complained of was duly authorized pursuant to the terms of this grant of power." The Court held that the *Smyth* case was on all fours with the *Mims* case, and that the decision in that case must be accepted as controlling on the merits and decisive of the authority of the supreme lodge to increase the monthly assessment rates.

It should be noted, as important in the consideration of our case, what *Justice Holmes* says in the *Mims* case, *supra*, viz., that the clause providing for periodical payments of the same amount "so long as the membership continued, was not a contract, but was a regulation subject to the possibility inherent in the case, and that any other view of it would create a privilege which would attack the corporation in its very life." This is the crux of the whole matter, and the vital principle of

the case, crisply stated and sharply and lucidly denied. The *Chief Justice* thus concludes the opinion of the Court in *Royal Arcanum v. Green*, in regard to the effect of the Massachusetts law and its application to cases in other States:

"Coming, then, to give full faith and credit to the Massachusetts charter of the corporation and to the laws of that State to determine the powers of the corporation and the rights and duties of its members,

there is no room for doubt that the amendment to the by-laws
(633) was valid if we accept, as we do, the significance of the charter

and of the Massachusetts law applicable to it as announced by the Supreme Judicial Court of Massachusetts in the *Reynolds* case. And this conclusion does not require us to consider whether the judgment *per se* as between the parties was not conclusive in view of the fact that the corporation for the purposes of the controversy as to assessments was the representative of the members. (See *Hartford Life Insurance Co. v. Ibs*, this day decided.) Into that subject, however, we do not enter."

There is another ground of distinction between the *Strauss*, *Williams*, and *Wilson* cases, and the other cases cited in them, on the one hand, and our case, on the other. In the former, there was not only a rising to a higher figure of the rates, but there also was classification and discrimination. That is, the old members were put in one class and the new members in another, and the losses (death benefits) in the old class were paid from the funds collected from that class, while the losses in the new class were paid from the funds collected from that class; but in this case it appears that all moneys collected from assessments are mingled or blended in one fund, and losses paid solely out of it. It is, therefore, a single or common fund for the payment of death benefits. In the one case there is classification and discrimination, while in the other, there is neither. This burden put upon the old class of payings its own death benefits, while an advantage is given to the new class, which increases in number, caused the *Chief Justice* to say in *Williams v. Heptasophs, supra:* "This is not the case of an increase of assessments, but it is a discrimination between members," resulting of course, from unfair and unjust classification.

In *Wilson v. Order of Heptasophs*, 174 N.C. at p. 628, the *Chief Justice*, comparing this process of classification to the flow of a river, says: "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 when 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 until they become unbearable."

And in the *Williams case,* 172 N.C. at p. 789, he demonstrates the baneful effect upon the older members in the application of this classification when he says: "Under this system the assessments upon the plaintiff became, of course, much higher than if the entire (634) membership had continued to share in the burden of all the deaths, with the result that if the plaintiff was 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, have been required to pay higher and higher assessments on the death of each of his fellow-members."

We have no such case here, as the law wisely provides for a common fund, to which the *Chief Justice* favorably referred, in those cases, and from this one source all are paid alike. It was held in *Supreme Council Royal Arcanum v. Bradshears,* 73 Am. St. (Md.), 244, that in a purely mutual association like the Royal Arcanum, all members must be treated alike, for it would be destructive of the mutuality itself of the association if in suits against it the benefit certificate issued to a citizen of one State should be entitled to a more favorable construction than a similar certificate issued to the citizen of another State. And also, in the same case, it is said to be well settled that the contract of membership in a mutual association is always made with reference to and includes the constitution and by-laws of the association, whether they are specially referred to in the contract or not citing cases and 3 Am. & Eng. Enc. (2 Ed.), 1081; *Yoe v. Howard Assn.,* 63 Md., 86; *Fuller v. Baltimore Assn.,* 67 Md., 433.

The plaintiff cannot say that he has borne "the heat and burden of the day." and therefore his case should be favorably considered, for he has not. He has been given insurance at less than its normal cost and at a much cheaper rate than it could have been secured by the ordinary life plan, and he will continue it, under the increased rate, at a stated sum which is not in excess of its cost to the order for member of his age. He, therefore, has no reasons for complaint against the law, because if it seems to be harsh, it is in reality not so.

But plaintiff alleges that he was fraudulently induced to join the order by its agent, who falsely represented that the rate would continue

to be the same so long as he was a member. He tendered two issues based upon this allegation which the judge rejected, as a false representation which induces another to act is not necessarily or even ordinarily fraudulent. The representation, though false, may have been honestly made in the belief that it was true, and it may have caused plaintiff to become a member without having been intended to deceive him. When we consider the facts and the language of the certificate and other documents to which plaintiff had easy access, it was more the expression of an opinion or the legal construction of words than a falsehood which was calculated and intended to willfully mislead; nor was there any trick or artifice employed to prevent a full and free inquiry,

(635) and besides, and what is more conclusive against the charge of fraud is the fact that language was used in the papers which expressed, or at least implied, what was affirmed by the agent, that the assessment would remain the same so long as he remained a member of the order. The language is: "Every applicant. . shall pay . . . the following named amounts (set forth in the table) . . . according to the age attained . . . and the same amount on each assessment thereafter whilst he is a member of the order, unless he should have changed his rate."

The plaintiff had the necessary documents for informing himself and as much intelligence as the agent, so it appears, for understanding them. He soon became the regent or head officer of his local council and must be presumed to have ascertained what were the constiution, by-laws, rules and regulations of the order, if he properly performed his duty, and he continued to be a member, to pay the amount of his assessments, and to accept and enjoy the highest honor of the order for some years without complaint or protest.

There are other important facts which relieve the agent of imputation of fraud, but it is unnecessary to recite them, as those already stated will suffice to show that the charge of fraud is without any real foundation. We will, therefore, content ourselves with a reference to a few of the precedents applicable to such cases. The following, relied on by the plaintiff, are not in point: *Caldwell v. Ins. Co.*, 149 N.C. 100; *Sykes v. Ins. Co.*, 148 N.C. 13, *and Whitehurst v. Ins. Co.*, 149 N.C. 273. In each of those cases the agent of the company took advantage of the ignorance and illiteracy of the applicant and deceived him as to the language and meaning of the policy when he well knew that the applicant could not read and could not understand. This case is like those of *Cathcart v. Ins. Co.*, 144 N.C. 623; *Clements v. Ins. Co.*, 155 N.C. 57, and *Wilson v. Ins. Co., id.*, 173. Those cases are very much like this one and sufficiently so in principle to control it.

In *Tarault v. Seip*, 158 N.C. at p. 370, the Court said: "Nor can fraud exist where the intent to deceive does not exist, for it is emphatically an action of the mind that gives it existence. It is not sufficient that the representations are false in point of fact; the defendant must be guilty of a moral falsehood. The party making the representation must know or believe it to be false, or, what is the same thing, have no reason to believe it to be true. The action for fraud and deceit rests in the intention with which the representation is made and not upon the representation alone," *citing Etheridge v. Palin*, 72 N.C. 213; *Tilghman v. West*, 43 N.C. 183; *Hamrick v. Hogg*, 12 N.C. 350, to which we add *Cash Register v. Townsend*, 137 N.C. 652; *Unitype Co. v. Ashcraft*, 155 N.C. 63.

It was said in *Floars v. Ins. Co.*, 144 N.C. at p. 232: "While these principles are very generally admitted, it is also accepted doc-
trine that when the parties have bargained together a contract (636)
of insurance, and reached an agreement, and in carrying out or
in the effort to carry out the agreement a formal written policy is delivered and accepted, the written policy, while it remains unaltered, will constitute the contract between the parties, and all prior parol agreements will be merged in the written instruments; nor will evidence be received of prior parol inducements and assurances to contradict or vary the written policy while it so stands as embodying the contract between the parties."

And in *Bland v. Harvester Co.*, 169 N.C. 418, we said: "The plaintiff relies entirely upon certain alleged verbal representations made to him by a sales agent of the defendant. In a late case this Court said that parties to the contract are 'not only held to the terms of the contract deliberately entered into, but are not permitted to contradict or vary its terms by parol evidence, as the 'written words abides' and must be considered as the only standard by which to measure the obligation of the respective parties to the agreement in the absence of fraud or mistake.' " See, also, *Guano Co. v. Live Stock Co.*, 168 N.C. 447.

In *Mowry v. Insurance Co.*, 96 U.S. 54, where plaintiff alleged that the agent of the company had allured him into accepting a policy by a tempting bait, the Court said: "The previous representation of the agent could in no respect operate as an estoppel against the company. Apart from the circumstances that the policy subsequently issued alone expressed its contract, an estoppel from the representations of a party can seldom arise, except where the representation relates to a matter of fact, to a present or past state of things. If the representation relate to something to be afterwards brought into existence, it will

amount only to a declaration of intention or of opinion, liable to modification or abandonment upon a change of circumstances of which neither party can have any certain knowledge."

And again, upon the same question, and answering the contention of the agent's fraud, the Court said in the same case: "But to this position there is an obvious and complete answer. All previous verbal arrangements were emerged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premium to be paid, were there expressed for the very purpose of avoiding any controversy or question respecting them. The entire engagement of the parties ,with all the conditions upon which its fulfillmnt could be claimed must be conclusively presumed to be there stated. If by inadvertence or mistake provisions other than those intended were inserted or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to
(637) give all needful relief in such cases. But until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company."

As to the duty of a member to read his certificate, the Court said in *Fraternities Acci. Order v. Armstrong,* 106 Va., 746: "A person who becomes a member of such a society or order must acquaint himself with its by-laws, for they, to the extent of their provisions, measure his duties, his rights and his liabilities. He is chargeable with knowledge of the general nature and character of the organization which he is joining, and of its rules and regulations. The member of such a corporation being bound by the provisions of its by-laws, such by-laws enter into and form part of the contract as between the member and the company, whether formally incorporated in the contract or not. . .The law conclusively presumes that those who become members of such a society have acquainted themselves with its by-laws."

And upon the same question it was said in *Upton v. Tribilock,* 91 U.S. at p. 45: "That the defendant did not read the charter and by-laws, if such were the fact, was his own fault. It will not do for a man to enter into a contract, and when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they were written. But such is not the law. A contractor must stand by the words of his contract, and if he will not read what he signs he alone is responsible for his omission," citing *Jackson v. Croy,* 12 Johns., 427; *Leis v. Stubbs,* 6 Watts., 48; *Farly v. Bryant,* 32 Me., 474; *Coffing v. Taylor,* 16 Ill., 457; *Slafyton v. Scott,* 13 Ves. 427; *Alvanly v. Kinnard,* 2 *Mac. & G.,* 7; 29 Beav., 490. The

case of *Gwaltney v. Ins. Co.*, 132 N.C. 925, on which plaintiff relies is not at all applicable.

In the course of the opinion he wrote for the Court in *Cathcart v. Ins. Co.*, 144 N.C. 623, which we have cited as ruling our cases, *Chief Justice Clark* says of the *Gwaltney* case; This case *(Cathcart v. Ins. Co.)* is rather like *Floars v. Ins. Co.*, 144 N.C. 232, where it was held that a failure to read the policy or examine it for three months is a waiver of any right to reform the policy on the ground of mistake," and this applies, of course, to other equitable relief.

We close this branch of the case with what is said in *Clements v. Ins. Co.*, 155 N.C. at p. 61 and 62: "The loss of the plaintiff, if any he has sustained, is directly and wholly attributable to gross neglect of his own interests and to his supineness when he should have been active and vigilant. Equity will not assist on ewhose condition is traceable only to that want of diligence which may fairly be expected from a reasonable and prudent person, and even when he is watchful and discovers a wrong practiced upon him, a court of equity requires (638) that he should be prompt in asserting his claim to relief against it, for it will not aid those who sleep on their rights, but only those who are vigilant."

Justice Holmes said in *Supreme Lodge of Knights of Pythias v. Mims*, 241 U.S. 571, already cited, that the provision as to the permanency of the rate charged at entrance of a member is but a rule or regulation, subject to change as the necessities of the order might require. If plaintiff had bestowed even slight care upon his interests and informed himself when he had ample opportunity to do so, he would have discovered what was the meaning of the clause as to rates. It is too late, after so many years have elapsed, even if there was any fraud or mistake, to ask for relief at the hands of a court of equity.

There are some objections to evidence, but they relate to the documentary and other proof showing the law of Massachusetts, and really go to its legal effect, rather than to its competency and relevancy.

We have shown why the issues tendered by the plaintiff should not have been submitted.

We consider the *Green* case, *supra*, as decisive of ths one on the two main and essential questions, that under the full faith and credit clause of the Constitution, the applicable law is that of the State of Massachusetts, and that under the law, of itself, and certainly as construed by its highest court, the increase by the assessments was fully warranted.

There was no real dispute about the material facts, and upon them plaintiff has no cause of action, and therefore the judgment of the Court is correct.

No error.

Cited: Pittman v. Tobacco Growers Association, 187 N.C. 342; *McNeal v. Insurance Co.,* 192 N.C. 451; *Finance Company v. McGaskill,* 192 N.C. 559; *Stone v. Milling Co.,* 192 N.C. 585; *Burton v. Insurance Co.,* 198 N.C. 501; *Small v. Dorsett,* 223 N.C. 760.

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MARY B. MASON v. DURHAM COUNTY.

(Filed 28 May, 1918.)

1. Roads and Highways — Counties — Assessment—Statutory Methods—Courts.

Where a county has taken and continued to use a part of the lands of the owner in constructing its public road, and there is a special provision of a statute applicable as to the assessment of the owner's damages by a jury, upon petition to the board of county commissioners, which has not been followed, the owner may maintain an action in the Superior Court to recover his permanent damages, and upon payment thereof the easement will pass to the county.

2. Same—Permanent Damages—Easements.

Where a method of assessing damages to the owner for the taking by the county of his lands for road purposes has been provided by statute, that it be upon petition to the board of county commissioners, etc., and the county has taken plaintiff's land without following this method: *Held,* at the election of either the owner or the board, an action lies for permanent damages in the Superior Court, and the application to the board was not essential to the right of the injured owner to sue and have his cause tried by the jury, as contemplated and conferred by the general laws.

3. Roads and Highways—Counties—Assessments—Statutes—Waiver.

The county board of commissioners in acting upon a petition by the injured owner whose land had been taken for road purposes, under a statute providing for the assessment of damages by this method, does so in an administrative capacity; and where the board has taken and is using the land for such purpose, and the owner has not followed the special method provided, and brings his action in the Sueprior Court for his damages, the defendant's denial of plaintiff's ownership and its liability for the damages, waives its right to insist that the statutory method should have been pursued by the plaintiff.

MASON *v.* DURHAM.

4. Roads and Highways — Counties—Assessments—Statutes—Petition—Compliance—Courts.

Chapter 463, Public-Local Laws of 1913, applying to Durham County, provided for assessment of damages to land of owner taken for road purposes by a jury, upon petition to the board of county commissioners, etc. The county took a part of plaintiffs land for this purpose without following this statute, and was using it therefor at the time plaintiff instituted his action in the Superior Court: *Held*, the action would lie; and, *Semble*, a letter written by plaintiff's attorney asking that the matter be settled by arbitration by three good men was a compliance with the statute providing that three disinterested freeholders assess the damages.

WALKER, J., dissenting, BROWN, J., concurring in the dissenting opinion.

APPEAL by defendant from *Kerr, J.*, at the March Term, 1917, of DURHAM.

This is an action by Mary B. Mason against the Commissioners of Durham to recover damages for the value of a strip of land 60 feet wide and 7 feet deep across the front of her lot on the Main Street road between Durham and East Durham, taken by the Commissioners of Durham County in the spring of 1916 for the purpose of widening said road in front of plaintiff's property. Plaintiff's complaint was filed 29 July, 1916, in which she alleged as a cause of action that she was the owner of a lot of land on East Main Street road; that the defendants had taken a strip across the front of it 7 feet deep and 60 feet wide, and prayed judgment for the value of the land so taken in the sum of $600. The defendants, in January, 1917, filed an answer, and denied in paragraph 3 of the answer that plaintiff owned the land in controversy, as alleged in paragraph 3 of the Complaint, and in paragraph 5 of the answer of the defendants denied that they took a strip of land from the plaintiff 7 feet deep and 60 feet wide, as alleged in paragraph 5 of the complaint.

And for a further defense the defendant pleaded that the land (640) had been taken under chapter 463, Public-Local Laws 1913, which provides for the assessment of damages by a jury upon petition to the board of county commissioners.

And defendants denied in said further answer that a petition had ever been filled with board of county commissioners requesting a jury to assess damages to plaintiff's property.

The action came on for trial at the March Term, 1917, of the Durham County Superior Court. The defendants demurred *ore tenus* to the complaint upon the ground that it did not state a cause of action, and for a further reason that the court did not have jurisdiction, as chapter 463 of the Public Local Laws of 1913 prescribed a method of assessing damages for property taken for public roads.

The court overruled the demurrer, as the ownership of the property and the taking the same was denied by defendants and sustained the jurisdiction of the court upon the ground that if it was purely a case for assessing damages that plaintiff would not be required to plead, but would be permitted to prove that she had filled a petition for a jury to assess damages as required by chapter 463 of the Public Local Laws of 1913. The defendants then admitted that the plaintiff owned the lot described in the complaint, but denied that they had taken plaintiff's property as alleged.

Evidence was offered by the plaintiff and defendants on the following issues:

1. Was plaintiff's land taken by defendants as alleged in the complaint? To which the jury responded, "Yes."

2. What amount, if any, is plaintiff entitled to recover of defendant? To which the jury answered "$200."

Plaintiff introduced a letter, dated 24 June, 1916, addressed to the Board of County Commissioners, Durham, N. C., written by R. O. Everett, her attorney. The following is a copy of the letter:

24 June, 1916.

To the Board of County Commissioners, Durham, N. C.

GENTLEMEN:—I beg to notify you that Mr. and Mrs. Joe Mason have retained me to present a claim against the Board of County Commissioners for damages in taking the property in front of their property located on the south side of East Main Street. They state that you took seven feet of their property and damaged the balance, and they are relying upon that constitutional provision which your honorable body is most familiar with that private property can not be taken without due compensation.

(641) They are willing to have this matter settled by arbitration by three men who can assess the damages. Please let me know your wishes in the matter. Yours very truly,

R. O. EVERETT.

The court held that the request contained in the letter from plaintiff's attorney, dated 24 June, 1916, was a sufficient compliance with the law for a petition to have a jury to assess damages.

Judgment was rendered in favor of the plaintiff and the defendant appealed, having excepted to the refusal to dismiss the action and to the ruling that the letter was in legal effect a petition.

Manning, Everett & Kitchin for plaintiff.
Fuller, Reade & Fuller for defendant.

ALLEN, J. It is true the Court has held in *McIntyre v. R. R.*, 67 N.C. 278, and other cases, that in an application to require a railroad right of way the statutory methods must be pursued, and this may still be the correct ruling as to the preliminary entry upon land and the acquisition of the same for such purposes, but it is also held, in numerous cases, that where a railroad or other public service corporation has made the entry, appropriated the right of way, constructed its road and is operating the same and neither party has seen fit to resort to the statutory method, the owner of the land has the right, at his election, to sue for permament damages, and on payment of the same the easement wil pass to the defendant. This was so held as to railroads in *Caveness v. R. R.*, 172 N.C. 305; *Bennett v. R. R.*, 170 N.C. 389; *Porter v. R. R.*, 148 N.C. 563; *Beasley v R. R.*, 145 N.C. 272. As to telegraph companies in *Phillips v. R. R.*, 130 N.C. 582. As to municipalities in the case of streets, etc., in *Harper v. Lenoir*, 152 N.C. 723. As to nuisances created by discharges of sewage where the right to do so may be protected by the exercise of the right of eminent domain, in *Rhodes v. Durham*, 165 N.C. 679. As to trespass by flow of water in cases where private right is subordinated to the public good, as in *Geer v. Waterworks*, 127 N.C. 349.

McIntyre and like cases were decided for the reason, chiefly, that at that time it was generally considered that the statutory proceeding was the only mode by which the companies could acquire a right of way and obtain protection from continued and ever repeated actions of trespass on the part of the owner, but later, when the Court had approved and emphasized the right of acquiring an easement in these cases by a suit for permanent damages and the payment of the same, as in *Ridley v. R. R.*, 118 N.C. 996, and subsequent cases, it is regarded as correct doctrine that, where a defendant has entered, constructed its work and the right to occupy the property and to exercise the (642) privilege is or may be protected by statutory right of eminent domain or by the existence of a superior right in the public; then, at the election of either, an action lies for permanent damages, and on payment of same an easement passes. *Webb v. Chemical Co.*, 170 N.C. 695. Again, while the right of an injured owner to sue and have his cause tried before the jury is clearly contemplated and conferred by the statute, the application to the board of commissioners is not essential to that right.

Under our system, county commissioners are not clothed with judicial powers and, representing the opposing side, they could not exercise them in such a case if they were. A petition to them, therefore should be properly regarded as a preliminary step before an adminis-

tration board, and is in no sense jurisdictional in its nature. This being true, the defendants have waived their right to insist on such a protection by an absolute denial of plaintiff's right, for by correct interpretation, these pleadings do deny plaintiff's right and raise issues both as to her ownership of the land and as to the injury. Why attempt a petition to an administrative board who, on the record, have denied plaintiff's right and put her to proof on the essential questions involved? And, further, we incline to the opinion that the letter addressed to the board should be construed and held a sufficient compliance with the statute. While the proposal for settlement made by plaintiff in that latter calls it an arbitration, it clearly refers to the damages suffered and the sources of it; makes claim for the same and proposes further "that plaintiff is willing to have this matter settled by arbitration by three good men who can assess the damages, this being the number specified in the statute." "Three disinterested freeholders shall assess the damages" is the provision of the law, and we think the commissioners should have so construed her application and responded to it by appointing the commissioners, or by having them selected by the sheriff as the statute requires. The powers given to the commissioners are very broad, and while they are in accord with the law on the subject (*S. v. Jones,* 139 N.C. 613), when the numbers of people that may be affected are considered, these powers should not be too rigidly construed to the injury of the landowners.

All of plaintiff's lot, constituting her front yard of 7 feet, has been taken across its full width and the sidewalk laid at her very door. She has writen a letter to the commissioners asking, in effect, that three jurors assess her damages, which has been denied by defendants. She then sues, and both her ownership and damages are denied, and after she has recovered her damages before the jury, the defendant asks that her suit be dismissed and that she be directed to begin over and in some other way. To what purpose or in what way? The statute pro-
(643) vides that the petition is to be filed in 20 days after the road is ordered. If this should be held to be a jurisdictional requirement and is to be upheld as valid, the time is already elapsed and plaintiff is to have her front yard taken and be without any relief whatever.

The facts in evidence do not justify such a judgment nor should the Court uphold the position of the defendant.

Affirmed.

WALKER, J. I am unable to concur in the opinion of the Court, as I think it overrules a long line of cases holding, upon the authority of *McIntyre v. R. R.*, 67 N.C. 278, that where there has been a condemna-

tion of property for public uses, the recovery of compensation by the owner for taking his property must be obtained through the particular remedy given by the statute, as the latter takes away, by clear implication, the comon law remedy, which was an action of trespass on the case, and is a substitute for it. The opinion of *Justice Rodman* in that case also states that the landowner is by the statute impliedly "deprived of his common-law remedy," that being wholly superseded by the one given in its stead, which is a substantial and adequate one, and not merely illusory. It has been held ever since our Mill Act of 1809 that such is the law, and that the specific remedy for damages must be pursued.

Chief Justice Ruffin in *Gillette v. Jones,* 18 N.C. 339, referring to and quoting from an earlier case in which *Chief Justice Taylor* wrote the opinion said: "When there is in fact an overflowing of the land, the juridiction certainly attaches; and the purposes of justice then forbid a construction which will prevent the remedy, provided in the act from being commensurate to the whole injury arising from the erection of a nuisance of this kind, unless the words themselves plainly and conclusively express the contrary. Indeed, very soon after the act passed (in January, 1816) the Supreme Court, in *Munford v. Terry,* 2 Car Law Repository, 425 (4 N.C. 309), construed it (the act) as extending to all cases. The *Chief Justice, Taylor,* emphatically says, upon its terms and design taken together, 'that in every case of a person receiving an injury from the erection of a mill, a petition must be filled, in order to ascertain the extent, because upon that depends, whether the common law is exercisable.' Of the correctness of that position, no judicial or professional doubt has reached us, until that expressed on the circuit in *Purcel v. McCallum (ante,* 221), which was before this Court at the last term, and struck us with surprise at the time. The policy of the act requires its application to all injuries of whatever character arising from the erection of a mill; for the statute may otherwise be rendered, in a great degree, nugatory."

The headnote of *Munford v. Terry, supra,* in Annotated Edi- (644) tion by *Chief Justice Clark,* is as follows: "Whenever a person has sustained an injury in his property by the erection of a mill by another, it is necessary, if he wishes to obtain redress, first to file a petition in the county court according to the act of 1809 (1 Rev. Stat, ch. 74, sec. 9 *et reg.*)."

The statute then provided that the remedy it prescribed should be the only one in certain circumstances, and the common law remedy was not thereby wholy excluded, but our present act makes no such restriction as was contained in the Mill Act. It allows compensation and

provides for an adequate remedy by petition and assessment of the damages under it, and this Court has always held the remedy to be exclusive of all others, except more recently in railroad cases, where a special provision is made by statute for assessing damages, and conferring the easement. Revisal, sec. 394.

At least that has been the construction of the statute. But it does not (except as to railroad companies and telegraph companies (section 1576), which have the same rights as railroad companies) change the general law. There is no analogy between the two classes of cases, as there is no such statute in the case of cities and towns, or public service corporations, other than railroad companies, and they must, of course, be governed by the law as it stood when *McIntyre's case* was decided.

This Court cannot change the statute, though it may construe it, but this does not mean that it can construe it away. It may be further said that the new doctrine is wholly based upon decisions in railroad cases, such as *Ridley v. R. R.*, 118 N.C. 996; *Porter v. R. R.*, 148 N.C. 563, and the other cases cited in the Court's opinion, and *Phillips v. R. R.*, 130 N.C. 582, is upon the same ground, telegraph companies, as we have shown having the same rights in respect to condemnation as railroad companies.

There was no plea to the jurisdiction, nor objection in any form taken thereto, in the cases cited by the Court in its opinion, and no discussion of the present question. *Harper v. Lenoir*, 152 N.C. 723, was not a case of condemnation, but an action to recover damages for the negligent improvement of a street. *Rhodes v. Durham*, 165 N.C. 679, was an action for negligently or improperly emptying sewage into a stream which polluted the water, and fouled the air, and incidentally damaged adjoining and adjacent lands, as was held. There were two dissents, by the *Chief Justice* and *Justice Brown*, the latter writing the opinion. The result there was reached because it was held that the plaintiff, an adjacent owner, could sue at comon law and recover his damages for the nuisance, which did him special injury, and to the extent that this was done, but the case is not an authority on the question as to how a landowner must proceed, under the statute, to recover his compensation.

(645) In *Geer v. Water Co.*, 127 N.C. 349, the plaintiff recovered damages for only the three years immediately preceeding the commencement of the action, and what is said by the justice who wrote the opinion is a dictum or a personal opinion upon matters not pertiment to the case, no point having been raised as to it by the parties. The question of the remedy we have here is not once referred to in any of the cases cited in the present opinion of this Court. *Webb v. Chemi-*

cal Co., 170 N.C. 665, was brought against a private corporation, and, of course, has no application to this case. It had no power to condemn. But it is argued that the board of commissioners is an administrative body, and defendants have, therefore, waived their right to insist on a want of jurisdiction by its denial of plaintiff's right. This argument was applicable to the *McIntyre case,* as the board there was as much administrative in its character as is this board, but the Court did not think the claim, if it is correct, that the board in respect to those matters is administrative would change the law as stated in that case. The point is not whether the board is administrative or judicial, but whether the statute gave a particular remedy for compensation which was adequate.

The Court in *McIntyre's case* made no distinction as to the nature of the board's functions, but held that where a special remedy (before a board) is given, it must be pursued. If the plaintiff regularly applied to the board for assessment of her damages, and her application was refused, her remedy, as in all other like cases, was an appeal from the action of the board, which would certainly have been reversed, and not the bringing of a common-law action in violation of the principle laid down in *McIntyre's case* and approved in a long line of cases since it was decided. Sometimes an enforcement of the law, and even the statute law, will work hardships, but we have been warned repeatedly against allowing them to influence our decisions. They have been called the "teacherous quicksands of the law," and to be avoided, as a basis for declaring the law. It is not infrequently the case that a party loses his right by not being diligent in its enforcement, but this is not the fault of the law.

So far I have assumed, for the sake of discussion, that this is a question of jurisdiction, but it is not, and the argument based upon that assumption fails, as the premise is wrong. It is not a question of jurisdiction, but a general principle of the law, not repealed by any statute, with a particular remedy for its enforcement; the latter is only the remedy, and the right must accordingly be enforced by it alone.

I think the *McIntyre case* can easily be reconciled with some and distinguished from other of the cases cited by the Court. I am constrained to dissent, believing that the rule stated in the opinion will, in many cases, amount to a repeal of the statute by the rejection of the safe and sound principle of the law which was applied (646) in *McIntyre v. R.R., supra,* and the numerous cases which have followed it. If that case decided anything, it was that the statutory remedy was not conclusive, or in addition to the one at common law, but in place of it, taking away the one and substituting the other. As

Justice Rodman stated, the Legislature had the right to take away the common-law remedy, so that an adequate remedy for compensation was left for the owner by the act, which was done. "The act intended to allow the company to enter and construct its road at once, leaving the question of damages (if the parties could not agree on them) to be settled afterwards. The company was not obliged to initiate proceedings. It is not obliged to know that the owner claims damages, until he claims them in the mode provided."

He then inquires as to what would be the reason or policy of giving the landowner the remedy provided by the statute unless it was intended or supposed that he would thereby lose the one already possessed, for, while more drastic and potent, it was not in accordance with a sound public policy in favor of public improvement, which the act was intended to enforce. It does no wrong to the land-owner, as he has a full and sufficient remedy for the recovery of his damages, and two chances, one to have an assessment by a jury of view, with whose verdict he may be well satisfied, and if not so satisfied, then another by appeal to the court, where he can have a new assessment by a jury in the box. *S. v. Jones,* 139 N.C. 613.

The policy of the statute in evident, and is fair to both parties. We have held in *Ridley v. R. R.,* 118 N.C. 996, and subsequent cases that it does not apply to railroad companies by reason of the later statute, and that is as far as we should go, without being in danger of interfering with the free operation of a legislative enactment.

I see nothing in the act unjust to the owner. It provided for the condemnation of the land in the usual and ordinary way, and after the improvement is ordered to be made, it allows the owner 60 days within which to ask for an assessment of the damages by "a jury of three disinterested freeholders," who are not appointed by the county commissioners, as claimed, but summoned by the sheriff, constable or other officer, as provided by law, and two days notice of the place and time appointed for making the appraisement must be given to the landowner, so that he may be present, if he desires, and protect his interests, and then follows a provision for a review, by appeal, of the jury's report, if the owner is not satisfied with it. The commissioners, therefore, have no interest in the matter. I do not see why so simple a remedy cannot be prosecuted within sixty days. The landowner, therefore, has all the advantages of a civil action and more. There would not be as much delay by appeal, for he could bring his case to an
(647) issue in the Superior Court just as soon as, if not sooner than, by a civil action, where two terms are required to make up the issue. But, whether the remedy is better or not, the statute so provides

for it, and I do not understand it to be contended that it is invalid under the Constitution. *Davis v. R. R.*, 19 N.C. 451, which sustains it, has been repeatedly quoted and approved.

It is said in the opinion of the Court that plaintiff is asked to begin over again and that she should not be required to do so because her time for filling a petition before the board has expired. This reasoning would apply to every case where a plaintiff has failed to pursue the right course or to bring his suit in time—that is the time fixed by the Legislature, which unquestionably has the power to fix it. And the further inquiry is, To what purpose, or in what way, should she be required to proceed otherwise than by civil action for damages? The simple answer is, because the Legislature, having the power to do so, has so declared in plain and mandatory language. The Durham statute allows 60 days (instead of 20) to file a petition, and affords a simple remedy for setting apart the quantity of land required and for assessing the damages. The time is reasonable, and there is no hardship in requiring the owner to pursue so simple and adequate a remedy.

But it is said the letter was equivalent of a petition. It shows, on its face, that it was not intended by its author, but was merely an offer to settle the damages by an arbitration outside, instead of by formal proceedings in the court. It did not ask for the appointment of commissioners or under the statute, but suggested only a private settlement by arbitration for any relief that would liken the case to a proceeding, and it is as wide a departure from the method prescribed by the law as it could possibly be. And all this appears not from construing the statute rigidly, but reasonably, and giving the natural and manifest meaning to its language.

The nature and location of the property taken, whether at one place or another, cannot alter the law, which is unchangeably the same in its application to all kinds of property that is subject to condemnation. It is calling the result (which was produced by plaintiff's inaction) by the wrong name, to say it works a hardship, for, in a legal sense, there can be no such thing if the law justifies what is done. To call it a hardship is merely another way of saying that the statute is wrong in principle, but this can hardly be maintained, as it affords an easy and perfectly adequate remedy.

The cases cited, when properly considered and applied, are not at all in conflict with *McIntyre's case*, which should be allowed to stand, as it has stood unchallenged for nearly a half-century. We are not the judges of its policy, even if, in principle, it may be wrong and bear harshly in some instances.

Where a man brings a loss upon himself by his own fault, the (648) law will not hear him complain of it as a hardship, for it favors

the vigilant, who preserve their rights, and not those who neglect them, and who by their silence and inactivity apparently consent to relinquish them. *Volenti non fit injuria.* A doctrine that would excuse or condemn a lack of proper care and attention to one's inmportant affairs would be fatal to any orderly procedure in our courts, which is so essential and even vital to the protection of the rights of both sides—not one more than the other.

Cited: Keener v. Asheville, 177 N.C. 4; *Fleming v. Congleton,* 177 N.C. 188; *Sawyer v. Drainage District,* 179 N.C. 184; *Dayton v. Asheville,* 185 N.C. 14; *Latham v. Highway Commission,* 185 N.C. 135; *Rouse v. Kinston,* 188 N.C. 11; *Latham v. Highway Commission,* 191 N.C. 142, *Manufacturing Co. v. Alumium Co.,* 207 N.C. 61.

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LILLIE W. DAVIS, ADMINISTRATRIX v. SOUTHERN RAILWAY CO. ET AL.

(Filed 28 May, 1918.)

1. **Master and Servant—Employer and Employee—Federal Employer's Liability Act—Contributory Negligence—Evidence—Nonsuit—Trials.**

   Contributory negligence is not a defense under the Employers' Liability Act, and evidence thereof may not be regarded upon motion to nonsuit upon the evidence.

2. **Railroads—Master and Servant—Employer and Employee—Negligence—Evidence—Nonsuit.**

   In an action against a railroad to recover damages for the negligent killing of plaintiff's intestate, there was evidence tending to show that as a messenger boy he was at the time delivering a message to defendant's conductor at its locomotive, where the tracks were too close together to admit of passing trains for his safety, and that he was struck by defendant's locomotive running with the tender in front, without signals or warnings of its approach, or watchman or lookout properly placed. *Held,* sufficient to be submitted to the jury upon the issue of the defendant's actionable negligence.

3. **Instructions—Evidence—Negligence—Contributory Negligence—Proximate Cause—Appeal and Error.**

   Where there is evidence tending to show that the plaintiff's intestate was killed by the negligence of the defendant railroad company in striking him with a locomotive moving along its track, without a proper lookout, or signals or warnings of its approach; and also evidence that the intestate, by the observance of proper care, could have, nevertheless, avoided the injury; *Held,* reversible error for the court in his charge to the jury to make the answer to the issue of negligence solely depend upon

the question as to the proper lookout or warnings of the engine's approach, and omit to charge them upon the principle of proximate cause.

4. Master and Servant—Employer and Employee—Federal Employer's Liability Act—Damages—Contributory Negligence—Instructions.

An instruction to the jury for the admeasurement of damages under the Federal Employer's Liability Act, where there is evidence of both negligence and contributory negligence, should follow the rule of proportion specified in the statute, or refer to the occasion for contrasting the negligence as a means of ascertaining what proportion of the full damages should be excluded from the recovery; and leaving it to the jury to determine otherwise the reasonableness of the deduction, is reversible error.

APPEAL by defendants from *Ferguson, J.*, at the February Term, 1918, of BUNCOMBE.

This is an action brought by the plaintiff administratrix against the defendant for the recovery of damages on account of the alleged negligent killing of plaintiff's intestate, Julian Carr Davis, a sixteen-year-old boy, in the yards of the defendant at Asheville on 18 November, 1916. Plaintiff's intestate was a messenger boy of the defendant, and was charged with the duty of delivering messages from the yardmaster's office to various employees of the defendant in the railroad yards.

The evidence offered by the plaintiff tended to prove that at the time plaintiff's intestate was killed by the negligence of the defendant he was standing between two parallel tracks of defendant, and had just handed Conductor Black a message pertaining to the movement of a certain car, and "the boy and Black were reading the message there" when he was knocked down and killed by an engine going east. The evidence further tended to show that at the exact point where the boy was struck, parallel tracks of the defendant were so close together that the boy did not have room to perform his duties with safety, and that he did not have room to get out of the way of the engine which was backing east without being injured by the engine and cars which were traveling west on the parallel track at the time he was struck, and that no signal or warning was given by the trainsmen on the engine, and that no one was on the front of the engine to give warning or to keep a lookout. The train which killed the deceased was running with the tender in front of the engine so the engineer could not see the deceased.

The evidence for the defendant tended to prove that there was ample space between the tracks for one to stand in safety with trains passing on both of them; that the train going west had passed the deceased before he was struck, and that the deceased was looking in the direction of the train which killed him.

There was a motion for judgment of nonsuit, which was denied, and the defendant excepted.

His Honor charged the jury on the issue of negligence as follows: "I charge you that it was the duty of the defendant company, by its engineer or others, to keep a lookout over and along the track where it was moving its engine, and that if it failed to do so, it would be negligent, and it would be your duty to answer that issue 'Yes.'" The defendant excepted.

(650) Also on the issue of damages as follows: "Now, when you come to consider that, it would be your duty to take into consideration as part of the evidence of his negligence, his age, the time that he had been engaged, his acquaintanceship with the engines with which he was surrounded, the extent of the business he was doing at the time, what there was to attract his attention, what there was to keep him from observing the necessary things to do in order to keep him from avoiding an injury; and you will also take into consideration the character of the morning and the distance he might have seen the train or engine approaching, if he could have seen it; and then you will measure the damages by such reduction as you think proper under all the circumstances." The defendant excepted.

The jury returned the following verdict:

1. Was the plaintiff's intestate, Julian Carr Davis, engaged in interstate commerce at the time the said Julian Carr Davis was injured and killed? Answer: "Yes."

2. Was the defendant Southern Railroad Company engaged in interstate commerce at the time the said Julian Carr Davis was injured and killed? Answer: "Yes."

3. Was the plaintiff's intestate, Julian Carr Davis, injured and killed by the negligence of the defendant Southern Railroad Company? Answer: "Yes."

4. Did the plaintiff's intestate, Julian Carr Davis, by his own negligence contribute to his injury and death? Answer: "Yes."

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

Judgment was rendered in favor of the plaintiff and the defendant appealed.

G. W. Garland and Curtis & Varnon for plaintiff.
Martin, Rollins & Wright for defendant.

ALLEN, J. Contributory negligence is not a defense in an action to recover damages on account of negligence under the Employer's Liabil-

ity Act, and it cannot, therefore, be taken into consideration on a motion for judgment of nonsuit.

We can deal only with the evidence relied on to prove the negligence of the defendant, which must be construed most favorably for the plaintiff, and when so considered, we are of opinion evidence was introduced on the trial fit to be considered by the jury.

The evidence tends to prove that the deceased was where he had the right to be in the performance of a duty; that he was engaged in reading telegrams; that he was standing between two parallel tracks close together; that a train was passing along one of these tracks (651) going west and that the train which killed the deceased passed on the other going east; that the place where the deceased was standing was dangerous, and one could not stand there with trains passing on both tracks without being struck; that the train was running with the tender in front of the engine so that the engineer could not see ahead; that there was no watchman on the front of the train, or if there was, he was not keeping a lookout; that no signal was given of the approach of the train, and the inference is permissible that if a lookout had been maintained or a signal given, the deceased would have been warned of his danger, or the train would have been stopped in time to avoid the injury.

The evidence is stronger for the plaintiff than in *Lassiter v. R. R.*, 133 N.C. 244, in which a judgment of nonsuit was reversed on appeal, in that the employee here was in a more dangerous situation, which could have been readily observed, and this is the important and material fact which distinguishes this case from *Aerkfetz v. Humphrey*, 145 U.S. 418, an authority relied on by the defendant.

In the *Lassiter* case the deceased, "a freight conductor in the defendant's service, was standing between the main track and a sidetrack in the defendant's yard in the town of Henderson, giving instructions to the hands on top of the box cars as to the movements of his train. The train of which he was in charge was on the main track and backing towards him. He was looking at it as he gave the signals to the hands. On the sidetrack a shifting engine with two box cars was moving backwards at the rate of about four miles an hour in the direction of the intestate, his back being turned to the shifting engine. When the box cars attached to the shifting engine were within about twenty steps of the intestate he stepped from a safe place between the track upon the sidetrack, with his back towards the shifting engine, and when engaged in giving orders to the men on the top of the box cars of his own train he was run over and killed by the box cars attached to the shifting engine. A person, Henry Thomason, who claimed to be

passing by, endeavored to attract the attention of the intestate by hallooing to his peril, but to no avail. There was no watchman on the box cars of the shifting engine. The engineer, from his cab, could not have seen the deceased on the sidetrack. There was no evidence that the bell was not ringing, nor any that the whistle was not sounding."

The court held that the question of the defendant's liability ought to have been submitted to the jury, and among other things, said: "It is the duty of railroad companies to keep a reasonable lookout on moving trains. When Thomason saw the intestate step upon the sidetrack the end of the box car attached to the shifting engine was twenty steps from him and the cars were moving at the rate of four (652) miles an hour. The same witness said that the intestate had time to have gotten off if he had heard the witness when he hallooed to him. That evidence was competent and fit to have been submitted to the jury upon the question of the last clear chance of the defendant—that is, whether if both the plaintiff and the defendant had been negligent the defendant could have prevented the death of the intestate by the use of means at hand or that reasonably ought to have been at hand." . . .

"In the present case it was of the utmost importance for the defendant to have kept a lookout other than that which the engineer ordinarily might keep, for the engineer here could not see in front of him by reason of the box cars, although the track was straight for some distance, and the view but for the box cars unobstructed."

This case has been approved ten or twelve times, the latest cases referring to it being *Talley v. R. R.*, 163 N.C. 572; *Meroney v. R. R.*, 165 N.C. 612; *Norman v. R. R.*, 167 N.C. 538.

The charge on the issue of negligence is erroneous. It is correct in so far as it imposes on the defendant the duty of keeping a lookout, but in it effect ignores the evidence of the defendant tending to prove that the deceased was looking in the direction of the train as it approached; that he was in a place of safety; that there was ample space between the track for one to stand without being injured with trains passing on both tracks; that the train going west had already passed the deceased; that if a lookout had been maintained there was no need of giving a signal, and no reason to stop because he was in no danger, and it omits proximate cause as a fact to be found under the third issue.

A similar instruction has been condemned at this term in *Ware v. R. R.*, and in *Lee v. Utilities Co.*, in which the authorities are reviewed, the Court saying in the last case: "The court failed to tell the jury that the negligence of defendants must have been the proximate cause of the injury in order to be actionable, so that the issue could be answered 'Yes.'"

"In order to establish actionable negligence, the plaintiff is required to show by the greater weight of the testimony, first, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff, under the circumstances in which they were placed, proper care being that degree of care which a prudent man should use under like circumstances and charged with a like duty; and second, that such negligence breach of duty was the proximate cause of the injury—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 the facts as they existed. *Ramsbottom v. R. R.*, 138 N.C. 38."

There is also error in the instruction on the issue of damages, (653) *R. R. v. Tilghman*, 237 U.S. 500.

In the *Tilghman case* the Court, after holding that "where the casual negligence is attributable partly to the carrier and partly to the injured employee, he shall not recover full damages, but only a diminished sum bearing the same relation to the full damages that the negligence attributable to the carrier bears to the negligence attributable to both; the purpose being to exclude from the recovery a proportional part of the damages corresponding to the employer's contribution to the total negligence" deals with the instruction under review as follows:

"At the trial the court instructed the jury that if they found the plaintiff was injured through the concurring negligence of the railway company and himself, they should determine the full amount of damages sustained by him, 'and then deduct from that whatever amount you think would be proper for the contributory negligence.' This was reiterated in different ways and somewhat elaborated, but the fair meaning of all that was said was that a resonable allowance or deduction should be made for the plaintiff's negligence and that it rested with the jury to determine what was reasonable. No reference was made to the rule of proportion specified in the statute or to the occasion for contrasting the negligence of the employee with the total casual negligence as a means of ascertaining what proportion of the full damages should be excluded from the recovery. On the contrary, the matter of diminishing the damages was committed to the jury without naming any standard to which their action should conform other than their own conception of what was reasonable. In this there was a failure to give proper effect to the part of the statute before quoted. It prescribes a rule for determining the amount of the deduction required to be made and the jury should have been advised of that rule and its controlling force.

"It results that the objection to the instructions upon this subject was well taken and should have been sustained.

The error pointed out is present in the instruction, to which the defendant excepts, and the two cases cannot be distinguished.

New trial.

Cited: Moore v. R. R., 185 N.C. 191; *Cobia v. R. R.*, 188 N.C. 495; *Brooks v. Lumber Co.*, 194 N.C. 145; *Daughtry v. Cline*, 224 N.C. 383; *Futrelle v. R. R.*, 245 N.C. 40.

(654)

ZEB SUMNER AND H. B. MARTIN, TRADING AS SUMNER & MARTIN, v. GRAHAM COUNTY LUMBER COMPANY.

(Filed 28 May, 1918.)

1. Contracts—Statute of Frauds—Standing Trees—Title.

A contract made with the owner of lands to cut and peel hemlock trees on his lands at a certain sum per thousand feet does not involve the title to or any interest in the standing trees, and is not one required by the statute to be in writing.

2. Same—Separate Contracts—Parol Evidence.

The defendant orally contracted with the plaintiff to cut and peel hemlock trees growing upon two separate tracts of its land, the one easily accessible and the other difficult of access. The defendant orally agreed that if the plaintiff signed a written contract as to the latter tract, he should cut the former one at the same price per thousand feet. Upon this agreement, the plaintiff signed the written contract tendered him, and it is *Held*, that evidence of the parol contract was admissible, as it was not intended to be a part of the written one, but a separate and distinct contract which the statute did not require to be in writing. The principle discussed by WALKER, J., where a contract, not required by the statute to be in writing, is partly in writing and partly in parol.

ACTION, tried before *Lane, J.*, and a jury, at Spring Term, 1918, of CHEROKEE.

The defendant lumber company had two tracks of hemlock timber to cut and peel. One was known as the Choga boundary, and consisted of some 200 acres of rough mountainous land, almost inaccessible, with scattered timber, and difficult to work over. The other was known as the Laurel Creek Boundary, a comparatively level tract, with fine timber and easy of access. Defendant offered plaintiffs $2 per thousand feet to cut the Choga boundary and peel and pile the bark on it. Plain-

tiffs refused, but offered to work the Choga boundary at $2, if defendant would let them work the Laurel Creek boundary at the same price. Defendant accepted the offer. The written contract, appearing in the record, dated 15 April, 1915, was prepared, but when it was tendered to plaintiffs for execution they refused to sign it because it did not embrace the Laurel Creek boundary. Defendant, by its agent, orally agreed, and as a separate contract, that if plaintiff signed the paper as to the Choga boundary, they should be given the right to work the Laurel Creek land at the same price as the Choga, and recognized the contract afterwards and affirmed it. Plaintiffs thereupon signed the contract.

Plaintiffs worked out the Choga boundary at a loss. While they were operating it, defendant's agent Day urged them to rush the work so as to get into the Laurel Creek boundary. Shortly before the Choga boundary was finished, defendant let the Laurel Creek boundary to J. L. Truett, who operated it at a profit of $350. Plaintiffs sued for damages, alleging that the Laurel Creek boundary contained (655) about 18,000,000 feet, and that they could have operated it at a profit of $1,800. The jury found that the parol contract was made as alleged, that is as a separate one, and assessed the damages at $350.

Judgment upon the verdict and defendant appealed.

Alley & Leatherwood and Dillard & Hill for plaintiff.
M. W. Bell for defendant.

WALKER, J., after stating the case: The first question is whether plaintiffs could offer proof as to the parol agreement respecting the Laurel Creek land, by which they were allowed to work that tract at the same price fixed in this Chicago land contract.

As this is a contract for peeling the timber of its bark and piling it on the land for the use of the defendant, it is not such a one as is required to be in writing. *Ives v. R. R.*, 142 N.C. 131. In that case the contract was one for cutting trees and converting them into cordwood, which was to be delivered on defendant's right of way, and we hold that a writing was not required under the statute. Th Court said:

"The contract of the parties to this action was not one for the sale of standing trees, but, in the one case, for the sale and delivery of cordwood, and, in the other, for the conversion of trees growing on the defendant's land into cordwood and the delivery of the same on the defendant's right of way. It was not contemplated by the parties that there should be a transfer of any title to or interest in the trees as they stood upon the land; and this is essential to bring the agreement within the purview of the statute," citing 29 A. & E. Enc. (2 Ed.), 880.

And the Court further said: "It was held in the case of *Smith v. Surman,* 9 B. & C., 561, that where the owner of land agreed with another to cut timber from his own land and deliver the trees, when cut down or severed from the freehold, to the latter for a stipulated price, the statute did not apply; and the particular agreement, in that case, being construed to have the said effect in law, was therefore held not to be within the statute. And the converse of the proposition is equally true, that where one contracts with another to cut timber from his own land and deliver it to him when cut or severed, the statute has no application. It has been so expressly decided. *Killmore v. Howlett,* 48 N.Y. 569; *Forbes v. Hamilton,* 2 Tyler, 356; *Scales v. Wiley,* 68 Vt., 39; *Green v. Armstrong,* 1 Denio, 550; *Royce v. Washburn,* 4 Hun, 792; 2 Reed on Statute of Frauds, sec. 711.

"The Courts properly said in the cases cited that to give the statute the construction contended for would be to destroy the right of recovery of almost every laborer at harvesting or mowing, which (656) generally and almost universally rests on a parol contract, and further, that it would make a writing indispensable to the validity of a contract by the owner of a peat-bed or a sand-bank to deliver even a load from it; and we may add, it would jeopardize the rights of every woodman who for hire fells trees in the forest."

But the defendant in this case is relying on the rule of evidence that when a contract is reduced to writing, parol evidence will not be heard to contradict, vary, or add to the same, as the parties are presumed to have expressed the entire agreement in the writing. *Moffitt v. Maness,* 102 N.C. 457; *Basnight v. Jobbing Co.,* 148 N.C. 350; *Walker v. Venters,* ibid., 388; *Cherokee v. Meroney,* 173 N.C. 653. The rule is a wholesome one and should be carefully and strictly enforced in instances where it properly applies, but it does not exclude the evidence admitted in this case, as here the plaintiffs did not propose to show that the contract as to the Laurel Creek land had been omitted from the writing by mistake or fraud, nor that it was agreed that it should be inserted therein, but that the writing was signed by them, well knowing that it was not inserted in the paper. They proved, though a parol contract, not required to be in writing, which, as they allege, was separate and distinct from the one stated in the writing, and intended by the parties to operate independently of it. It was not, therefore, merged in the writing, as it was not intended that it should be a part thereof, and, in any view, it does not "contradict, add to, or vary" the written agreement, but is perfectly consistent with it. The writing was merely signed and a stipulation then made that the plaintiff should peel the bark from the hemlock trees on the Laurel Creek land at the same price

and upon the same terms as in the case of the trees on the Chogo land. Instead of being a part of the written agreement, it was distinctly separated from it by the parties, and was altogether an additional contract as to a different tract of land. It was clearly regarded by the parties when it was made as a contract not expressed in the written instrument, nor intended to be, and was in reality a subsequent agreement, resting wholly in parol.

The proper rule is thus stated in *Brown v. Hobbs,* 147 N.C. 73: "A written instrument, although it be a contract within the meaning of the rule on this point, does not exclude evidence tending to show the actual transaction in the following case: Where it appears that the instrument was not intended to be a complete final statement of the whole transaction, and the object of the evidence is simply to establish a separate oral agreement in the matter, as to which the instrument is silent, and which is not contrary to its terms nor to their legal effect." The same doctrine was applied in *Manning v. Jones,* 44 N.C. 368; *Michael v. Foil,* 100 N.C. 178; *Sherrill v. Hagan,* 92 N.C. 345; *Bourne v. Sherrill,* 143 N.C. 381; *Freeman v. Bell,* 150 N.C. 146; *McKin-* (657) *ney v. Matthews,* 166 N.C. 576.

"While parol evidence is not admissible to vary or contradict a written agreement, yet when the agreement is not one which the statute requires to be in writing, it is competent to show by parol that only part of the agreement was in writing and what was the rest of the agreement." *Palmer v. Lowder,* 167 N.C. 233, citing numerous cases.

We have so far been treating the oral terms as those of an entirely separate and distinct contract not stated in the writing and purposely omitted therefrom, because it was such a contract, and therefore, had no proper place in it. But there is another principle applicable, if the contract should be treated as one having separate parts in itself. There the rule laid down in *Cobb v. Clegg,* 137 N.C. 153, applies. It was there said: "When it is not intended that a written contract should state the whole agreement between the parties thereto, evidence of an independent verbal agreement is admissible." Clark on Contracts (2 Ed), 85, thus states the principle: "Where a contract does not fall within the statute, the parties may, at their option, put their agreement in writing or may contract orally, or put some of the terms in writing and arrange others orally. In the latter case, although that which is written cannot be varied by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitutes one entire contract." So, however we may consider the matter, the parole evidence rule does not apply.

Of course, the oral part of the contract must not contradict that which is written in it. *Cobb v. Clegg, supra.* It would seem that this case, in principle, if not in its facts, is exactly like that of *Manning v. Jones, supra.*

This disposes of the main question upon which the decision must turn. The other exceptions are without merit. The judge's charge stated the issues and the law with great accuracy and clearness, and it seems that the jury, upon the evidence and under the guidance of the Court as to the law, have come to the right conclusion.

No error.

Cited: Kindler v. Trust Co., 204 N.C. 201; *Walston v. Lowery*, 212 N.C. 24; *Johnson v .Wallin*, 227 N.C. 671.

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(658)

SLOAN BROTHERS v. SAWYER-FELDER COMPANY, ASHCRAFT-WILKINSON COMPANY, INTERPLEADER.

(Filed 28 May, 1918.)

1. Mortgages—Bills of Sale.

A paper-writing conveying personal property, reciting that it is to better secure the payment of a debt, and upon its payment to be satisfied in the same manner as deeds may be concelled at law, though called a bill of sale by the creditor, is in effect a mortgage, and will be so regarded.

2. Mortgages—Personal Property—Registration—Attachment.

A mortgage of personal property made to a nonresident must be registered in the county where the property is situated to have priority over the rights of attaching creditors of the mortgagor. *Hornthal v. Burwell*, 109 N.C. 10, is cited and distinguished.

3. Mortgages—Parol Evidence—Appeal and Error.

Where a chattel mortgage has been introduced in evidence in a controversy to determine the rights of the mortgagee and attaching creditors, the exclusion of testimony in mortgagee's behalf tending to show that the parties intended the writing to be a mortgage, is harmless and not to the mortgagee's prejudice.

4. Same—Hearsay—Opinion.

Testimony of a witness as to a conversation between himself and the mortgagee relating to a paper-writing put in evidence and appearing upon its face to be a mortgage, if otherwise competent, is hearsay and incompetent as substantive evidence, as is also the opinion of the witness as to the effect of the transaction.

5. Mortgages—Attachment—Priorities.

The owner of an improperly registered mortgage of personal property in his possession holds it subject to the prior claims raising under attachment of the mortgagor's creditors.

APPEAL by interpleader from *Shaw, J.*, at the Fall Term, 1918, of MACON.

The creditors of Sawyers-Felder Company instituted various actions to collect their debts, and levied attachments on a certain motor truck. After the action had been instituted Ashcraft-Wilkinson Company filed interpleas in which it alleged that it was the owner of the truck and the several actions were then consolidated.

On the trial the following instrument was introduced in evidence: *Georgia—Fulton County.*

Whereas Sawyer-Felder Co. (a partnership composed of F. L. Sawyer and K. T. Felder) is indebted to Ashcraft-Wilkinson Co.,

Now for ($5) in hand paid and to better secure the payment of said indebtedness, and any and all future indebtedness, whether on note or open account, by said partnership, to Ashcraft-Wilkinson Co., we hereby bargain, sell and convey to Ashcraft-Wilkinson Co. the following described property and all our right, title, equity and interest therein:

A certain tractor truck manufacture of the White Co., model ATH, Serial No. 31318, steel body, power-end-pump, equipped with tractor wheels, and cushions, lamps and tools.

A certain Alco truck, 5-ton capacity, purchased from C. L. (659) DuPuy, together with all accessories and equipment complete.

Both of said trucks now in our possession and are hereby covenanted to be free of all liens and incumbrances.

Upon prompt payment by us of all indebtedness which shall become due the said Ashcraft-Wilkinson Co., they are to satisfy this bill of sale in the same manner as deeds may be cancelled in law.

In witness whereof we have hereunto set our hands and seals at Atlanta, Ga., this the 20th day of May, 1916.

Sawyer-Felder Co. (L. S.)

F. L. SAWYER. (L. S.)

Signed, sealed, and delivered in the presence of P. B. D'Orr, Notary Public, Fulton County, Ga.

The said instrument was filed for record at 5 p. m., 19 September, 1916, and recorded in Fulton County, Ga., 29 September, 1916.

The interpleader introduced as a witness P. B. D'Orr. The witness was handed the instrument hereinbefore set out, and in the absence of the jury certain questions were asked the witness which, with the answers thereto, were as follows:

Q. What is that instrument you have? A. This instrument is a deed of sale in our State and a mortgage, I believe it is called, in your State.

Q. Who drew that instrument? A. I drew the instrument.

Q. At whose instance? A. At the instance of Ashcraft and Wilkinson, president and vice-president of the interpleader.

Q. For what purpose was the instrument drawn? A. After the Sawyer-Felder Company had been engaged in this mining business for some time it was the sense of the company, of the Ashcraft-Wilkinson Company, and those who control its affairs, that Sawyer-Felder Company would be unable to pay the funds advanced; that their behavior had become such that Ashcraft-Wilkinson were disturbed over their transactions under which they loaned them this money and they had turned this truck over to them to my personal knowledge, and they instructed me to prepare a deed of sale, which would put the title of the trucks in us in order that it might on the Fulton Company records so that if Sawyer-Felder attempted to sell the truck they would have a record showing that it belonged to us, and they had no record and said that something ought to be on the books to show in whom the title lay, and Mr. Ashcraft instructed me to prepare a deed from Sawyer-Felder Company to put on record for the truck. At the time I told Mr. Ashcraft that we owned the truck and had never sold it and never passed the title and I did not think it necessary to have a deed, and be-
(660) ing a layman and contrary, insisted, and I drew the deed and it was put on record in September, although I drew it on the 30th of May.

The court instructed the sheriff to recall the jury to the box, and the following proceedings were laid:

The interpleaders offered to introduce the foregoing evidence of the witness D'Orr. Plaintiffs objected; objection sustained; interpleader excepted.

The only other evidence offered by the interpleader was that of one Wilkinson, who after testifying to certain facts, substantially those stated by the witness D'Orr, admitted that he knew nothing about the transaction and that he was speaking from hearsay.

The purpose of the interpleader in offering the evidence of D'Orr and Wilkinson was to prove an outstanding title in the interpleader derived by purchase from the White Company before the execution of the paper introduced in evidence and to avoid the effect of the paper as a mortgage.

At the conclusion of the evidence his Honor dismissed the interpleas, and the Ashcraft-Wilkinson Company excepted and appealed.

Johnston & Horn, G. L. Jones, R. D. Sisk, and J. Frank Ray for plaintiff.

T. J. Johnston and P. B. D'Orr for defendant.

ALLEN, J. The paper introduced in evidence, while called a bill of sale, is in legal effect a mortgage, because it purports to convey personal property as a security for debt *(Harris v. Jones,* 83 N.C. 321), and being a mortgage, and the mortgagor being a nonresident of the State, it was necessary to cause it to be registered in the county of Macon, where the property was situate, to give it priority over attaching creditors.

The case of *Hornthal v. Burwell,* 109 N.C. 10, has no application because it does not appear that the truck was not in Macon County when the mortgage was executed.

This principle is therefore decisive of the appeal against the interpleader unless error has been committed in excluding the evidence of the witness D'Orr or in holding that the evidence of the witness Wilkinson was not sufficient to be submitted to the jury.

The last part of the evidence of D'Orr, as to the conversation with Ashcraft, was clearly incompetent, as it does not come within any exception to the rule excluding hearsay evidence, and, omitting this, his evidence was immaterial, as it could not change the relation of mortgagor and mortgagee, but would confirm it, as it shows that the Ashcraft-Wilkinson Company had loaned money to the Sawyer-Felder company, and becoming uneasy about the debt, it took the (661) mortgage for the purpose of putting the title of the truck in Ashcraft-Wilkinson Company, so that the other company could not dispose of it.

The evidence is a very good description of a sale of personal property on credit, aud taking a mortgage on the property as a security, upon becoming doubtful as to the solvency of the debtor.

And the evidence of Wilkinson, if it ought to be considered after his admission that he knew nothing of the transaction and was speaking from hearsay, is subject to the same condemnation. It is true, he says the truck was not sold to Sawyer-Felder Company, but this is merely his conclusion, and he afterwards testified "that so far as witness knew personally Ashcraft might have sold this truck to Sawyer-Felder Company."

He also testified that the Ashcraft-Wilkinson Company bought the truck from the White Company, and turned it over to the Sawyer-Felder Company, which was to pay for it when able, and that the mortgage was taken to protect the Ashcraft-Wilkinson Company.

This evidence, if true, has no tendency to prove an outstanding title in the interpleader derived from the White Company if it was permissible to do so, to which we do not give our assent, and on the contrary establishes the relationship between the parties as shown by the mortgage.

We are, therefore, of opinion there was no error in the exclusion of evidence or in the dismissal of the interpleas.

The judgment must, however, be modified by declaring the Ashcraft-Wilkinson Company to be the owners of the property, subject to the prior claim and lien of the attachments, and to this modification the plaintiffs consent.

The interpleader will pay the costs of the appeal.

Modified and affirmed.

Cited: Harris v. R. R., 190 N.C. 482; *Young v. Stewart*, 191 N.C. 302; *Discount Corp. v. Radecky*, 205 N.C. 164; *Thrift Corp. v. Guthrie*, 227 N.C. 432; *Discount Corp. v. McKinney*, 230 N.C. 732; *Montague Bros. v. Shepherd Co.*, 231 N.C. 554.

(662)

T. J. WALLS v. CAROLINA SPRUCE COMPANY.

(Filed 28 May, 1918.)

1. Appeal and Error—Verdict—Harmless Error.

Where damages are sought to be recovered from the defendant, alleging several causes of action on contract and one arising from its negligent acts, and as to the last the jury has not answered the issue, and no recovery has been had thereon, no error has been committed to the defendant's prejudice therein.

2. Negligence—Fires—Evidence—Trials—Questions for Jury.

Evidence tending to show that the defendant independently operated a logging road, and that fire was set out to the damage of plaintiff by defendant's skidder having no spark arrester or other protection against fire where inflammable matter had collected, and where sparks had fallen from the skidder and ignited, communicating to the plaintiff's property, is sufficient to take the case to the jury upon the question of defendant's actionable negligence.

3. Conversion—Evidence—Admissions—Accounting.

In an action to recover for the conversion of a quantity of cord wood, the defendant's evidence showed that it had received the proceeds of sale of at least a part thereof, and that a certain amount was due the plain-

tiff and unpaid on another lot of the wood: *Held*, the defendant must at least account to the plaintiff for the amount of the conversion admitted, the issue as to defendant's counterclaim having been answered in the negative.

4. Contracts—Breach—Evidence—Trials—Questions for Jury.

Defendant, operating an independent steam logging road, contracted with the plaintiff for the former to cut and deliver a quantity of cord wood with cars that the plaintiff would have delivered by a railroad company to the defendant for the purpose. There was evidence tending to show that but for the use by the defendant of these cars for other purposes the plaintiff would have delivered the wood before the occurrence of a fire which destroyed it, causing the damage complained of: *Held*, sufficient to take the case to the jury upon the issue of defendant's breach of contract.

5. Instructions—Evidence—Contracts.

The plaintiff contracted with the defendant to cut and deliver to it a certain quantity of cord wood on gondola cars to be procured by him from a railroad, delivered to the defendant, operating a logging road, and in turn to be delivered by it to the plaintiff. There was evidence tending to show, and *per contra*, that the plaintiff was damaged on account of the defendant's using these cars for other purposes: *Held*, an instruction to the jury was erroneous, and to defendant's prejudice, which imposed a duty on it to furnish to the plaintiff all of the gondola cars it had received from the railroad, and not confirming the question to the cars the plaintiff had procured from the railroad company.

6. Contracts — Breach — Damages — Proximate Result—Profits—Remote Cause.

The plaintiff sued the defendant for damages by fire arising from breach of contract in defendant's failing to deliver to it gondola cars on which to deliver a quantity of cord wood, which it was required to do. By reason of this breach the plaintiff, without default, was unable to deliver the wood before it was destroyed by a fire: *Held*, the plaintiff was entitled to recover, as damages, the loss of his profits under the contract, but not for the loss of his other wood, as such did not naturally and proximately result from defendant's breach of contract or duty. *Extinguisher Co. v. R. R.*, 137 N.C. 278, cited and applied.

7. Contracts—Breach—Evidence.

The plaintiff sued the defendant for breach of contract in its failure to deliver cars for the transportation of cord wood before it was destroyed by fire: *Held*, plaintiff's testimony that he stopped work because the wood was burned was, in effect, that he could not continue unless he could get the proceeds for the wood, and under the evidence in this case was properly admitted.

8. Contracts—Breach—Damages—Remote Cause—Speculative Damages.

Where plaintiff is permitted to recover damages for defendant's breach of contract to deliver cars for the transportation of cord wood burned by reason of the consequent delay, the admission of evidence that the plaintiff sold his camp outfit and tools at a great sacrifice in order to pay his debts is error prejudicial to the defendant and constitutes reversible error.

APPEAL by defendant from *Lane, J.*, at the January Term, 1918, of HAYWOOD.

This is an action to recover damages for the breach of a
(663) written and a verbal contract for conversion of 250 cords of wood, and for the negligent destruction by fire of 200 cords of wood.

The plaintiff had a contract with the Champion Fiber Company by which he was to sell it from 1,500 to 3,000 cords of pulp wood. On 21 October, 1916, the defendant entered into a contract with the plaintiff by which the plaintiff was to take the pulp wood left on the boundary, reasonably accessible to the railroad, and pay the Spruce Company therefor $3 per cord stumpage. Under the contract, the Spruce Company, which was operating a railroad, agreed to furnish cars to the plaintiff when the plaintiff procured cars from the Black Mountain Railroad for that purpose. They were to be gondola cars. The plaintiff commenced his operations, and after operating several months a fire occurred which burned a part of his wood and he ceased his operations and brought suit, alleging four causes of action.

In one cause he claimed $1,000 damage on account of the burning of 200 cords of wood; in another he claimed $1,250 for wood which he claimed he had piled on the right of way and was converted by the defendant; in the third he claimed $50 by reason of verbal contract for logging for defendant; and in the fourth his claim was for profit he would have made, in the sum of $2,400, had the contract not been breached by the defendant in failing to furnish cars.

The plaintiff also claimed the right of recover for the wood burned and the wood converted under this cause of action for breach of contract.

The plaintiff alleged and contended that the defendant violated the contract by failing to furnish cars as it was required to do under the contract, and that he was compelled to cease operations for that reason, and that on account of the failure to furnish cars he had wood cut and in the woods prepared for shipment which was required to remain until burned, and defendant was, therefore, responsible for his damage to the amount of his profit, and that he would have finished cutting the
(664) boundary, from which he would have obtained 2,400 cords of wood at a profit of $1 a cord.

The defendant denied that it had in any way breached the contract. It alleged and contended that it was anxious to have the wood cut and taken, and that it not only furnished all the cars set apart for Walls by the railroad company, but allowed Walls to take cars that were furnished to defendant for its own purpose. It alleged that Walls took the more accessible wood, became largely indebted to the Champion Fiber

Company, and abandoned the contract without cause, whereby the defendant was damaged. There was a great difference in the testimony as to the amount of wood which could have been taken and the amount that was burned and converted.

At the close of plaintiff's testimony the defendant moved for judgment of nonsuit: First, as to the first cause of action, and second, as to the second cause of action.

It was contended by the defendant that there was a car shortage, and that the evidence of the plaintiff showed that the defendant had furnished to plaintiff 18 cars, and that the plaintiff's testimony showed that no more than 18 cars had been furnished to the defendant for the plaintiff.

The motions to nonsuit were overruled, and the defendant excepted.

The court charged the jury, among other things, as follows: "Now, the court charges you that if you find from the greater weight of the evidence in this case—the preponderance of the evidence—that they received gondola cars there which could be operated on this track of the Spruce Company and the other line, and that they failed and refused to furnish them to Walls, that would be a breach of the terms of their contract; that if you so find from the greater weight of the evidence you should answer the first issue 'Yes.'" The defendant excepted.

He also charged the jury they could consider as an element of damage for breach of contract the wood destroyed by fire if they found that cars were not furnished according to the terms of the contract, and that the wood would have been moved before the fire if the cars had been furnished, and defendant excepted.

There was also objection to the recovery of profits and there are certain exceptions to rulings on the evidence which will be adverted to.

At the conclusion of the evidence there was a motion for judgment of nonsuit and exception by defendant to its refusal.

The jury returned the following verdict:

1. Did the defendant commit a breach of its contracts with the plaintiff, as alleged in the complaint? Answer: "Yes; verbal and written."

2. What damages, if any, is the plaintiff entitled to recover by reason thereof? Answer: "$2,800."

3. Was the plaintiff's wood burned by the negligence of the (665) defendant, as alleged in the complaint? Answer: .....

4. What damages, if any, is plaintiff entitled to recover by reason thereof? Answer: .....

5. Did the plaintiff commit a breach of his contract with the defendant, as alleged in the answer: Answer "No."

6. What damages, if any, is the defendant entitled to recover by reason of its counterclaim? Answer: .....

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

Alley & Leatherwood and Morgan & Ward for plaintiff.
John M. Queen and Pless & Winborne for defendant.

ALLEN, J. The refusal to enter judgment of nonsuit as to the first cause of action to recover damages for burning the wood of the plaintiff was not prejudicial to the defendant as the jury did not answer the third issue and there has been no recovery on this cause of action. There was, however, evidence sustaining this cause of action fit for the consideration of the jury.

The evidence of the plaintiff tended to prove that the wood was burned by the sparks coming from a skidder; that the skidder had no spark arrester or other protection against fire; that there was a large collection of very inflammable matter around the skidder; that the sparks fell from the skidder on this matter and ignited it and was then communicated to the wood, and that the skidder was operated by the defendant, and not by an independent agency, and this brings the plaintiff's case within the principle of *Williams v. R. R.*, 140 N.C. 623; *Currie v. R. R.*, 156 N.C. 422, and many other authorities.

As to the second cause of action for the conversion of 250 cords of wood, the controversy was as to the quantity of wood taken and sold by the defendant, and as, according to its own evidence, it has in hand the proceeds of the sale by it of 19 cords, it must at least account for this much, the jury having found against it on its counterclaim in response to the fifth issue; and the same may be said of the third cause of action on the verbal contract for logging, the plaintiff claiming $50 to be due him under this contract, and the defendant admitting $8.11 to be due and unpaid.

The motion for nonsuit on the fourth cause of action is upon the ground that there is no evidence of a breach of the contract which requires the defendant to furnish the gonola cars to the plaintiff which he procured from the Black Mountain Railroad.

(666) The plaintiff testified that he repeatedly called on the agent of the Black Mountain Railroad Company for cars; that the agent would place the cars as often as 20 or 25 times before the fire on the defendant's track that he would then notify the defendant that the cars were placed; that the cars would be used by the defendant for its own purposes; that he complained to the defendant about not getting

cars; that he complained to the Champion Fiber Company and it furnished him twelve cars of which he got only three; that the cars set on the defendant's track at his request were sufficient in number to have hauled the $1,000 worth of wood that was burned before it was burned; that had the cars which he procured been delivered to him that he would have hauled the wood before it was burned, and that the number of cars that he procured was sufficient to have hauled his entire output of wood had they been delivered to him; that the cars so furnished to him by the Black Mountain Railroad Company at his request were all gondola cars, and that he had only gondola cars placed.

The plaintiff also proved by Charley Wilson that he went to the office of the Black Mountain Railroad Company repeatedly and ordered cars for the plaintiff; that the agent would immediately place the cars on the defendant's tracks for the use of the plaintiff, and the defendant would then use them and not deliver them to the plaintiff; that a sufficient number of cars were placed on the defendant's tracks to have delivered all of plaintiff's wood, and that had the cars procured for the plaintiff been delivered to him the 200 cords of wood that were burned could and would have been delivered before they were burned; that all the cars witness procured from the railroad company for the use of the plaintiff were gondola cars.

Plaintiff also proved by Frank Ewing that plaintiff often sent him to the office of the railroad company to order cars; that thereupon the agent would place the cars on defendant's tracks, and the defendant, instead of delivering them to the plaintiff, would use them for its own purposes; that all of the cars witness saw furnished were gondola cars.

Plaintiff introduced the agent of the Black Mountain Railroad Company, who testified that Mr. Walls and his men would order cars and he would place them on the defendant's tracks and notify the defendant they were for this plaintiff; that later he would notice that these cars were billed out by other shippers than the plaintiff.

This evidence, if true, clearly established a breach of the contract to furnish the plaintiff with the gondola cars he procured from the railroad, and the evidence of the defendant to the contrary simply raised an issue to be settled by the jury.

The exception to the charge on the first issue is well taken, the error consisting in imposing the duty on the defendant of furnishing to the plaintiff all gondola cars it received, which could be op- (667) erated on the track of the Spruce Company, when the contract only required it to furnish the gondola cars the plaintiff procured from the Black Mountain Railroad, and the error was upon a vital question as the evidence of the defendant tended to prove that while it had and

used other cars, the plaintiff only procured 18 gondola cars from the railroad, and that these were furnished him by the defendant.

There is also error in charging the jury they could consider the burned wood as an item of damage for breach of contract. *Extinguisher Co. v. R. R.*, 137 N.C. 278.

In the case cited, property delivered to the defendant for transportation was destroyed by fire, not due to the negligence of the defendant, when it would not have been at the place of the fire but for delay in forwarding, and it was held that the defendant was not liable, and the Court said: "The defendant by its failure to ship within a reasonable time became liable for such damages as naturally and proximately resulted from such breach of contract or duty. *Lindley v. R. R.*, 88 N.C. 549. *Pearson, J.*, in *Ashe v. DeRossett*, 50 N.C. 299, 72 Am. Dec., 552, says: 'When one violates his contract, he is liable only for such damages as are caused by the breach, or such as being incidental to the act of omission or commission, as a natural consequence thereof, may reasonably be presumed to have been in contemplation of the parties when the contract was made. This rule of law is well settled, but the difficulty arises in making its application. In that case a quantity of rice was sent to the mill of defendant's intestate pursuant to a contract that it was to be worked in its 'turn.' The rice was not worked in its 'turn.' The mill with its contents was thereafter burned. In an action on the contract for failure to have the rice beaten in its 'turn' the plaintiff claimed the value of the rice as the measure of the damage to which he was entitled. This Court held that in the absence of any evidence of negligence in respect to the burning of the mill, he was not entitled to recover the value of the rice. The Court said: 'There is nothing to show that the contingency that the rice might be burned if left in the mill was in the contemplation of the parties. On the contrary, its being burnt was an accident unlooked for and unforseen, and can in no sense be considered as having been caused by the fact that it was not beat in the turn promised by the defendant's intestate; consequently the damages were too remote.' . . . His Honor should have told the jury that there was no evidence showing that the delay in shipping was the proximate cause of the destruction of the property."

If there has been a breach of the contract it was proper for the jury to consider the loss of profits as an element of damages under the authority of *Wilkinson v. Dunbar*, 149 N.C. 20, which was denied (668) by a unanimous Court, has been frequently approved and is directly in point.

The fact that the plaintiff testified that he stopped work because the wood was burned was but another way of stating that he would not

continue his work unless the wood was moved, so he would get the proceeds for use, and that the failure to move the wood according to the contract was the cause of the loss of profits.

We have examined the exceptions to the evidence and find them without merit, except we do not think it was material to any issue to prove that the plaintiff sold his camp outfit and tools at half price to enable him to pay his debts, and this evidence had a tendency to prejudice the cause of the defendant before the jury.

New trial.

(669)

CAROLINA-TENNESSEE POWER COMPANY v. HIAWASSEE RIVER POWER COMPANY.

(Filed 28 May, 1918.)

1. Deeds and Conveyances—Registration—Filing.

Where the filing of a paper in the office of the register of deeds is necessary to the title to lands, the time thereof will be considered as at that which the paper was delivered to and received by the proper officer; and while the file mark of the officer is evidence as to the time, it is not essential under our statutes.

2. Corporations—Public Utilities—Electricity—Water-powers—Statutes—Charter—Rights—Vested Interests—Lands.

Where two public utilities corporations are given under their legislative charters the right to acquire by purchase or condemnation lands for the development of water-power to supply electricity to the public for power and lighting purposes, etc., the prior right belongs to that company which first defined and marked its route according to the statutory provisions and adopted the same for its permanent course or location by proper and authoritative corporate action, and which is proceeding in good faith with reasonable diligence to acquire the title to the lands located in a regular and orderly way; and the competitive company can acquire no superior right by starting a distance ahead to obtain the title to the lands intervening between the beginning and objective points.

3. Corporations—Public Utilities—Eminent Domain—Statutes—Charters—Private Enterprises.

The validity of a charter granting the right of eminent domain to a *quasi*-public corporation is not affected by the authority conferred therein allowing it, also to engage in private enterprises which do not require the exercise of the right of eminent domain; nor can the question of the validity of the act be raised before the corporation has attempted to aquire property by condemnation, and thereby threatens the constitutional rights of the defendant.

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4. Constitutional Law—Statutes—Private Acts—Notice—Collateral Attack.

Where an act granting a charter to a private corporation has been duly ratified, it may not be collaterally impeached in an action between it and another corporation or private person on the ground that the thirty days notice preceeding the application therefor had not been made as required by our Constitution, Art. II, sec. 12.

5. Constitutional Law—Eminent Domain—Special Privileges—Corporations—Charters—Statutes.

A corporation chartered for the purpose of furnishing electricity for power and light to the people of a certain territory is a public-service corporation, and a legislative charter granting this power impliedly requires it to render such service when in operation, and its charter falls within the exceptions to our Constitution, Art. I, sec. 7, declaring that "no man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services," and the objection is untenable that the right of eminent domain may not be granted to one of such corporations in the State without granting it to all of them, or in one county unless granted in all.

6. Corporations—Charters—Statutes—Rights—Parties.

Where the defendant to the action has acquired no vested rights in the lands, he may not attack the rights of the plaintiff corporation to condemn them under authority given it by its charter.

7. Statutes—Condemnation—Corporations—Riparian Owner.

A public-service corporation has no power to condemn lands by reason of its being a riparian proprietor, but only under the authority given by a valid statute to do so.

8. Instructions—Abandonment—Corporations—Charters.

The charge of the court to the jury in this case upon the law of abandonment, when construed as a whole, is held to instruct them that the period of delay in which no work was done by the plaintiff corporation in acquiring land for public use was only evidence of abandonment of its charter rights, which could not have misled the jury, and was not erroneous. Whether the defense of abandonment is open to the defendant under the evidence in this case, *Quoere?*

9. Appeal and Error—Objections and Exceptions—Instructions—Special Requests.

Exception that instructions given by the court to the jury were not sufficiently full and explicit must be to the refusal of appellant's request, aptly and properly made, to have them made so.

10. Evidence—Deeds and Conveyances—Commencement of Action—Puis Darreign Continuance.

Where a plaintiff corporation has shown its right to acquire lands for a public utility which is claimed by a rival company, deeds to the land

made to the defendant since the commencement of the action are not evidence of the latter's right. The admission of matters in defense since the last discontinuance discussed by WALKER, J.

11. Injunction—Equity—Cloud on Title—Statutes—Corporations—Public Utilities.

The plaintiff corporation perfected its right under its charter provisions to acquire lands for the purpose of generating electricity for public use by water-power, which was being wrongfully and seriously interfered with by a rival corporation that had not acquired the right: *Held*, the equitable remedy by injunction was available by the plaintiff; and *Held further*, that such relief was proper under our statute, as construed by this Court, to remove a cloud upon title to real property. Revisal, sec. 1589.

ACTION, tried before *Adams, J.*, and a jury, at March Term, 1917, of CHEROKEE. The case was before us at a former term, and for any facts not herein stated, reference may be had to the report of the case, 171 N.C. 248.

The following summary of the facts so far as necessary to be stated at present will show the contentions of the parties in a general way; This action was brought in the Superior Court of Cherokee County by the plaintiff against the defendant, both of which are North Carolina corporations, on 21 August, 1914. Plaintiff alleged that it was a corporation organized under the laws of North Carolina by virtue of a special act of the General Assembly ratified 16 February, 1909 (chapter 76, Private Laws of North Carolina 1909), and further alleged that by virtue of the rights conferred upon it by its charter it had during the year 1909 and thereafter, but before the organization of the defendant company, surveyed, staked out, located and adopted by authoritative corporate action, locations and sites on the Hiawassee River, in Cherokee County, N. C., for building and maintaining two hydro-electric plants for the generation of electricity to be sold for heat, light and power purposes; that it had acquired title to 50 per cent of the lands necessary for its proposed developments, and had obtained contracts covering some lands for the same, and had begun condemnation proceedings for other lands; and that it had by deeds, contracts, and under condemnation proceedings 75 per cent of the lands necessary for its proposed developments; that on 21 June, 1911, it had duly filed in the office of the clerk of the Superior Court for Cherokee County maps and plats of its locations, as required by the terms of its charter, and that on or about 13 July, 1914, the defendant corporation had been organized and had purchased some lands lying above the proposed dams and hydro-electric developments of the plaintiff, which lands were necessary for the plaintiff's uses and purposes and were included in the maps

and plans of said developments as filed in the office of the clerk of the Superior Court for Cherokee County, and that the defendant
(671) was proceeding to acquire by deed, contract and condemnation other lands and rights along and on Hiawassee River which was necessary for the plaintiff's proposed developments, and that the defendant was in this way and manner interfering with and obstructing and preventing the plaintiff from carrying out its plans to make the developments contemplated by its charter and by the surveys, maps, plan and proceedings used by it.

The defendant filed an answer and an amended answer in the case denying the allegations of the complaint of the plaintiff and pleading that if the plaintiff had ever acquired and adopted any locations on the Hiawassee River for its proposed developments it had prior to the beginning of this action abandoned the same; that the defendant had been organized as a corporation on 13 July, 1914, and had immediately after the organization of the defendant corporation adopted by appropriate corporate action certain locations for its dams and power houses on the Hiawassee River in Cherokee County, N. C., and that its right to any conflicting locations was superior to that of the plaintiff. Plaintiff replied to the defendant's amended answer and denied the allegation contained therein.

Upon the trial the following issues were submitted to the jury, who answered the same as follows:

1. Were the locations for the dams, reservoirs and public works claimed by the plaintiff surveyed and staked out on the Hiawassee River in the year 1909, as alleged in the complaint and as indicated on the maps offered in evidence by plaintiff, marked Exhibits 7 and 7-A? Answer: "Yes" (by consent).

2. If so, did the plaintiff in the year 1909 and thereafter, but before the organization of the defendant company in July, 1914, adopt said locations by authoritative corporate action, as alleged in the complaint? Answer: "Yes."

3. Did the plaintiff prior to the commencement of this action on 21 August, 1914, abandon its said locations and proposed plans, as alleged in the answer? Answer: "No."

4. Did the plaintiff file the maps or plats of its said locations in the office of the clerk of the Superior Court of Cherokee on or about 21 June, 1911, as alleged in the complaint? Answer: "Yes."

5. Did the plaintiff on or about 17 August, 1914, by authoritative corporate action, adopt the surveys and locations for its dams, reservoirs, and public works which had theretofore been made and marked

out on the Hiawassee River, as alleged in the complaint? Answer: "Yes" (by consent).

6. Were the locations for the dams, reservoirs, and public works claimed by the defendant surveyed and staked out on the Hiawassee River, as alleged in the answer? Answer: "Yes" (by consent).

7. If so, did the defendant thereafter by authoritative corpo- (672) rate action adopt said locations, and if so, when ? Answer: "No."

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

Martin, Rollins & Wright for plaintiff.

J. N. Moody, Dillard & Hill, Felix Alley, Uebulon Weaver, and McDaniel & Black for defendant.

WALKER, J., after stating the case: The plaintiff says that upon a fair analysis and consideration of the verdict there is little if anything left after the decision in the former appeal for the defendant's present contentions to rest upon, and for these reasons, as stated in its brief:

First it was found in the first issue, by consent, that plaintiff's locations for its dams, reservoir, and public works had been surveyed in the year 1909, as alleged in the complaint, and the plaintiff had alleged in its complaint that in the year 1909 that officers, engineers and representatives of the plaintiff had entered upon, explored and surveyed the lands bordering on the Hiawassee River for its location of said works. So the finding of the first issue by consent established the fact that the plaintiff had had the proper surveys made.

Second. The jury found, based on abundance of testimony, as we insist, that the plaintiff has, set out in the second issue, prior to the organization of the defendant company, adopted said locations by authoritative corporate action.

Third. That the plaintiff did not abandon said locations, as alleged in the answer.

Fourth. That plaintiff had filed maps or plats of its location in the office of the clerk of the Superior Court of Cherokee County 21 Jun, 1911.

Fifth. That on 17 August, 1914, plaintiff had, by a formal resolution, adopted said locations for its dams, reservoirs and public works. This issue was found by consent of the defendant and was clearly proven by the minutes of the corporation introduced, dated 17 August, 1914.

Sixth. The jury found by consent that the locations claimed by the defendant had been surveyed and staked out on the Hiawassee River.

Seventh. That the defendant had not adopted such locations.

Plaintiff then insists that the defendant would not be entitled to a new trial in any event because of any error which arose either on the first, second, third, or fourth issues unless there was also reversible error arising on the seventh issue. And further, defendant would not be entitled to a new trial for reversible error arising on the seventh issue unless there was reversible error arising either on the sec-
(673) ond, third, or fourth issues as well. In other words, the defendant agrees that the plaintiff had adopted locations on 17 August, 1914; now unless there was error on the seventh issue concerning the defendant's adoption of said locations prior thereto, then the verdict in favor of the plaintiff on the fifth issue establishing the plaintiff's location entitles the plaintiff to judgment, and, as before stated, reversible error, if it existed on the seventh issue, would not entitle the defendant to a new trial unless there was also reversible error either on the second or third or fourth issues, and of course then only on the issue concerning which reversible error was found.

These are substantially the plaintiff's contentions upon the verdict, and they would seem to be a fair and reasonable construction of the same when we understand and consider the questions at issue.

When the case was here at a former term we remanded it so that the jury might find more definitely certain facts regarding the time when the plaintiff "surveyed, staked out, and adopted the locations of the sites of its dam, reservoirs and public works on the Hiawassee River," and also pass upon certain findings stated by the presiding judge as supplementary to the verdict of the jury, and especially to have it found under an issue submitted for the purpose whether plaintiff's map was duly filed in the office of the clerk of the Superior Court, and if it was, at what time. The jury have found all the essential facts in favor of the plaintiff, this being the second verdict.

It has been found that the map of plaintiff's locations was filed in the office of the clerk of the Superior Court, 21 June, 1911, as alleged in the complaint, and there was evidence, as we think, to support this finding. It has been held that "a paper-writing is deemed to be filed within the meaning of the law when it is delivered for that purpose to the proper officer and received by him, and it is not necessary to the filing of a paper that it shall be endorsed as having been so filed. The file mark of the officer is evidence of filing, but is not the essential element of the act" unless the statute makes it so. 34 Cyc., 587, sec. A-1; *Eureka Stone Co. v. Knight*, 82 Ark., 164; *Darnell v. Flynn*, 69 W. Va., 146; *People v. Fisch*, 164 Mich., 680; *Edward v. Grand*, 121 Cal., 254, 256; *Tregambo v. Comanche Mill*, 57 Cal., 501, 506; *Hull v. Louth*,

109 Ind., 315; *S. v. Foulkes,* 94 Ind., 493; *Masterson v. R. R.,* 82 N.E. 1021. Additional cases in other jurisdictions where this question has arisen will be found in Words and Phrases (2d Series), p. 531, and especially at p. 533, and the point is decided the same way, in principle, by this Court in *Glanton v. Jacobs,* 117 N.C. 428; *Smith v. Lumber Co.,* 144 N.C. 47, 49.

As far as the actual location is concerned, we have already held, when this case was here before, that prior right belonged to that company which first defined and marked its route and adopted (674) the same for its permanent course or location by proper and authoritative corporate action. *Street R. R. v. R. R.,* 142 N.C. 423; *R. R. v. R. R.,* 57 W. Va., 641; *In re Milwaukee Light, Heat and Traction Co.,* 112 N.Y. 663; *R. R. v. R. R.,* 96 S.W. 199; *Rochester v. R. R.,* 110 N.Y. 128; Elliott on Railroads, sec. 927; *San Francisco W. Co. v. Alameda Water Co.,* 36 Cal., 639; *Water Co. v. Cowles,* 31 Cal., 215.

The two California cases refer to the efforts of rival companies to acquire water rights on the same stream, and in the last one of them it is said: "Respondent therein having, prior to the institution of appellant's proceedings to condemn, secured essential property rights in the premises thereby sought to be condemned by successful negotiations and the construction of works necessary to the appropriation of the waters to accomplish all the business of its corporation, we can discover no just grounds for subordinating its rights thus acquired to the subsequent efforts of appellant to acquire the same property for similar purposes by compulsory process of acquisition."

In *R. R. v. R. R.,* 27 Fed., 770, the Court said: "It is certainly equitable that a company which in good faith surveys and locates a line of railway and pays the expense thereof should have a prior claim for the right of way for at least a reasonable length of time. . . . The right to the use of the right of way is a public, not a private right. It is in fact a grant from the State, and although the payment of the damages to the owner is a necessary prerequisite the State may define who shall have the prior right to pay the damages to the owner and thereby acquire a perfected right to the assessment. The owner cannot by conveying the right of way to A. thereby prevent the State from granting the right to B., and, subject to the right of compensation to the owner, the State has the control over the right of way, and can by statute prescribed when and by what acts the right thereto shall vest, and also what shall constitute an abandonment of such right."

And in *R. R. v. R. R. 96* S. W. Rep., 199, it was said by the Court: "When a company has actually located its right of way, and is in good faith following up its location by buying the land or instituting pro-

ceedings to condemn it with reasonable diligence, another company cannot go to a point on the route which is neither the beginning nor the ending of its proposed line and run a race with the company which has begun at the beginning of its route and is going on in an orderly way to its other terminus. The railroad company is authorized to take land under eminent domain, and when it has in good faith entered for this purpose, located its right of way and is proceeding to perfect its right, the law prefers him who thus first enters in good faith, and it cannot be permitted that another company with notice of his rights (675) shall make another survey right behind him and destroy his priority which he has thus gained. While it is true that on some days the Pine Mountain Company's were ahead of the Cumberland Company's engineers, they got thus ahead by beginning in the middle of the line and then running a race with the other people. The statute does not contemplate this. It contemplates a location in good faith and in the usual course of business. Under the circumstances, we conclude that the Cumberland Company has the better right. The motion to discharge the injunction granted in favor of the Pine Mountain Railroad Company is sustained, and that injunction is dissolved."

Discussing the same question in *L. H. & T. Co. v. R. R.*, 132 Wis., 313, the Court said: "In such case the prize would go to the company which first secured a completed location. So it appears that prior to 16 January, 1906, the respondent company had made or adopted a fully completed survey over the disputed lands and determined in good faith to build its railroad thereon, had secured all the necessary franchises and crossing privileges from towns and villages, and had obtained option contracts on all but a very small fraction of said land, and intended in good faith to utilize such options and take deeds of the lands at an early date. These are very decisive acts, and unless it be necessary that it should have actually secured deeds or binding contracts to purchase the lands, these acts must be held to constitute a completed location, so far at least as to give precedence in a contest with a rival company seeking to obtain the same lands. Certainly it was not necessary that it should have paid for the lands or secured deeds. As to all the world except the owner, the appropriation of land for railroad purposes may be complete without either of these steps, and the only question then is whether it was necessary that it should have bound itself by contract to purchase the lands. We think not. The essential requirement is not that there should be a completed purchase, but that there should be decisive corporate action taken in good faith locating the route and committing the corporation to that route, though not necessarily irrevocably. The securing of option contracts over prac-

tically the whole line surveyed with the bona fide intention of utilizing them and completing the purchases and building the line must be held to be such a decisive act, and we therefore hold that the petition for condemnation was properly denied." *R. R. v. R. R.*, 110 N.Y. 128. See, also, *R. R. v. R. R.*, 57 W. Va. 641, and note to *Street R. R. v. R. R.*, 9 Anno. Cases, 689.

The plaintiff, therefore, has acquired the prior right.

The defendant has assailed the charter of the plaintiff as being unconstitutional and invalid. We decided before that the charter was a valid exercise of the legislative power, and especially held (676) that the fact of allowing the plaintiff to engage enterprises and to exercise the power of eminent domain did not invalidate it, as it could purchase property, as it had done, for its private purposes, and condemn it when necessary for its public or *quasi*-public purposes, citing Cyc., 579; *Land Co. v. Traction Co.*, 162 N.C. 314, and other cases. Besides, the plaintiff has not as yet attempted to condemn any property, and it is premature to raise a question which certainly is not presented now, and may never be. If hereafter plaintiff attempts to invade any of the property rights of the defendant, the latter will have ample time and opportunity to defend them in the proper forum.

We considered and decided in the former appeal other objections to plaintiff's charter and to its right to proceed in acquiring riparian and other property rights on the river by the means and measures set forth in the case. As far as appears, the defendant does not seem to have any right which is likely to be invaded, as the jury, by the seventh issue, have found that there was no adoption of the locations claimed by it, but we need not dwell on this matter any further, as we are of the opinion that, upon the verdict, the plaintiff is entitled to judgment regardless of this matter, as it is shown thereby that plaintiff acquired a prior and superior right, especially by that part of it contained in the first, second, third, fourth, and fifth issues, and those issues were answered by the jury upon sufficient evidence to support the findings.

The objection to the plaintiff's charter, that the thirty days notice required by Constitution, Art. II, sec. 12, had not been given, is untenable, as we have often held that the validity of a statute cannot be attacked in this colateral way. The same kind of objection was made in *Broadnax v. Green*, 64 N.C. 244, and *Chief Justice Pearson* said in regard to it (at p. 247): "We do not think it necessary to enter into the question whether this is a *public-local* act or a mere *private* act, in regard to which thirty days notice of the application must be given, for, taking it to be a mere private act, we are of opinion that the ratification certified by the Lieutenant-Governor and the Speaker of the House

of Representatives makes it a 'matter of record' which cannot be impeached before the courts in a collateral way. My *Lord Coke* says 'a record, until reversed, importeth verity.' " See, also, *Gatlin v. Tarboro,* 78 N.C. 119; *Wilson v. Markley,* 133 N.C. 616.

The position that the Legislature cannot grant the power of eminent domain to one public-service corporation unless it is granted to all such corporation, or in one or more counties unless granted in all, would greatly curtail the industrial growth and progress of the State if it is a correct one. For example, certain localities may be selected, as in this case, because of the facilities afforded of conducting enterprises
(677) calculated to promote the public welfare where the facilities and advantages necessary for the purpose exist. It could hardly be contended with any hope of success that in such a case the Legislature is without the power to grant the right of condemning property locally in order that a company may avail itself of those facilities which may exist in certain parts of the State and not in other sections. Such a right has been conferred in many instances, especially in the case of railroad companies and other like corporations which serve the public. It is not forbidden to be done by our Constitution, Art. I, sec. 7 (Bill of Rights), which declares that "no man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services," because in this case the power to condemn is based upon the obligation to render that kind of service.

The *Chief Justice* said in the case of *In re Spease Ferry,* 138 N.C. 219, "that public ferries are not monopolies, but franchises granted in consideration of public services *(Smith v. Harkins,* 38 N.C. 619), and that there is a correlative duty devolved upon the grantees, as common carriers, to serve the public, and under public regulations of their charges and duties has been uniformly held from the earliest times and in all jurisdictions."

The distinction between this case and *Bridge Co. v. Comrs.,* 81 N.C. 491, is stated by the *Chief Justice.* Electric light and power companies are public-service corporations, and their rates or charges to the public may be regulated as in the case of other public corporations.

It was said in *Griffin v. Water Co.,* 122 N.C. at p. 207: "The defendant corporation operates under the franchise from the city, which permits it to lay its pipes in the public streets and otherwise to take benefit of the right of eminent domain. Besides, from the very nature of its functions it is 'affected with a public use.' In *Munn v. Illinois,* 94 U.S. 113, which was a case in regard to regulating the charges of grain elevators, it was held that in England, from time immemorial, and in this country from its colonization, it has been customary to reg-

ulate ferries, common carriers, hackmen, bakers, millers, public wharfingers, auctioneers, innkeepers, and many other matters of like nature, and where the owner of property devotes it to a use in which the public had an interest he in effect grants to the public an interest in such case, and must to the extent of that interest submit to be controlled by the public. Probably the most familiar instances with us are the public mills, whose tolls are fixed by statute, and railroad, telegraph and telephone companies, for the regulation of whose conduct and charges there is a State commission established by law. There have been reiterated decisions in the United States Supreme Court and in the several States affirming the doctrine laid down in *Munn v. Illinois, supra,* and as to every class of interest affected with a public use, among (678) others, water companies," citing *Spring Valley v. Schottler,* 110 U.S. 347.

It is very generaly held that a telegram company, acting under a *quasi*-public franchise, is properly classified among the public-service corporations, and as such is subject to public regulation and reasonable control. *Telephone Co. v. Telephone Co.,* 159 N.C. 9.

The duties and obligations assumed by the plaintiff in its charter are, therefore, of such a nature that it may properly be characterized as a public-service corporation, rendering services to the community in like manner as in the cases above cited. It is declared to be a public-service corporation in Laws 1913, ch. 133. So that being a corporation which serves the public, it comes within the proviso or exception of Article I, section 7, of our Constitution.

In *Mugler v. Kansas,* 123 U.S. 623, the Court said in regard to the extent and operation of the Fourteenth Amendment upon local laws: "But this Court has declared upon full consideration in *Barbier v. Connolly,* 113 U.S. 27, that the Fourteenth Amendment has no such effect. After observing, among other things, that the amendment forbade the arbitrary deprivation of life and liberty, and the arbitrary spoilation of property, and secured equal protection to all under like circumstances in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the Court said: 'But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote health, peace, morals, education, and good order of the people and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity," which was quoted with approval by this Court in *S. v. Moore,* 104 N.C. at p. 721, 722.

And *Judge Cooley* says in his work on Const. Limitations (7 Ed.), at p. 555: "The authority which legislates for the State at large must

determine whether particular rules shall extend to the whole State and all its citizens or, on the other hand, to a subdivision of the State or a single class of its citizens only. The circumstances of a particular locality or the prevailing public sentiment in that section of the State may require or make acceptable different police regulations from those demanded in another, or call for different taxation and a different application of the public moneys. The Legislature may therefore prescribe or authorize different laws of police, allow the right of eminent domain to be exercised in different cases and through different agencies, and prescribe peculiar restrictions upon taxation in each distinct municipality, provided the State Constitution does not forbid. These discriminations are made constantly, and the fact that the laws are
(679) of local or special operation only is not supposed to render them obnoxious in principle."

And in the same work, at p. 554, Note 2, it is said: "To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the State. All that is required is that it shall apply equally to all persons within the territorial limits described in the act," citing *S. v. County Commissioners of Baltimore,* 29 Md., 516; *Pollock v. McClurken,* 42 Ill., 370; *Haskel v. Burlington,* 30 Iowa, 232; *Unity v. Burrage,* 103 U.S. 447.

This doctrine was approved by this Court in *S. v. Moore, supra.* The power to restrict legislation affecting public interests to certain localities was discussed and asserted in *S. v. Barrett,* 138 N.C. 630, the Court remarking that it had been so long and in so many instances recognized that it was not deemed necessary to reexamine the grounds upon which it rests.

In our case there is nobody competent to raise the question, as the jury have found that defendant has no vested interest to be impaired, not having adopted any plan of improvement, and no condemnation of property having been attempted by the plaintiff, and no one in the excepted territory being a party to the suit. There is, therefore, no wrong done to the defendant and no violation of its constiutional rights. The legislation is neither partial nor discriminatory.

We do not see how the determination of this case can be affected by the argument in regard to riparian rights. If the plaintiff does not acquire by purchase the necessary land and water rights or easements it will have to condemn them and pay a just compensation for the same. It cannot interfere with the lawful rights of another, either above or below the place on the stream where it has obtained priority of location unless it has acquired by purchase or condemnation, or in some other legal way, the right to do so. It may be that hereafter the

extent of plaintiff's rights in the waters of the stream may arise in some way, but it is not presented at present. The plaintiff would, of course, have no power of eminent domain merely because it may be a riparian proprietor, as that power can be acquired only by legislative grant, it being a sovereign power. It is not an incident of private ownership. *Lloyd v. Venable,* 168 N.C. 531; 1 Cyc. 567; Lewis on Em. Domain, sec. 240; *Comrs. v. Bonner,* 153 N.C. 66.

On the question of abandonment, we think that the learned judge presented the law to the jury in a very full, clear and ample manner and in strict accordance with the law upon that subject, as we understand it to be. *Falls v. Carpenter,* 21 N.C. 237; *Faw v. Whittington,* 72 N.C. 321; *Banks v. Banks,* 77 N.C. 186; *Miller v. Pierce,* 104 N.C. 391; *R.R. v. McGuire,* 171 N.C. 277; 1 Cyc. 3; *Aiken v. Ins. Co.,* 173 N.C. 400; *Public Utilities Co. v. Bessemer City,* (680) 173 N.C. 482. He did say that mere nonuser, or lapse of time, or delay in prosecuting the enterprise, or the existence of a period of time during which no work was done would not, under the circumstances, be sufficient of itself to constitute abandonment, but he as clearly stated to the jury, if not expressly then by the plainest implication, so that they could not have misunderstood him, that it was evidence of abandonment. If the defendant considered the charge in respect to this matter not as full as it ought to have been, it should have asked for it to be made more definite. *McKinnon v. Morrison,* 104 N.C. 354; *Simmons v. Davenport,* 140 N.C. 407; *S. v. Yellowday,* 152 N.C. 793; *Orvis v. Holt,* 173 N.C. 231. The charge not only stated the law in a general way, but explained it in much detail, and in all its bearings, and with strict regard to the evidence, which, it was claimed by defendant, tended to prove an abandonment by the plaintiff.

It is said in Elliott on Railroads, sec. 931: "No general rule of law applicable to all cases can be laid down as to what constitutes abandonment of the whole or a part of its right of way by a railroad company, but the question whether abandonment exists in a given case must be determined by the particular circumstances of that case," citing numerous cases in the notes. See, also *R. R. v. Taylor,* 57 Am. & Eng. R. Cases; 1 Am. & Eng. Enc., 296, 1; *R. R. v. R. R.,* 159 Pa. St. 331.

We have assumed so far, and for the purpose of argument, that the defendant can set up the defense of abandonment, and that this right does not belong solely to the State. Having proceeded upon that assumption, it will not be necessary to consider whether it is a correct one. The question is discussed, however, in *R. R. v. R. R., supra,* and *R. R. Co.'s Appeal,* 104 Pa. St. 399.

The court instructed the jury as to the effect of Laws of 1913, ch. 133, which fixes the time within which a water power company already

incorporated shall begin active work at two years after the passage of the act, and requires a diligent prosecution of the same, and provides further that if it is not so begun, the Corporation Commission may recommend to the Attorney-General that suit be brought for the State, through him, to declare a forfeiture of its charter. The court properly told the jury that the failure to comply with this law is something of which the State alone can take advantage, and it is so expressly provided in the act.

There are several questions of evidence, but it will not be necessary to consider them in detail. The deeds offered in evidence by the defendant were executed after this suit was commenced. We do not see the relevancy of them to this controversy in the light of the issues.

(681) Ordinarily, unless properly introduced by supplemental answer or other pleading, or by *puis darrein* continuance, defendant cannot avail himself of matters strictly of defense which have arisen since the action was commenced, or in an action involving the title property rely upon a title strictly of a defensive character which has been acquired since the commencement of the action, or matter which goes only to the further maintenance of the action. 31 Cyc 684, 493, and 497. He will not generally be allowed to bolster up his case by such new matter as is here offered, on account of its dangerous tendency. There are cases where things happening *post litem* may be brought before the Court, but this is not one of them.

It was said in *Hollingsworth v. Flint*, 101 U.S. 591, 596: "The plaintiff could not avail himself in this action of a title acquired, or which did not subsist in him until after he commenced the suit. The title at the beginning of the action was the question to be tried."

And in *Stein v. Bowman*, 13 Peters, at p. 220. "The declarations offered as evidence were made subsequent to the commencement of this controversy, and in fact after the suit was commenced. It would be extremely dangerous to receive hearsay declarations in evidence respecting any matter after the controversy has commenced. This would enable the party by ingenious contrivances to manufacture evidence to sustain his cause."

The action should be tried as of the time when it was commenced, though there are a few exceptions to this rule which are not applicable here.

The other objections to evidence are of no substantial importance, as we discover nothing that shows any clear intention on the part of the plaintiff to abandon its location or any right it acquired by what it had already done in the furtherance of the project, nor anything to show that it was not acting in good faith with the intention of continuing in the prosecution of the work. Besides, the defendant had seriously ques-

tioned the plaintiff's motives, and it was competent to rebut the accusation by evidence tending to show its falsity.

The defendant has assigned error in the charge of the court, but we have carefully examined the same, and it appears therefrom that the court has committed no such errors as alleged, but has given fair and correct instructions throughout, and the jury seem to have decided and answered the several issues submitted to them in accordance with the clear weight of the testimony. The refusal of a nonsuit was also proper, whether or not the plaintiff should have an injunction, as it is entitled to the other relief prayed for.

Defendant contends that an injunction cannot issue against it to stop interference with plaintiff's rights as determined by the jury, upon the ground that there has not been, and will not probably (682) be, any such interference as will entitle the plaintiff to such equitable relief, and also that plaintiff will have an adequate remedy at law. It is a mistake to suppose that plaintiff's only right in this case is that of a riparian owner acquired by purchase, as it has other rights conferred by its charter apart from its ownership of the banks of the stream or any part thereof. But defendant relies upon a case recently decided by the Supreme Court of the United States. *Sears v. Akron*, 38 Supreme Court Reporter (1 April 1918), page 245. An examination of that case will show that it has no application here. The Court did not decide in that case that an injunction would not lie generally to protect such rights as the plaintiff in this case possesses, but the restraining process was denied there for special reasons, among them the following: That plaintiff' charter, under the reserved power of the State as contained in the Ohio Constitution, was subject to amendment, and that the special act of the Legislature of Ohio, by which the city of Akron was authorized to divert and use the Tuscarawas and Little Cuyahoga rivers and tributaries thereto for the purposes of a water supply, must be regarded as an amendment of plaintiff's charter to that extent where there had been nothing done but the mere incorporation of the Cuyahoga Company, and no land had been acquired by it except a very small quantity, and there was no actual or probable interference with plaintiff's right in taking water from the streams for the use of the city. It is apparent from the statement of the facts in that case and the general trend of the opinion by *Justice Brandeis* that the Court was largely influenced in its refusal of equitable relief by injunction by the fact that, as said by the Court, "the property alleged to be now owned by the plaintiff was not acquired by it until after the city's development had been practically completed." The city, therefore, had acquired, for the present at least, the preferential right

to the appropriation of the rivers for its public supply of water by prior use, and this right was recognized as superior to that claimed by the plaintiff, and for the further reason that the plaintiff could not be harmed, so far as appeared at the time of the trial, by the city's taking water from the rivers for its uses. The Court said: "It follows from what has been said above, that at least until something more had occurred than incorporation, the city was free as against the Cuyahoga Company to appropriate any of the land or any of the water rights which might otherwise have come under the development described in its certificate of incorporation. Plaintiff contends, however, that it became vested with an indefeasible property right to proceed with its development *(a)* when by resolution the board of directors adopted the plan, or *(b)* when condemnation proceedings were begun. Whether the adoption of a plan by the company would
(683) under the general laws of Ohio have vested in it such a preferential right as against rival power companies or other municipalities, we have no occasion to consider, for it is clear that Ohio retained the power as against one of its creatures to revoke any such right to appropriate property until it had been acted upon by acquiring the property authorized to be taken. *R. R. v. New York*, 176 U.S. 335, and the act of 1911 and the ordinance (under which the city justified) were both passed before the company had acquired any property."

It will be observed that the Court did not decide as to the "preferential right" of the plaintiff under facts and circumstances such as exists in this case, while this Court has held, as shown by the cases above cited, that such a right exists in favor of this plaintiff upon the facts which were undisputed.

The case of *Sears v. Akron* originated in a Federal court, but the question involved is not one of Federal law, and even if there were any conflict between that case and what we decide ,and there is none), we would be governed by our own view of the law as applicable to the special facts of this case. It may be further said that our case differs from *Sears v. Akron* in the fact that the defendant's contemplated acts will be most harmful to the plaintiff and will seriously impair its rights and utterly destroy them if defendant's proposed plan of development is fully carried out. Besides, we have a statute in this State which permits the plaintiff to establish its rights and remove any cloud from them by suit against a party claiming adversely thereto, and an injunction, under our law, is a remedy which can be resorted to for the purpose of protecting the same against threatened invasion by the defendant, or to prevent it from setting up any further and false claim to the rights and property in controversy and thereby

clouding the plaintiff's title and impairing the value of its property rights. Revisal, sec. 1589. The amended statute and annotations will be found in 1 Pell's Revisal of 1908, at p. 1588, sec. 1589. This statute being of a remedial and beneficial nature should be liberally construed, and should be held to embrace all cases coming fairly and equitably within its scope. We said of this statute in *Chrisman v. Hilliard,* 167 N.C. 4, at p. 8:

"The statute has been said to be an extension of the remedy in equity theretofore existing for the removal of clouds on title, and is intended to afford an easy and expeditious mode of determining all conflicting claims to land, whether derived from a common source or from different and independent sources. It is fairly remedial and beneficial in its nature, and should therefore be construed liberally. It is also a statute of repose, and also for that reason is entitled to favorable consideration. *Adler v. Sullivan,* 115 Ala. 582; *Walton v. Perkins,* 33 Minn. 357; *Holmes v. Chester,* 26 N.J. Eq. 81. It deprives the defendant of no right, but affords him every opportunity of defending (684) the validity of his title; but in the interest of peace and the settlement of controversies, it allows his adversary to put to the test of early judicial investigation, and does not compel plaintiff to wait on his pleasure as to the time when the inquiry shall be made, and thus give defendant an unfair advantage over him. *Jersey City v. Lembeck,* 31 N.J. Eq. 255. The plaintiff is not required to have possession as a condition precedent to his right of action, nor will the apparent invalidity of defendant's title deprive him of the statutory remedy. *Daniels v. Fowler,* 120 N.C. 14; *Rumbo v. Mfg. Co.,* 129 N.C. 9; *Beck v. Meroney,* 135 N.C. 532; *Campbell v. Cronly, supra.* The beneficial purpose of the statute is to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion, instead of remaining idle and unremunerative. This case is within its letter and spirit, and plaintiff has a right to the relief he seeks if he can make good his allegations," citing *Campbell v. Cronly,* 150 N.C. 457.

And in a more recent case this Court gave it a broad interpretation in order to carry out the evident purpose of its enactment, and said: "Having reference to the broad and inclusive language of the statute, the mischief complained of and the purpose sought to be accomplished, we are of opinion that the law, as it terms clearly import, was designed and intended to afford a remedy wherever one owns or has an estate or interest in real property, whether he is in or out of possession, and another wrongfully sets up a claim to an estate or interest therein which purports to affect adversely the estate or interest of the true

owner and which is reasonably calculated to burden and embarrass such owner in the full and proper enjoyment of his proprietary rights, including the right to dispose of the same at its fair market value. And it should and does extend to such adverse and wrongful claims, whether in writing or parol, whenever a claim by parol, if established, could create an interest or estate in the property, as in case of a parol trust or a lease not required to be in writing. And it should be allowed, too, when existent records or written instruments reasonably present such a claim, the statute preventing all hardship in such cases by its provision that if the holder does not insist on the same in his answer or does not answer at all, the plaintiff shall pay the costs." *Satterwhite v. Gallegher*, 173 N.C. 525, at p. 528, citing *Rumbo v. Mfg. Co.*, 129 N.C. 9.

Referring to a similar statute of Nebraska, *Justice Field* said, in *Holland v. Chellen*, 110 U.S. 15 (cited in *Chrisman v. Hilliard, supra*):

"Any person claiming title to real estate, whether in or out of possession, may maintain the suit against one who claims an adverse
(685) estate in it for the purpose of determining such estate and quieting his title. It is certainly for the interest of the State that this jurisdiction of the court should be maintained, and that causes of apprehended litigation respecting real property necessarily affecting its use and enjoyment should be removed, for so long as they remain they will prevent improvement and consequent benefit to the public. It is a matter of everyday observation that many lots of land in our cities remain unimproved because of conflicting claims to them. It is manifestly to the interest of the community that conflicting claims to property thus situated should be settled so that it may be subject to use and improvement. To meet cases of this character, statutes like the one in Nebraska have been passed by several States, and they accomplish a most useful purpose."

Referring to the remedy of injunction as auxiliary to the principal relief of removing a cloud or preventing one from being thrown on the title, the general rule is thus stated 1 High on Injunctions (4 Ed.), p. 349, sec. 372: "The prevention of a cloud upon title is a salutary branch of the jurisdiction of equity recognized by all the authorities and founded upon the clearest principles of right and justice. The jurisdiction by injunction to prevent a cloud upon title is closely analagous to the well-settled jurisdiction of courts of chancery for the removal of cloud upon title; and the reasoning which supports the jurisdiction in the latter case would seem to apply with equal if not greater force in the former. It seems, therefore, to follow as a necessary consequence that if the aid of equity may be invoked to remove a cloud upon title to realty, it may with equal propriety be exerted to enjoin such illegal acts as will necessarily result in a clouded title."

As to the jurisdiction of equity to grant a perpetual injunction for the purpose of quieting a title or right in property which has been fully established when necessary to fully protect the complainant or make his remedy effectual, see *Wickliffe v. Owings*, 17 How. 47. And with respect to the remedy which is given by statute in several of the States, including this one, it was said by the Court in *Spencer v. Merwin*, 80 Conn. 330, at p. 334:

"General Statutes, sec. 4053, authorizes this special statutory remedy when legal injury results to the owner in possession of land from unlawful claim of an adverse estate or interest in that land; the statutory relief authorized is equitable, and consists in a judgment quieting and settling the title to the land in dispute, and necessarily includes such incidential relief as may be proper to make the main equitable relief granted full and complete."

It was held in *Oakley v. Williamsburg*, 6 Paige 2621, and virtually also in *Petit v. Shepherd*, 5 Paige 493, that a court of equity has jurisdiction to enjoin a defendant from proceeding in an illegal act which will operate so as to cast a cloud on the plaintiff's interest (686) or right in real estate, and thereby diminish its value. And in *Meyer v. Phillips*, 97 N.Y. 485, it was decided that one through whose lands various persons are threatening to float a large number of logs, using a stream thereon for the purpose, and claiming a right in the public to so use the stream, may maintain an equitable action to quiet his title and settle his rights and prevent the threatened cloud.

Of course, the danger to plaintiff must not be merely speculative or imaginary, for an equitable action will not lie to remove a cloud on title or to prevent one unless it is made to appear that there is substantial ground of apprehension that defendant will so act as to cloud the same, and that there is a detemination or purpose to do so, and it was so held in *Sanders v. Davenport*, 95 N.Y. 477, affirming same case reported in 30 Hun. 161.

An action will lie, not only to remove an existing cloud on title, but also to prevent one from being created (*Thomas v. Simmons*, 103 Ind. 538), and where the object is merely preventive an injunction is the proper remedy to restrain the doing of the wrongful act.

In our case, the title of plaintiff, whether it is considered as growing out of the ownership of land or water rights, or an easement or incorporeal hereditament therein, has been established by a verdict and a judgment upon it, and, therefore, the right is clear, and the injunction extends so far only as to prevent the defendant from doing the threatened acts which, if done, will certainly interfere with and obstruct plaintiff in prosecuting its plan of development, to which it

has established, under law, a preferential right. If not restrained by the injunctive process of the court, defendant may very seriously harass and hamper the plaintiff, who is now engaged in a work of improvement which will be of great value and usefulness to the community where it is situated.

The recent amendments of our Constitution have nothing to do with this case, for as to it they operate and take effect prospectively.

We have carefully examined the case as it appears in the record and have been unable to find any error in the proceedings or judgment.

No error.

Cited: Futch v. R.R., 178 N.C. 284; *Kornegay v. Goldsboro*, 180 N.C. 451; *Blacknall v. Hancock*, 182 N.C. 372; *Retreat Association v. Development Co.*, 183 N.C. 44; *Eagles v. R.R.*, 184 N.C. 69; *S.c.*, 186 N.C. 180; *S.c.*, 188 N.C. 129, 131; *Hardware Co. v. Cotton Co.*, 188 N.C. 445; *Gallimore v. Thomasville*, 191 N.C. 6; *S. v. Dixon*, 215 N.C. 177; *Ramsey v. Ramsey*, 224 N.C. 113; *Bailey v. Davis*, 231 N.C. 89; *S. v. Felton*, 239 N.C. 585; *Vandiford v. Vandiford*, 241 N.C. 45; *Furniture Co. v. Baron*, 243 N.C. 506.

(687)

J. W. BAILEY v. H. F. LONG.

(Filed 22 December, 1917.)

Negligence — Physicians — Hospitals — Evidence — Trials—Questions for Jury.

In an action by the husband to recover damages for the death of his wife alleged to have been caused by the negligence of defendant in failing to provide a suitable room for her while under treatment at his hospital, there was evidence tending to show that her health was good when she was taken there, except for injuries received in an automobile accident, and that on two or more occasions during a severe rainstorm the rain beat in through an improperly constructed window so that it stood upon the floor of the room, from which it was soon removed, and that a cold to the patient at once resulted, followed by pneumonia, from which she died: *Held*, under this and the other evidence in the case, it was proper to submit the issue of defendant's actionable negligence to the jury.

ALLEN, J., dissenting.

ACTION, tried before *Justice, J.*, at October Term 1917 of BURKE.

Avery & Avery, R. L. Huffman, A. C. Avery, and D. L. Russell for plaintiff.

W. D. Turner, S. J. Ervin, Z. V. Long, and J. F. Spainhour for defendant.

PER CURIAM. This action was brought by the plaintiff to recover damages for (1) loss of the services of his wife, (2) loss of her society, and (3) mental anguish on account of her death, which is alleged to have been caused by the defendant's negligence. At the close of the plaintiff's evidence, the defendant, who introduced none, moved for a nonsuit, which was granted, and plaintiff appealed.

The only question in the case is whether there was any evidence of negligence, the weight and sufficiency of it being for the jury to consider. While the evidence may not be of a very strong or conclusive nature, we cannot say upon a perusal of it that there was literally no evidence which should have been submitted to the jury. The allegation of the plaintiff is that his wife, who was suffering with a broken hip, for her better treatment by a most competent and skillful surgeon, was taken by him to Statesville on 18 August 1913, and placed in the hospital of defendant, who contracted to treat her in a careful and skillful manner, as a physician and surgeon, and to furnish her with a suitable room during her stay therein. There is no complaint at all of the surgical treatment, but plaintiff alleges that when the dislocation of the hip had almost healed, under the defendant's skillful treatment, and when she was otherwise in good health, and about to be discharged from the hospital, his wife's room, by reason of a defect in the construction of the window sash, was covered with water from (688) a rain, and on account of her exposure to the dampness of the room caused thereby, she contracted a severe cold, which increased in severity, until it developed into pneumonia, which finally caused her death. The evidence tended to show that the deceased was a strong and healthy woman, and had no cough and no trouble with her throat until she caught cold just after the rain. The water was an inch or an inch and a half deep in one corner of the room near her bed, and if the floor had been level it would have been the same depth all over. It required some time to remove it, and the floor was damp afterwards. After plaintiff had bored holes in the outside sash, and let out the water between the sashes, he was asked to fix the window in another room in the same condition, which he did.

The plaintiff testified as to the condition of the window: "Right soon there came a nurse; I don't know who it was; I said, 'Here, stop here a minute; look here at this water.' I suppose it was Dr. Long's nurse; she had on a cap and was dressed like all the rest. I wasn't very well acquainted with them. She turned right back, as quick as she could, and brought Miss Davidson, the head nurse, and two buckets

and two cloths or something and went to wiping up the water and wringing it out in those buckets. They kept at that, just as busy as they could be. It was still raining. I said, 'Miss Davidson, it looks like you are not getting it out any faster than it's coming in.' She said, 'It doesn't look so. I must see a carpenter tomorrow and get that fixed.' I said, 'I have to leave here on No. 35, and I'd like to see that fixed before I leave.' I said, 'I'm a carpenter; how about my examining it and see if I can find the trouble?' She said, 'Go ahead.' I raised the window and the rain came blowing right through. I found a deep puddle on the window. I have a model of that window (model is produced. Witness explains model to the jury.) It was a double window. The water was running over the inside of the window. The sash had been pieced; the front piece had been pieced; it seemed the sash had been made too short. I told Miss Davidson if they would get me some tools I thought I could fix it. She came with a box of tools and I looked for a chisel and couldn't find it, and I took a large screw-driver and hammer and drove it up here (indicating on model) and tried to move it, to make a leak, and couldn't do it; it was very tight. I picked up a brace and bit and bored two holes, and the water ran out. I let the sash down, and there wasn't any more trouble. They wiped the floor up until it was as dry as they could get it with a cloth. Miss Davidson was gone out about ten minutes and she said, 'I wish you would come and fix another in one of the rooms.' I took the bit and fixed the other; I couldn't tell you the number of that room; it might have been the second room from where my wife was." He stated that the rain occurred on 10 September, 1913.

(689) He then testified: "I went back on Sunday, the 14th, and she had a very deep cold and cough—bad cough; I think that was the 14th—it was Sunday. The room was dry on that occasion; it was a nice sunshiny day. I guess I must have went back the next Wednesday, far as I know. She had a very bad cold then. I went over and met the doctor near his office door and talked to him. I said, 'My wife's hip is doing nicely.' He said, 'Yes.' I said, 'She has a very deep cold and a mighty bad cough.' I said, 'I come over here to see if you wouldn't give her something for her cough; it hurts her hip so bad when she coughs.' She said to tell Dr. Long so, and I did tell him. I didn't tell him anything she said about how she contracted the cold. He looked at me straight a little bit and said, 'Never you mind, Mr. Bailey, we'll give her the attention she needs without your looking after it at all.' He opened the door and went in the office and shut the door, and I went back to her bed. He said, 'I don't believe in medicine anyway.' "

This witness further stated that they returned to his home on 25 September 1913. That her cough continued and her physical condition

was bad, until he called in a physician, Dr. Flowers, on Monday, 16 November 1913, who examined his wife, and witness then further testified: "The doctor said, 'How long have you been this way?' Answer, She had been that way ever since 10 September 1913. Dr. Flowers treated her Monday, Wednesday, and Friday, and on Saturday she died, the 15th of November. The doctor went there on Monday before the 15th. The 15th was Saturday; I recollect that part. The doctor was called in on Monday before Saturday, and he was there on Wednesday and on Friday; three trips is all he made. From the time I took my wife home on the 25th of September until her death on the 15th of November, she was coughing all the time, snuffing and working with her nose; spitting up phlegm; she didn't sleep good; slept maybe an hour or two and would wake up coughing. I waited on her at night altogether, and she suffered. She showed her suffering by coughing, spitting, and complaining of her breast hurting her; never complained of her breast until about a week before Dr. Flowers was there. . . . After my wife got home she never complained of her breast until somewhere near a week before she died. I don't remember exactly. I didn't say she didn't complain of her chest until about the time I sent for Dr. Flowers; she had it before that, something in the neighborhood of a week; might have been five or six days, before the doctor came; up to that time she had a cough, but had no pain in her chest. She hadn't always had that cough. She didn't have trouble with her throat; she was never sick a day in the whole four years we lived together; she never had a catarrh of the throat; stood a good examination for insurance. . . . I did everything for my wife's cold after she came back that I knew to do; gave her teas and other things; she (690) would cough and snuffle and sometimes take her finger and pull phlegm out of her throat; get it out with her handkerchief; she did that from the time she came back from the hospital until she died; she was that way when I went after her. When she got so much weaker I went after Dr. Flowers; I saw that she was staying one way all the time; she told me she was worse in the morning; Dr. Flowers was from Granite Falls; the nearest doctor I could get."

Susie Parker, one of the nurses, testified: "I live in Statesville, and I worked in Dr. Long's hospital during the time Mr. J. W. Bailey's wife was there; all the time she was there; she was in room No. 14; I don't know how many occasions I have seen water in there, but one time an awful hard rain came and blew in pretty heavy; I don't know what date that was; Mrs. Bailey was there then; nobody else was in that room; I took the water off of the floor; think I took about a slop bucket and a half of water out of that room; the water kind of run to the side of Mrs. Bailey's bed; don't think it was under the bed; the

water came from the window; it was raining when I was in there; that was Saturday evening late; I went in there again when there was water in the room, about the same place, kind of a swag in the floor; I didn't take up but about a half bucketful then; it was kind of under the bed, standing under the bed; it had come from the window; I was there again when there came a hard rain from the north, and it came in; none of the nurses were in there when I was in there, but Miss Davidson saw it; had a hard storm; that wasn't the evening Mr. Bailey was there; Miss Davidson saw it the first evening; I didn't say anything to her about it. She saw it. I saw Mr. Bailey at the time he was there. I noticed what kind of sash that was; it was like that model; a screen on the back. I saw holes bored in the screen; two holes. I saw something like that in No. 11. . . . I left Dr. Long's hospital on the 15th of September 1913, I reckon. This is 1916. I saw water on that floor while Mrs. Bailey was there; I don't know how many times; I think about twice; that was along about the first of the month, I think; the first of September; that was during a heavy rainstorm; the wind was blowing; while the rain was still falling and the wind still blowing, they wiped it up; it stayed on the floor until we could get it up; don't know how many minutes; that happened twice; that was all while Mrs. Bailey was there." The witness further testified:

"Mr. Bailey said he wanted to know what I knew about the water being on the floor; he said Mrs. Bailey contracted a cold, he thought, from the water being on the floor."

Q. Did he tell how he knew she contracted a cold from the water being on the floor?

Defendant objects.

(691) Q. Tell exactly what he said. A. "I don't know exactly. He said he wanted to know when I had seen water on the floor; he told me how he happened to ask me about it. She had told him. . . .

"I went up to Mr. Bailey's house; he asked me to come up there. When I got there I found he wanted to know something concerning the water; wanted to see what I would testify; he had a lawyer there, Mr. Russell was there; took down my testimony. I saw water in that room several times before Mrs. Bailey was there, but not so much; I just took it up at those times; I would just go and take it up; nobody would tell me to do it; I would just be cleaning up the room; I cleaned up the rooms there and carried trays."

Annie Kistler testified: "I live at Hildebrand. I knew Mrs. Bailey; I knew she was the wife of Mr. J. W. Bailey; I was called in to wait on her after she came from Dr. Long's hospital; I remember the time she came back; they came on the train and I went to see her that evening; she was coughing and had a very bad cold, and the next morning

I went back, and then I never went back until the next day or two, and I went back to see her and asked her how she was getting on, and she said she wasn't feeling any better; she said she had a cough and said 'It hurts me to cough.' I didn't stay with her then; I went home and in a few days or a week, I don't remember which, he sent for me to come; said his wife was no better and he wanted me to cook, and I went and stayed two weeks, and I saw every day his wife was sinking and I went home. She had a cough and bad cold and cried and hollered, and her nose was running all the time, and she was throwing phlegm out of her mouth. I don't know when Dr. Flowers was called; I went home; I didn't go back; I can't tell you how long it was after I left until she died; I never paid any attention after that; I know it wasn't very long after I left until she died. I sat up with her sometimes until 11 o'clock; after I would get through my work I did so. Her husband took care of her."

There was evidence which tended to disparage some of the plaintiff's witnesses and to attack their testimony, but it is not necessary to state it as the plaintiff is entitled to the most favorable construction of the evidence and, upon a motion to nonsuit, we need only consider that part of the evidence which tends to sustain his cause of action, and not that which tends to disprove it. There was no expert medical testimony.

It would not be proper to comment on the evidence, or to say more than is necessary to decide the question whether there is any evidence which is relevant and tends to support the allegations in the complaint, as there is no contention as to their sufficiency to constitute a cause of action, if they are true. It was necessarily decided in the former appeal that plaintiff could recover if he established his case by competent testimony, as the defendant demurred to the (692) complaint and his demurrer was overruled.

It is said in 13 Cyc. 216: "Evidence of good health prior to the injury, and of suffering or ailments immediately or shortly thereafter, which are shown by competent testimony to be reasonably imputed to it and are not shown by expert testimony to be an impossible effect of the injury is sufficient to carry the question to the jury."

And in *Stephenson v. Flagg*, 41 Neb., at p. 373, the Court said: "There was abundant evidence to sustain the verdict of the jury, first, as to the health of Mrs. Flagg before 7 April 1887, and, second, as to the change in her health following upon the injury, and that it was of such nature as to be reasonably imputed to it. There was detailed in evidence the history of her case, showing the gradual development of new and unfavorable symptoms until we reached the results described on the trial." See, also, *Quackenbush v. R. R.*, 73 Iowa 458;

Berard v. R. R., 177 Mass. 179; *Stein v. Kosler*, 67 N.J.L. 481; *Denver v. Hyatt*, 28 Col. 129.

The question as to whether the injuries to plaintiff's wife, and her death, were caused by the water which entered her room during the storm should have been submitted to the jury under proper instructions from the court, and it was error to dismiss the action for a failure of evidence.

New trial.

ALLEN, J., dissenting: I do not think there is any evidence of negligence, or that the conduct of the defendant caused the death of the plaintiff's wife, and the evidence of damage is slight.

The wife of the plaintiff was injured in an automobile accident, and was carried to the hospital of the defendant for treatment on 18 August 1913; she remained in the hospital until 25th September, when she returned to her husband's home, where she remained until her death on 15th November.

It is admitted that she was skillfully treated while in the hospital of the defendant, and the only evidence of negligence is that on two occasions during a heavy rain water beat through the window onto the floor of the room where she was. The first of these occasions was about the 1st of September, and the plaintiff's witness describes this as follows: "It was during a heavy rainstorm; the wind was blowing; while the rain was still falling and the wind still blowing they wiped it up; it stayed on the floor until we could get it up; don't know how many minutes"; and the second by the plaintiff, who says: "That was a heavy rain that day; blew in the window; it wasn't no hard storm; the wind was coming from the northeast; came right against that window."

(693) This is an experience common to all householders, and which cannot be averted by the exercise of the greatest care. If, however, there is evidence of negligence, it is purely conjectural that this negligence had anything to do with the death of the plaintiff's wife.

The first rain, occurring about the 1st of September, did not injure her because the plaintiff testifies that the second rain occurred on the 10th of September, and that he went back to see his wife on the 14th of September, and he says "she was looking all right up until that time that I went there; she wasn't doing so well that day."

According to the evidence of both witnesses who testified as to the water on the floor, the water did not reach the bed on which his wife was and it only remained upon the floor a few minutes.

The plaintiff testifies that after she went back home she was sometimes better and sometimes worse; that she did not complain of any

pain in her chest until about a week before she died, and that he did not call a physician to her until Monday before her death, and this physician was not introduced as a witness.

Under these circumstances a jury could do no more than guess as to what caused the death of the plaintiff's wife. I cannot say that there is no evidence of damage, but it is slight.

The plaintiff testifies: "She was a stout, handy woman; did her washing, her own ironing, kept up all her place, worked her garden, tended to the office some, sold the machines when I'd be away; she did the cooking and housekeeping." This furnishes evidence that the wife was an industrious woman, who did much to maintain the plaintiff, but he is not suing to recover damages for the wrongful death for the reason that he waited more than a year before the commencement of this action, and he seeks to recover only for the loss of the services and the society of his wife.

It appears, however, that the wife who died was his second wife, and that he married her two months after his first wife died. It also appears that he married a third wife four and one-half months after the death of his second wife, and surely her society and services are a full compensation for the loss of the services and society of his second wife.

Cited: Fields v. Ogburn, 178 N.C. 409; *Croom v. Murphy,* 179 N.C. 395; *Hinnant v. Power Company,* 189 N.C. 125.

(694)

J. P. QUELCH, ADMINISTRATOR, ET AL. V. D. K. FUTCH.

(Filed 22 December, 1918.)

1. **Deeds and Conveyances — Interpretation — Intent — Reference for Description.**

   As to the construction of a deed referring to a former deed for description, giving effect to its intent, transposing its parts if necessary, etc., see *S. c.*, 172 N.C. 316.

2. **Appeal and Error—Objections and Exceptions—Instructions.**

   Exception taken to a part of the charge to the jury which contains both correct and incorrect instructions will not be considered on appeal.

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

   The admission of evidence which is harmless will not be held for reversible error.

4. **Evidence—Deceased Persons—Interest.**

   Testimony of a party interested of transactions or communications with a deceased person is properly excluded under Revisal, sec. 1631.

5. Appeal and Error—Substantial Error—Burden of Proof.

The burden is upon appellant to show substantial error on appeal.

APPEAL by defendant from *Bond, J.*, at the February Term 1917 of NEW HANOVER.

Kenan & Wright and McClammy & Burgwin for plaintiff.

John D. Bellamy & Son, W. P. Gafford, and E. K. Bryan for defendant.

PER CURIAM. We have carefully examined this case and find that there is no reversible error.

This case was before the Court at Fall Term, 1916, 172 N.C. 316. We held at that time as follows:

"We have in the deed in question a description by metes and bounds, in which the land in controversy is not conveyed, and also a description which refers to another deed duly recorded by book and page which gives a definite description covering the land in controversy.

"It must be admitted that if the first or specific description entirely is eliminated from the deed, according to the evidence, the second or general description is sufficient and covers the land described in the complaint. It matters not that the last description follows the warranty. The whole deed must be so construed as to give effect to the plain intent of the grantor, and the parts of the deed will be transposed if necessary. *Triplett v. Williams,* 149 N.C. 394; 13 Cyc 627. The entire description in a deed should be considered in determining the identity of the land conveyed. Clauses inserted in a deed should (695) be regarded as inserted for a purpose, and should be given a meaning that would aid the description. Every part of a deed ought, if possible, to take effect, and every word to operate. A reference to another deed may control a particular description, for the deed referred to for purposes of description becomes a part of the deed that calls for it. 13 Cyc. 632; *Brown v. Ricaud,* 107 N.C. 639; *Everett v. Thomas,* 23 N.C. 252."

That must stand as the law of this case, and it is the correct principle applicable to the deed which was then construed.

This action was brought to recover two tracts of land. Plaintiff recovered judgment for the tract now in question, and defendant appealed. The defendant recovered the other tract, and plaintiff appealed. We affirmed the judgment. *Quelch v. Futch,* 174 N.C. 395.

There are numerous exceptions in this appeal, but we do not think any of them requires a reversal of the judgment. In at least one instance an exception is taken to a part of the charge embracing several

propositions, one of which is correct in law, and we have held that when this occurs the exception fails. *Savings Bank v. Chase,* 151 N.C. 108; *Bost v. Bost,* 87 N.C. 477; *Ins. Co. v. Sea,* 21 Wallace (U.S.), 158; *S. v. Ledford,* 133 N.C. 714; *R. R. v. Mfg. Co.,* 169 N.C. 156, 169.

The other exceptions to the charge are without merit.

The requests for instructions, which were not granted by the court and made a part of its charge to the jury, were properly refused.

As to the questions of evidence, if the answers of the witness J. T. Kerr were incompetent, which is not admitted, we cannot see that they were more than harmless; and it appears that the witness W. E. Worth was interested in the result of the action, and was, therefore, disqualified as a witness under Revisal, sec. 1631. The other exceptions are without any merit.

It appears that the real question in the case was one of fact, and the jury, under the evidence and instructions of the court, decided the fact in issue against the defendant as to the tract now being considered, and with him as to the other tract. The burden is upon the appellant to show clearly that there is substantial error, and he must have been prejudiced by it. This does not appear.

No error.

Cited: Pope v. Pope, 176 N.C. 286; *Bradley v. Manufacturing Co.,* 177 N.C. 156; *S. v. Evans,* 177 N.C. 570; *Williams v. Bailey,* 178 N.C. 633; *Ferguson v. Fibre Co.,* 182 N.C. 736; *Perry v. Surety Co.,* 190 N.C. 292; *Michaux v. Rubber Co.,* 190 N.C. 619; *Rudd v. Casualty Co.,* 202 N.C. 782; *S. v. Harris,* 204 N.C. 423; *Call v. Stroud,* 232 N.C. 480; *Beaman v. R.R.,* 238 N.C. 420.

(696)

MARY O. THOMPSON AND HUSBAND v. D. E. WILLIAMS.

(Filed 27 February, 1918.)

1. Appeal and Error—Case—Requisites.

The appellant is required, in stating his case on appeal, to make a concise statement of the entire case necessary to present the assignments of error relied upon, and set out the necessary and pertinent evidence in narrative form, together with the charge of the court necessary to be considered; and when this is not done the appellee may move before the trial judge to dismiss the appeal.

2. Appeal and Error—Case—Evidence—Narrative Form—Exceptions.

Upon exception, when the appellant has set out the evidence in narrative form, it is the duty of the trial judge to supervise and correct it, where correction is required.

3. Appeal and Error—Case—Certificate of Judge—Motion to Dismiss.

Where the trial judge has certified that the parties have been unable to agree upon the case on appeal, and that the foregoing is the case, it is binding upon the Supreme Court and it will not be dismissed (Rules 17-21) on the ground that no case on appeal had been stated and settled. Revisal, sec. 591.

ACTION, tried before *Justice, J.*, at June Term 1917 of PASQUOTANK, upon these issues:

1. Did the plaintiff and defendant enter into contract, as alleged in the complaint? Answer: "Yes."

2. Did the defendant wrongfully refuse to comply with his part of the contract? Answer: "No."

3. Was the plaintiff ready, able and willing to comply with his part of the contract? Answer: "No."

4. Did plaintiff abandon his contract? Answer: "Yes."

5. What damages, if any, is the plaintiff entitled to recover? Answer: "None."

6. What damages, if any, is the defendant entitled to recover upon his counterclaim? Answer: "None."

The court rendered judgment dismissing the action, and plaintiffs appealed.

Aydlett & Simpson for plaintiffs.
Ehringhaus & Small for defendant.

PER CURIAM. The defendant, appellee, moved to dismiss the appeal under Rules 17 and 21, for that there has been no case on appeal stated and settled by the judge, as required by the statute, Revisal, sec. 591.

It is contended, and so appears in the record, that there was a
(697) case on appeal and counter-case served, and the judge undertook, upon request, to settle the case on appeal. The appellee contends that the clerk received from the judge the paper marked "Case on Appeal" attached to his affidavit. It appears therein that instead of settling the case on appeal the judge simply made a few small pen corrections in the notes of charge and referred the balance of case to the clerk, arbitrarily ordering him to "copy all the testimony in case as offered by the parties, putting the testimony of the witnesses in narrative form."

The defendant further contends that "the plaintiff's attorneys, at the request of the clerk, took the stenographer's typewritten notes of the evidence and reduced the same to narrative form under the supervision of the clerk."

It was the duty of plaintiff, appellant, in stating the case on appeal to make a concise statement of the entire case necessary to present the assignments of error relied upon. In doing so, the appellant should set out all necessary and pertinent evidence in narrative form, together with the charge of the court. This is necessary in order to constitute a concise and proper statement of a case on appeal. For failure to do so the appellee may except and move before the judge, when settling the case, to dismiss the appeal for failure to serve a proper statement. When the evidence is stated in narrative form by the counsel for appellant, it is the duty of the trial judge, if exception is taken to the statement, to supervise and correct it.

In the record in this case, the judge of the Superior Court certifies over his own signature as follows: "Parties being unable to agree on case on appeal, the court settles the foregoing as case on appeal. Attorneys waived notice of time and place." This certificate is binding upon us and we cannot go behind it. From it we must conclude that the judge supervised the settlement of the case on appeal and that it has received his approval.

The motion to dismiss must be denied.

Considering the appeal upon the assignments of error, we find no substantial error committed which necessitates another trial.

There are no exceptions to the evidence. The sixteen exceptions to the charge are principally directed to a construction of his Honor's charge and no serious question of law is presented. The charge is set out in full and appears to be a clear, fair and full presentation of the issues to the jury.

No error.

Cited: Hoke v. Greyhound Corporation, 227 N.C. 376.

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(698)

V. M. TOWNSEND v. E. B. McCULLUM.

(Filed 20 March, 1918.)

Negligence—Reckless Shooting—Towns—Ordinances.

A person, while shooting sparrows with a 27 Winchester rifle in a town, who inadvertently shoots through a window in the toilet of a hotel 60 yards distant is guilty of such conduct as makes it proper to submit to a jury the question of his liability in damages to a person he has thus injured, without the necessity of an ordinance prohibiting shooting within the town.

ACTION, tried before *Lyon, J.*, at October Term 1917 of WAKE, upon the following issues:

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

2. What damages, if any, did plaintiff suffer in consequence of said alleged injuries? Answer: "$1,254."

From the judgment rendered, defendant appealed.

Jones & Bailey and W. L. Currie for plaintiff.
Douglass & Douglass for defendant.

PER CURIAM. The great weight of evidence in this case tends to prove that defendant is a merchant in the town of Star, N. C.; that on 31 March 1916, he was engaged in shooting sparrows in the town and very near the Leach Hotel with a 27 Winchester rifle. In firing the rifle he sent a ball into the toilet of the hotel, which was sixty yards distant from where defendant was shooting and shot plaintiff in the head, inflicting a painful and severe wound.

We have examined the entire evidence and record and find no error. In the absence of prohibitive ordinance the defendant was guilty of such reckless conduct, if the evidence is to be believed, as must render him liable to plaintiff for the injury inflicted.

If defendant had killed plaintiff he would probably have to answer a charge of manslaughter as well as this demand for damages.

No error.

(699)

L. A. BAILEY AND WIFE v. ATLANTIC COAST LINE RAILROAD CO.

(Filed 27 March, 1918.)

Railroads—Fires—Negligence—Trials—Evidence—Questions for Jury.

In an action to recover damages against a railroad company for negligently setting out fire to the injury of plaintiff's lands, evidence is sufficient which tends to show that broomsedge and old crossties had been left upon the right of way from which the fire started, which was seen there about 25 or 30 minutes after the train passed or after the witness had gone about half a mile from the place, etc., and that no other fires were seen there.

ACTION tried before *Devin, J.*, and a jury at November Term 1917 of COLUMBUS. Defendant appealed.

McRackan & Greer, E. G. Brown, and S. Brown Shepherd for plaintiffs.

Rountree & Davis and Schulken, Toon & Schulken for defendant.

PER CURIAM. The action was brought to recover damages for the destruction by fire of the timber and other property of the plaintiffs. The only question raised was by the motion to nonsuit upon the evidence, defendant contending that there is no evidence that its engine set out the fire, or that its right of way was foul, or that any other act of negligence which caused the fire was imputable to it. It will be necessary to state so much of the evidence which is favorable to the plaintiff in regard to the origin of the fire.

C. P. Brown testified: "On 14 April 1916, I was at Ward's Station in the morning, and I rode from Ward's Station back home. I left Ward's Station near 12 o'clock, I don't know exactly what time; I was riding a bicycle; Ransom Blackwell was with me. I rode from Ward's Station along the side of the railroad track to Chadbourn. We met the noon train going towards Conway at the second curve, about a quarter of a mile below the second curve from the depot at Chadbourn. The second curve is about two miles or a little over from the depot. As I rode up about fifty yards on the east side of the track fire started up in the broomsedge, about fifty yards north of the yard limits and was sweeping over. On the east side it was burning up to the track to the end of the cross-ties. The wind was blowing southeast. The wind was blowing southeast, northeast to southeast. I did not observe any fire burning on the opposite side, west side. I do not know where Mr. Bailey's or Mr. Jolly's land is. I just saw the fire. That was the riding path on the west side of the track, couldn't ride on the other because of old cross-ties piled up there and brush; you couldn't ride on the east side at all; the cross-ties were rotten, and shattered (700) off pieces of rotten cross-ties. The fire was burning on grass and all kinds of trash by the side of the track; right on the bank, it started out through the sedge. I was down there hunting some hogs. After I met the train, I did not stop anywhere; I kept coming, not riding very fast. I don't know exactly how long the train had passed the place where I saw the fire—I suppose between 25 and 30 minutes."

Ransom Blackwell testified: "I was with Pope Brown on 14 April, 1916. We went to Ward's Station to see about some hogs and came back about 12 o'clock and saw fire burning there on the east side of the railroad track, two pieces of old rotton cross-ties pulled out there and burning in the hedge on the east side. We were riding on the west side. The fire was not burning very big, it was burning off from the right of way; it was about four steps from the track. We met

the train below the second curve, about half a mile, about two miles and a half from Chadbourn. We had come about a mile before we saw the fire. We passed the train before we saw the fire; it was intended for the 10:45 train, but it was behind time that day. We came right on from where we met the train until we saw the fire; the train was going to Conway from Chadbourn."

B. O. Edwards testified: "I saw fire that day about 12 o'clock, on the 14th; it was up in the direction of the railroad, on the east side; I saw it right about the time the train went down, right after." The court asked: "Where did you say you saw that fire?" Answer: "Right up the railroad, at least down the railroad, from where I was at work is where the fire caught. I did not see any fire about that railroad before that; I was plowing. After I saw it, it came right on down pretty much in the direction where I was working."

It would appear that the foregoing evidence is equally as strong, if not stronger, than that which we have held to be sufficient in recent fire burning cases. *Williams v. R. R.*, 140 N.C. 624; *McRainey v. R. R.*, 168 N.C. 570; *Moore v. R. R.*, 173 N.C. 311; *Simmons v. Lumber Co.*, 174 N.C. 220, and the very recent case (decided at this term) of *Moore v. Lumber Co.* If reference is made to those cases, especially to *Simmons v. Lumber Co., supra,* and *Moore v. Lumber Co., supra,* the reason for holding that such evidence is sufficient to support the verdict will be found to be stated very fully, and it is not necessary to reiterate them. The jury in this case might have fairly and reasonably inferred, and concluded, that the engine emitted the sparks or live coals which fell upon defendant's right of way, which was in a foul and inflammable condition, and started the fire which burned the plaintiff's property.

No error.

Cited: Dickerson v. R.R., 190 N.C. 299; *Manufacturing Company v. R.R.*, 191 N.C. 111.

(701)

U. W. KEENER v. GRAHAM COUNTY LUMBER COMPANY.

(Filed 28 May, 1918.)

Contracts—Parol Evidence—New Agreement.

APPEAL by defendant from judgment rendered at March Term 1918 of SWAIN, *Lane, J.*, presiding.

Alley & Leatherwood for plaintiff.
M. W. Bell for defendant.

PER CURIAM. Action for damage by loss of logs. The case is exactly like *Sumner v. same defendant,* decided at this term. The plaintiff did not propose to contradict, add to or vary the written contract, but to show a later and fresh agreement as to how the logs should be delivered. The two cases are not distinguishable, and the controlling principles are stated in the *Sumner* case, with the authorities sustaining them, and there was no error upon the issue as to the damages.

No error.

BOARD OF COMMISSIONERS OF MITCHELL COUNTY v. ABEE BROTHERS AND HART AND THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

(Filed 22 May, 1918.)

1. **Appeal and Error—Reference—Findings—Evidence.**

The findings of fact by a referee, upon competent evidence, and concurred in by the judge, are conclusive on appeal.

2. **Contracts — Abandonment—Damages—Roads and Highways—Counties.**

Where a contract for the building of a county highway within a certain time has been abandoned by the contractor, and he thereafter obtains an extension of time for its completion with the consent of the surety for performance on his bond, without waiver by the county of any of its rights for the breach of the contract; and the contractor again abandons his contract, both he and his bondsman are liable to the county for the amount required to make good the pecuniary value of the contract to the county.

3. **Contracts—Monthly Payments—Estimate—Contract Price—Charges—Damages.**

Where a contract has been entered into with a county to construct a certain length of its highway within a given time at a fixed sum, after the contractor had carefully gone over the line and had made his bid, and monthly payments are provided for as the work progressed of 90 per cent of the work performed upon the basis of 23 cents per cubic yard for each excavation, 45 cents per cubic yard for loose rock excavations, and 70 cents per cubic yard for solid rock excavations; *Held,* sufficient to sustain findings of a referee that the clause as to monthly payments would not have the effect of enlarging the contract price for the whole or allow the contractor any additional sum for any change in the proportion of earth and loose and solid rock excavations.

4. Contracts—Breach—Extension of Time—Resumption of Work—Waiver —Damages.

Where a contractor has abandoned his contract for the building of a county road at a fixed sum within a certain time, with provision for monthly payments of a certain per cent of the value of the work as it progressed, upon estimates to be made by the county, and upon abandonment of the contract, the contractor is given an extension of time at his request, without releasing him from liability; *Held*, the contractor, by obtaining the privilege and resuming work under the contract, waived any right he may have had to abandon it and to any damages for minor departures therefrom as to the time and amount of monthly payments, etc.

(702) APPEAL from judgment on exceptions to report of referee by *Lane, J.*, at Fall Term 1917 of MCDOWELL.

The action was to recover damages for alleged breach of contract by which the principal defendants undertook to build a two-mile section of the public road of plaintiff county leading from Bakersville, N. C., to a point near the C. C. & O. Railroad, for the contract price of $8,800. The referee, in his report, awarded recovery for plaintiff of $1,925 damages, with interest. On the hearing before the Superior Court, the exceptions of defendant were overruled and the findings of fact and conclusions of law set forth in the report were in all things confirmed. Judgment for plaintiff accordingly, and defendant excepted and appealed.

Pless & Winborne and Charles E. Green for plaintiff.
A. A. Whitener and B. A. Stansbury for Fidelity Company.
Squires & Whisnant for Abee Bros. & Hart.

PER CURIAM. It is the accepted position with us that the findings of fact by a referee, concurred in by the judge, are conclusive when there is competent evidence to sustain them. *Thornton v. McNeely*, 144 N.C. 622.

In the present case the referee in his elaborate and careful report finds, in effect, that on 8 October 1912, the principal defendant entered into a written contract with Board of Commissioners of plaintiff county to construct two miles of the road from Bakersville, N. C., at the price of $8,800, to commence on 21 October 1912, the work to
(703) be completed within five months from the commencement of same, and give a bond in the sum of $5,000, executed by the co-defendant, to secure faithful performance of the stipulations of the contract; that the said contractors having done a considerable portion of the work, for which they received the sum of $6,225, paid as the work progressed, abandoned the contract; that later, in April 1913,

on written request of the contractors, sanctioned and concurred in by the surety, plaintiffs granted to the applicants sixty additional days within which to complete the contract, the said order being in terms as follows:

"*In re* Toecane Road:

"It is ordered by the Board of County Commissioners of Mitchell that Abee Bros. & Hart be allowed an extension of time of sixty working days from date hereof to complete the road under a certain contract which the said Abee Bros. & Hart executed with Mitchell County, and the faithful performance of said contract being guaranteed by the Fidelity and Deposit Company of Baltimore, Maryland.

"It is understood and agreed that said road be completed according to said contract. This order is made with the understanding and agreement that the County Commissioners of Mitchell County do not waive any of the county's rights or rights of action which it may have acquired by reason of the said Abee Bros. & Hart failing to complete said road according to the terms of said contract. Said order is made at the request of the said Abee Bros. & Hart and by the consent of Fidelity and Deposit Company."

That the contractors having again abandoned the work before completing the same, the commissioners took charge and built the road so as to be usable by the county, at the price of $3,602.34; that the reasonable cost of completing the road according to the contract specifications would amount to $4,500, being $1,925 more than the amount that the commissioners had agreed to pay for a road completed as the contract required.

There were facts in evidence to support these findings by the referee, and we concur in the conclusion of law that plaintiff should recover the sum of $1,925, this being the amount required to make good to plaintiff the pecuniary value of its contract.

It is argued for the defendant that there should be some reduction from this recovery by reason of a subsequent clause of the contract, that at the end of each calendar month an estimate of the work done on the piers of bridges, culverts, grading and excavations should be made and plaintiff should pay 90 per cent of the work performed, and as a basis for such payments the following prices should govern; 23 cents per cubic yard for each excavation, 45 cents per cubic yard for loose-rock excavations, and 70 cents per cubic yard for solid-rock excavations, with facts in evidence tending to show that (704) this estimate was not made as the contract requires, and that there was a larger percentage of solid rock than the preliminary estimate of the engineer had indicated. But we must again approve the ruling of the judge and referee to the effect that the subsequent clause

was not intended to modify or permit an enlargement of the contract price for the whole, but was only designed to fix the rule of monthly payments.

A perusal of the entire contract and the facts in evidence relevant to its correct interpretation gives clear indication that the contractor, himself an engineer, had gone over the line before making his bid, intended such bid to cover the entire price of the work, and that he took the risk of any change in the proportion of earth and loose and solid rock excavations.

Again, it is contended as the commissioners had not made the monthly estimates as the contract requires, a recovery could not be sustained. Under the construction we have given the contract there is no evidence tending to show substantial damages to defendant by reason of this alleged breach, but if there was real harassment to defendant on that account, even if it might have justified them in quitting the contract, any such right or claim for damages must be considered waived, we think, when the contractors with the assent of the surety sought and obtained the privilege of an additional sixty days time in which to complete the work.

At that time the entire facts relevant to the performance of the contract were fully known, and defendants in obtaining this privilege and resuming work under the terms of the contract are properly held to have waived any rights they may have had to abandon the contract and any damages for this or other minor departures from its terms as to time and amount of monthly payments, etc.

On very careful examination of the record we find no error to defendant's prejudice, and the judgment of the Superior Court must be

Affirmed.

Cited: Manufacturing Co. v. Lumber Co., 177 N.C. 407; *Cotton Mills v. Cotton Yarn Co.*, 192 N.C. 713; *Story v. Truitt*, 193 N.C. 852; *Dent v. Mica Company*, 212 N.C. 242.

J. W. BRADY v. WACCAMAW LUMBER COMPANY.

(Filed 27 March, 1918.)

Railroads—Fires—Negligence—Act of God—Proximate Cause—Trials—Evidence—Nonsuit.

Where there is evidence that a fire was set out and damaged plaintiff's land from a defective locomotive of defendant railroad company on its foul right of way, and also, in defendant's behalf, that the damages

would not have resulted except for an unusually high wind, a judgment of nonsuit is properly refused, the defendant's initial negligence running through and being the proximate cause of the concurring acts which resulted in the injury complained of. *Ferebee v. R. R.*, 163 N.C. 331, and other like cases, cited and applied.

ACTION, tried before *Devin, J.*, and a jury, at August Term (705) 1917 of BRUNSWICK.

Plaintiff sued for damages from burning timber on his land, which he alleged was caused by defendant's negligence. The fire was set out from one of the defendant's engines, which it is alleged, was defectively constructed, so that it emitted sparks from its smoke-stack, it not having a proper spark-arrester. The jury returned the following verdict:

1. Is the plaintiff the owner of the lands described in the complaint as the home tract, and of that portion of the Gum Branch tract alleged to have been burned over? Answer: "Yes."

2. Did the defendant negligently and carelessly cause the fire, as alleged in the complaint, to burn over lands owned by the plaintiff and cause damage as alleged? Answer: "Yes."

3. What damage, if any, is plaintiff entitled to recover from the defendant? Answer: "$500."

The defendant at the close of the evidence moved to nonsuit the plaintiff. Motion refused. Judgment on the verdict, and appeal by defendant.

C. Ed Taylor for plaintiff.
Robert Ruark for defendant.

PER CURIAM. The case states and there was proof:

1. That plaintiff is the owner of the land on which the timber was standing and growing.

2. That the defendant negligently started the fire.

3. That the amount of damages is $500.

There was testimony to the effect that the defendant's engine was defective, and its right of way was foul. The fire caught on the right of way, and was communicated over the intervening land to plaintiff's timber on an adjoining tract. The defendant contends that there was an extraordinary wind blowing at the time, and this caused the fire to spread and destroy the plaintiff's trees, and that this was a special intervening cause of the injury beyond its control, it being an act of God, for which defendant was not responsible.

While there is evidence that there was a very high and strong wind, which was not usual at that season of the year, that is, in the month of June, but quite usual at the equinoctial period, there is also evidence that "the wind was blowing a pretty good gale, but witnesses would not say that it was unusual." So the evidence was not
(706) all one way, and in the best view of the evidence for the defendant, it was a question for the jury, as to the force of the wind, and as to whether it was usual or unusual, and also as to whether it was an independent or providential cause, for which defendant was not responsible; that is, if such a question could arise in the admitted state of the proof. There was evidence that the fire was caused, in part at least, by defendant's negligence, and when such negligence concurs and cooperates with some other cause in producing the injury, so that the latter is not a sole and independent cause sufficient of itself to have caused the injury, the defendant is liable. We held so in *Ferebee v. R. R.*, 163 N.C. 351, 354, where we said, quoting from Shearman and Redfield on Negligence (6 Ed.), sec. 16: "When an act of God or an accident combines or concurs with the negligence of the defendant to produce the injury, or when any other efficient cause so combines or concurs, the defendant is liable if the injury would not have resulted but for his own negligent act or omission."

And again it was there said: "It was urged for defendant that the evidence tending to show the prevalence of an unusual windstorm on the night in question has not been allowed its proper weight, but, on the facts in evidence, the position cannot avail the defendant. The negligent placing of the boxes having been accpted as the proximate cause of the injury, or one of them, the defendant is not relieved, though an unexpected or unusual storm should have contributed also to the result." And we say here:

The two questions in the case are:

1. Whether there was a failure on defendant's part to use ordinary care in performing some legal duty which it owed to the plaintiff under the circumstances.

2. Whether the failure so to do was the proximate cause of the injury, 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. 39; *Brewster v. Elizabeth City*, 137 N.C. 392; *Raiford v. R. R.*, 130 N.C. 597; *Hardy v. Hines Lumber Co.*, 160 N.C. 113.

It is not required, in order to constitute proximate cause, that the negligent act should be next in the order of time and place to the in-

jury. It may be the first cause if it operates in unbroken and continuous sequence until the injury occurs.

Shearman and Redfield on Negligence, sec. 26, says: "The proximate cause of an event must be understood to be that which in natural and continuous sequence, unbroken by any new and independent cause, produces that event and without which such event would not have occurred. Proximity in point of time and space, however, is no part of the definition."

This doctrine of causation with reference to setting out and (707) spreading fires by sparks from an engine was considered fully in *Hardy v. Hines Lumber Co., supra,* to which we refer, it being so much like this case as to control it. We said in that case: "The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. *Scott v. Shepherd* (squib case), 2 W. Bl., 892. "The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances.' *R. R. v. Kellogg,* 94 U.S. 469."

There was sufficient evidence to sustain the verdict, and the nonsuit was properly disallowed

No error.

MARGARET CRONLY ET AL. v. W. E. RENNEKER.

(Filed 3 April, 1918.)

Trials—Evidence—Questions for Jury.

Where the controversy to recover rents for a leased premises depends upon whether they were rented by the year or month, an issue of fact is alone presented, for the jury to determine.

BLOUNT *v.* JONES.

APPEAL by plaintiffs from *Devin, J.*, at the November Term 1917 of NEW HANOVER.

This is an action to recover rent. The plaintiffs claim that they rented a house and lot to the defendant by the year, the term beginning in October, 1913; that the defendant occupied the premises one year and nine months, for which time he paid the rent; that he then vacated the premises without their consent; that they were unable to rent the premises for the last three months of the second year, and that the defendant is indebted to them for the rent for three months, which he has refused to pay.

(708) The defendant contends that the renting was by the month; that he has paid for the time he occupied the premises and that he does not owe the plaintiffs anything.

There was a verdict and judgment for the defendant and the plaintiffs appealed, contending that it was the duty of the court to declare as matter of law on the evidence that the renting was by the year.

E. K. Bryan for plaintiffs.
Rountree & Davis for defendant.

PER CURIAM. A fair construction of the evidence shows a conflict as to the terms of the contract, and this raised an issue which the jury alone could settle.

The instructions to the jury are free from error, and as the fact has been found with the defendant, the plaintiffs must abide the result.

No error.

H. M. BLOUNT AND WIFE v. M. M. JONES AND WIFE.

(Filed 3 April, 1918.)

Appeal and Error—Frivolous Appeals—Motions.

Appeals from the Superior Court as a matter of right must be taken *bona fide* for the purpose of reviewing alleged error, and when no serious assignment of error is made and it appears that the appeal is frivolous and for the purpose of delay, it will be dismissed on appellee's motion.

PER CURIAM. This is a proceeding under the landloard and tenant act, brought to recover possession of a house, tried before *Bond, J.*, at February Term 1918 of BEAUFORT. Defendant appealed. Plaintiff, having docketed the transcript of appeal in this Court, moves upon due

notice to dismiss the appeal and affirm the judgment, upon the ground that it appears upon the face of the record that the appeal is frivolous and taken solely for delay.

No pleas of defense were pleaded before the justice of the peace and none in Superior Court. No assignments of error appear in the case on appeal and the exceptions taken on trial are entirely without merit. While appeals from the Superior Court to this Court are a matter of right, they must be bona fide for the purpose of reviewing some alleged error. Where it appears upon the record that no serious assignment of error is made and that the appeal is frivolous and taken solely for delay, the appeal will be dismissed. *Ludwick v. Mining Co.*, 171 N.C. 61.

Appeal dismissed and judgment affirmed.

Cited: Barnes v. Saleeby, 177 N.C. 260; *Hotel Company v. Griffin*, 182 N.C. 540; *Ross v. Robinson*, 185 N.C. 550; *Stephenson v. Watson*, 226 N.C. 743.

(709)

STATE v. J. P. JONES.

(Filed 10 April, 1918.)

1. Spirituous Liquors — Illegal Manufacture — Evidence — Trials—Questions for Jury.

The evidence in this case that the component parts to make a complete still was found on defendant's premises, over his kitchen, with material in the progress of distilling, the odor of the liquor, etc., is held sufficient for conviction of the manufacture of liquor contrary to the statute.

2. Spirituous Liquors—Use of Premises—Consent—Trials—Instructions.

One who permits his premises to be used for the unlawful purpose of manufacturing spirituous liquor is a participant in the crime and as guilty of the offense as those who actually manufacture it; and where there is evidence that a still had been found on the defendant's premises, in a room over his kitchen, where spirituous liquor had been manufactured, a charge by the court that he would be guilty if he took part in the offense by giving permission that his premises be thus used, is not erroneous.

3. Evidence—Photographs—Explanatory.

Where there is evidence of the accuracy of a photograph, a witness may us it for the restricted purpose of illustrating his testimony to the jury, relevant to the inquiry.

CLARK, C. J., concurring with opinion.

STATE *v.* JONES.

INDICTMENT tried before *Shaw, J.*, at February Term 1918 of SURRY.

The defendant was charged with the manufacture of liquor contrary to the statute. As there was a motion to nonsuit, it will be necessary to state some of the evidence.

U. G. Belton testified: "In consequence of information received by me, I went with E. G. Smith, revenue officer, and two policemen of the town of Mount Airy, to the home of the defendant Sampson Jones; we went into the smokehouse, a few feet in the rear of the dwelling, and there found a 50-gallon barrel about two-thirds full of still beer, two 25-gallon tubs, which apparently had had still beer in them, and something like a peck of rye malt; just outside the smokehouse door was a 50-gallon barrel about two-thirds full of sweet cider. We also found a five-gallon keg on the back porch which smelt like corn whiskey and which apparently had been recently emptied; perhaps a little of the whiskey remaining in the bottom of the keg. I was not in the house when the can and coffee pot and things were found upstairs, having gone out down the branch, away from the house, searching, but found nothing down there. When I came back these things had been found. I went in the room, saw the furnace of rock and mud, about four or five feet long and about 18 inches high, built on the floor; saw the dead coals and ashes, apparently fresh ashes, and the oil can, coffee pot, still-worm, and keg. The keg containing the
(710) still-worm was sitting near the furnace, the worm being attached to the keg and the lower end of the still-worm extending out through a hole near the bottom of the keg. There was also a brass faucet in the lower part of the keg, apparently for draining the keg. I do not remember whether there was any water in the keg when I got there or not. The still-worm was several feet long in a coil and is what I call a fine worm. The oil can held about five gallons; the opening at the top was enlarged and had a collar about it; the coffee pot, which held about three quarts, had been split up about the spout and lapped over so that it fitted the opening in this still. I was four years a brandy gauger and visited, on an average, fifty or more brandy distilleries a year. I have also seen in operation a great many whiskey distilleries and know the outfit and ingredients necessary for the making of whiskey and brandy. Still beer is the fermented meal or malt out of which whiskey is made by distillation; low wine is a whiskey, less than proof, which runs out through a worm at the end of the 'doubling,' and which in the ordinary process is poured into the next 'run' to make it proof liquor. The necessary outfit for making whiskey is a still, a still cap, a still-worm, and a cooling tub. The paraphernalia found at Sampson Jones', when connected up, made a complete distillery outfit to manufacture either whiskey or brandy, and I should

say that the outfit there found would make from five to seven gallons of liquor in a day."

M. F. Patterson testified: "I was at J. P. Jones' with Sheriff Belton, Deputy Sheriff Davis, and Policeman Monday and Revenue Officer E. G. Smith; we went there in the afternoon, some time prior to October Term of court; we found in the smokehouse, a few yards in the rear of the dwelling, a barrell about three-fourths full of still beer, and two empty 25-gallon receptacles which appeared to have had still beer in them, and some rye malt; just outside the smokehouse we found a 50-gallon barrel, about three-fourths full of sweet cider. While the others were making the search about the premises, E. G. Smith and myself went in the dwelling-house, which was open, and searched the rooms downstairs and found nothing, except the ordinary furnishings. We went upstairs, accompanied by a son of J. P. Jones, a boy of about fourteen or fifteen years of age, and searched the two front rooms and found, behind a trunk, two quarts in bottles of low wine; when we came to the door of the room over the kitchen it was locked, and we asked the boy to let us into this room, but he hesitated and said he would rather not go in there until his father came, and that he was on the upper place, about a mile in Virginia. He then took the key, which was hanging somewhere about the door, and unlocked it. We found in this room over the kitchen a furnace of rock and mud, or mortar, built on the floor near the chimney, about four or five feet long, and from fourteen to eighteen inches high; by the side of the furnace was a wooden keg with a still-worm (711) in it, and there was also on the floor a tin can holding about four gallons, which looked like an oil can, and a coffee pot with a copper arm or spout about 18 inches long. We took the five-gallon can and set it on top of the furnace and it fitted exactly into the opening surrounded by a rim of mortar; the bottom of the can was black and the sides of it were smoked black, and there was what appeared to be baked meal around the top of the can. The opening in the top of the five-gallon can was not so large as the opening at the top of the coffee pot, about three-quart coffee pot; the upper part of the coffee pot had been split and lapped over, so laped that it fitted exactly into the top of the can; the end of the arm or spout extending from the coffee pot fitted exactly into the still-worm in the tub or keg. They were not connected, however, but lying in different parts of the room. The defendant Jones was not at home; his son was there clerking in the store. He went in the house with us and told us his father was at work on the farm. The house had three rooms upstairs and three rooms down stairs. There were cans packed in the room over the kitchen in which we found the furnace and other articles of furniture. We found two

bottles of backings or wines in a bedroom behind a trunk, not the room in which we found the furnace and other articles mentioned. Jones lives on the sand-clay road about four miles from Mount Airy, in a thickly populated neighborhood."

There was other testimony of a like kind.

The defendant was convicted and appealed from the judgment of the court.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Folger, Jackson & Folger for defendant.

WALKER, J., after stating the case: There was ample evidence to support the verdict, and the motion to nonsuit was properly overruled. The evidence tended to show that defendant had been engaged in the business of manufacturing liquor. He had on his premises and in his residence all the component parts of a perfect apparatus for distilling liquor, and if others assisted in the process of manufacturing, there was also evidence that the defendant not only permitted the illegal business to be done in his house, but actually furnished the still and the place for using it, and this would make him a participant in the crime.

The charge of the court that if the defendant took part in the offense by giving his permission to the use of his premises for the illegal purpose, he would be guilty, is clearly sustained by the case of *S. v. Denton*, 154 N.C. 641, where this Court held, as shown by the head-
(712) notes, as follows: "1. If the jury should be satisfied from the evidence that H. owned the whiskey and brought it in a basket to defendant's home for the purpose of selling it there, and sold a pint to one D. in defendant's presence and with his knowledge, the defendant would be guilty of aiding and abetting the sale; and that is in misdemeanors all aiders and abettors are principals, defendant would be guilty as a principal in the unlawful sale. 2. One is guilty of an unlawful sale of spirituous liquor as a principal when he allows the use of his home in order to more secretly effect the sale there; and evidence tending to show that this was done and the price paid while at defendant's home in a room wherein he was lying on a lounge, though without evidence of his receiving a part of the price paid, is sufficient for his conviction as a principal in aiding and abetting the unlawful act," citing *Commonwealth v. Hayes*, 167 Mass. 176, as deciding that one may be convicted for the unlawful sale of or keeping for sale of, intoxicating liquors, if the jury find "that the premises were kept and maintained by him, and that any part thereof was, with defendant's consent, used for the illegal sale or keeping of spirituous liquors."

And this Court added in *S. v. Denton, supra*: "If the defendant knowingly permitted Hodge to use his home for the illicit sale of whiskey on one occasion, he is an aider and abettor on that occasion; and it is as much a violation of law as if he habitually permitted it."

That case was decided by a divided Court (two of the justices dissenting), but, even under the view held by the dissenting justices, the charge here could be sustained. This case is much stronger to show defendant's actual participation, as an aider and abettor, than the *Denton* case, for under the instruction of the Court the jury must have found that defendant did more than assent tacitly to the manufacture of liquor, and that he "aided and assisted" by contributing the use of his premises to the unlawful purpose. He is just as guilty, under the statute (Public Laws of 1917, ch. 157), as if he had furnished the still or the corn and apples, or the coal and wood to make the fire, or any other material used in the manufacture of the liquor.

The mere knowledge of the use of premises by a distiller and consent thereto of one who holds a mortgage on the same is made a ground of forfeiture by him of his interest under the act of Congress. *U. S. v. Stowell,* 133 U.S. 1; *Glenn v. Winstead,* 116 N.C. 454.

The exceptions as to the use of the photograph for the purpose of allowing one of the witnesses to illustrate or explain his testimony is not well taken. The witness was endeavoring to show how the parts of the distillery which were found in the house might be assembled so as to make a complete apparatus for manufacturing liquor. He could use a diagram for the purpose, and why not a photograph? The trial judge excluded it for any other purpose, and distinct- (713) ly charged the jury to disregard it, except for the indicated purpose and not to use it as substantive testimony. The witness M. F. Patterson testified that "it was a correct picture of the implements found in the defendant's house."

Photographs have been admitted in evidence with the sanction of the courts in similar cases. *Butler v. State,* 142 Ga. 286; *Wade v. R. R.,* 89 S.C. 280; *Griffith v. Coal Co.,* 84 S.E. 621; *Spencer v. Looney,* 116 Va. 767; *Prok v. R.R.,* 75 W. Va. 697; *Napier v. Little,* 38 L.R.A. (N.S.), 91 (Anno. Cases, 1913 A, 1013); *Shaw v. State,* 83 Ga. 92; and in *S. v. O'Reilly,* 126 Mo. 597, where it is said: "It has always been permissible to use diagrams in the trial of causes, both civil and criminal, and especially in the latter class to use diagrams, if shown to be correct, to illustrate the position of persons and places and to better enable the witnesses to properly locate them. If, then, a diagram may be used for such a purpose, we can see no good reason why a photograph may not be, by which is presented to view everything within the range of the camera at the time the photograph was taken."

We have permitted photographs to be used, instead of diagrams, under circumstances making the latter competent, when they were shown to have been correctly taken. *Hampton v. R. R.*, 120 N.C. 534; *Davis v. R. R.*, 136 N.C. 116; *Pickett v. R. R.*, 153 N.C. 148; *Hoyle v. Hickory*, 167 N.C. 619. As we said in the *Hickory* case, it might be impossible to illustrate the situation, or to give the jury a correct idea of it in any other way. If the correctness of the picture is shown, we do not see why it should be less competent than a diagram, or a drawing made by the witness for purposes of illustration at the time he testified.

No error.

CLARK, C.J., concurring: When a witness described the still and appurtenances it was not the article itself that was presented to the jury, but simply a representation, more or less vivid, and more or less accurate, depending upon the witness. When the still and attachments were presented by a photograph, this was really more accurate and better calculated to convey to the minds of the jury the appearance of the still and fixtures than the oral description. It is true that a photograph can be so taken as to convey a false impression. But that is true also as to oral testimony. In both cases, there is the safeguard of cross-examination of witnesses and of other testimony. In describing action or movement, as an assault and battery, a kinematoscope, if it could be had, would be more useful than the language of any witness, for on such occasions witnesses often honestly disagree in their account of what they saw.

(714) When there is an agreement reduced to writing, the writing is the best and sometimes the only proof allowed of what was said. Then there are occasions in which the jury has been allowed to visit the scene of the crime, as being more accurate and useful than the testimony of witnesses. *Jenkins v. R. R.*, 110 N.C. 441; *S. v. Gooch*, 94 N.C. 987; *Hampton v. R. R.*, 120 N.C. 534; *S. v. Perry*, 121 N.C. 535; *Brown v. R. R.*, 165 N.C. 396; *Long v Byrd*, 169 N.C. 658. In short, the courts resort to all these forms of evidence, the object being to elicit the truth.

When a photograph was first offered in our Court it was excluded (*Hampton v. R. R.*, 120 N.C. 537) by the majority opinion, but the dissenting opinion quoted 31 American Law, 268, that its "admission was opposed upon the principle that this kind of evidence was unknown to the learned lawyers of the Saxon Heptarch, and therefore not evidence." Ever since that opinion, however, the Court has followed the now uniform ruling of other courts that photographs are competent as evidence, subject, however, to the usual tests of truth.

A trial is a search for truth, and no court will exclude testimony that will be an aid to that end, whether it is oral testimony, a photograph, a sketch or a map made during the trial, or a map made under the order of the court, or a writing, or an X-ray, or any other process or means, subject to the rule that the best evidence which the nature of the case will admit of must be used and subject to cross-examination and opposing evidence in open court.

Cited: S. v. Baldwin, 178 N.C. 697; *S. v. Brown,* 183 N.C. 792; *S. v. Lutterloh,* 188 N.C. 414; *S. v. Mitchem,* 188 N.C. 609; *S. v. Matthews,* 191 N.C. 385; *Kepley v. Kirk,* 191 N.C. 693; *Honeycutt v. Brick Co.,* 196 N.C. 557; *S. v. Perry,* 212 N.C. 534. *S. v. Miller,* 219 N.C. 519; *S. v. Mays,* 225 N.C. 488; *S. v. Gardner,* 227 N.C. 572; *In re Will of McGowan,* 235 N.C. 407; *Hunt v. Wooten,* 238 N.C. 48; *S. v. Norris,* 242 N.C. 56.

J. W. RICHARDSON v. SECURITY MUTUAL LIFE INSURANCE CO.

(Filed 17 April, 1918.)

Insurance, Life—Assessment Companies—Assessments Increased—Policies—Contracts.

A provision in the policy of a purely mutual assessment life insurance company that the insurer has the authority to increase the assessment fixed in the policy itself, when necessary to pay death claims, in accordance with the actuary's table of mortality, or as the mortality experience of the company may require, is a valid defense in an action by the insured to recover the assessments he had theretofore paid, on the ground that his assessment had been raised, when it is shown that such increase was in accord with the terms of the policy; and the insurer is not required to give previous notice of the increase in the assessment.

ACTION tried before *Harding, J.,* and a jury, at September Term 1917 of GUILFORD.

It appeared that on 6 December, 1897, plaintiff, then 55 years (715) of age, took out a policy of $2,000 in the Bankers' Guarantee Fund Life Association of Atlanta, Ga., a mutual assessment life insurance company having no capital stock nor resources other than funds derived from assessments on its members pursuant to the terms and stipulations of the policies and the rules and regulations authorized by its charter and by-laws; that on 6 December 1899, the obligations of plaintiff's policy were assumed by the present defendant

company, and plaintiff has since paid assessments to the latter company; that some time after defendant undertook said obligation it made a change in its method or basis of the mortuary assessments from the fixed sum of $7.09, an amount specified in the policy, to an assessment made on the basis of the actuaries' table of mortality, also provided for in the policy, and thereafter plaintiff continued to pay the assessments on this basis and in ever-increasing amounts, but under protest, till 1 August 1917, when, a quarterly assessment having been made of $46.98, plaintiff declined to pay further and instituted the present suit to recover the entire amount of the premiums paid by him, alleging that the change in the method of making the mortuary assessments were in breach of the contract of insurance.

2. That if authorized by the charter and by-laws, it was made without any notice having been given to plaintiff of the proposed change.

All of the facts deemed material to the controversy being admitted except that of notice, an issue was submitted as to whether any notice had been given plaintiff as to the change of method complained of and the jury, for their verdict, answered the issue, "No."

On the rendition of the verdict and the facts admitted, his Honor being of the opinion that the breach of contract on which plaintiff sued had not been established, entered judgment for defendant containing terms as follows:

"1. That the policy sued on, No. 3054, issued by the Banker's Guarantee Fund Life Association of Atlanta, Ga., and reinsured according to its terms by defendant, lapsed and became null and void and ceased and determined, according to its terms, for nonpayment of quarterly premium dues thereon 1 August 1917.

"2. It is further ordered and adjudged that, independent of the lapse of said policy for nonpayment of premium due 1 August 1917, and notwithstanding the verdict of the jury on the issue submitted, defendant did not violate nor breach the policy contract sued on in any of the particulars alleged, and that plaintiff is not entitled to the relief demanded in his original and amended complaints, nor any part thereof."

From which judgment plaintiff, having duly excepted, appealed.

(716) *Thomas C. Hoyle and C. A. Hines for plaintiff.*
King & Kimball for defendant.

PER CURIAM. The policy of insurance on breach of which the action is predicated contained, among others, the following stipulations:

"1. To continue this policy in force a further advance payment of $7.09 cents each, on or before the first day of February, May, August,

and November in every year, and payment of the mortuary assessments at the rate of $1.67 for each assessment when the same shall be called for to pay the policies of deceased members shall be made to the association at its home office.

"2. From each advance payment received after the primary policy year, there shall be deposited by the association to the credit of the Guarantee Surplus Fund $5.19. The mortuary assessments shall provide such sums as may be necessary to pay current death claims on the basis of the actuaries' table of mortality or as the mortality experience of the association may require.

"3. When, however, the above payments in any one year after primary policy year, aggregate the sum fixed by the table printed elsewhere on this policy based on the age at entry, no further assessments shall be made on assured for that year until the guarantee surplus fund standing to the credit of the policy shall be exhausted in payment thereof."

It was admitted on the trial that the guarantee surplus fund, standing to the credit of the policyholders, was exhausted prior to 6 December 1899, when the present defendant assumed the obligation of these policies, and at that time there were valid death claims to the amount of $10,000 which defendant had no means of paying except by assessment on the members, but that these facts were not known to plaintiff till this action was instituted.

It was further admitted on the hearing that the defendant, "since it reinsured the old Bankers' Guarantee Fund Life Association, collected its premiums and mortuary assessments on the basis of the actuaries' tables of mortality," including the premiums collected from plaintiff.

From the provisions in the contract itself and the admitted facts relevant to the controversy, it appears that the basis of assessment pursued by the present defendant is in accord with the express stipulations of the agreement contained in the policy, and we concur in his Honor's view that notwithstanding the verdict, the breach of contract alleged by plaintiff has not been established and the judgment in defendant's favor should be affirmed.

No error.

(717)

R. A. CROWELL v. J. M. PARKER ET AL.

(Filed 1 May, 1918.)

Evidence—Conspiracy—Commissions—Principal and Agent—Vendor and Purchaser.

Evidence in this case held sufficient to sustain a verdict and judgment in plaintiff's favor that he was entitled to his agreed commissions on sale of land of which he had been deprived by a conspiracy between the vendor and his purchaser.

APPEAL by defendant from *Long, J.*, at the October Term 1917 of STANLY.

This is an action to recover commissions for the sale of land or damages in lieu thereof.

The facts are fully reported on the former appeal in this action, 171 N.C. 392. The jury returned the following verdict:

1. Did the defendant Parker execute and deliver to the plaintiff the contract marked "Exhibit A," as alleged in the complaint? Answer: "Yes." (Answered by consent.)

2. Did the defendant Parker, without the knowledge of plaintiff, make the contract to sell the land to Shirey and Cook, before the expiration of the contract between Crowell and Parker? Answer: "Yes." (Answered by consent.)

3. Was Shirey ready, able, and willing to buy the land and pay therefor $5,000, as alleged in the complaint? Answer: "No."

4. Was the defendant Parker enabled to make the contract he made with Shirey and Cook to sell the land to them for $4,500 by reason of the efforts, influence, advertisement, or personal solicitation of plaintiff? Answer: "Yes."

4½. Did Parker waive the provisions of the contract that the lands should be sold for $5,000? Answer: "Yes."

5. Were Shirey and Cook ready, able, and willing to comply with the terms of the trade as made with them for $4,500? Answer: "Yes."

6. Did the defendants Parker and Shirey conspire together to make a contract to sell at the price of $4,500 instead of $5,000, for the purpose and with the intention of defeating the plaintiff of his commissions of $500, as alleged in the complaint? Answer: "Yes."

7. What amount, if any, is the defendant Parker indebted to the plaintiff? Answer: "$450."

8. What amount, if any, is the defendant Shirey indebted to the plaintiff? Answer: "$450."

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

R. A. Brown and J. A. Spence for plaintiff. (718)
R. L. Smith and Manly, Hendren & Womble for defendants.

PER CURIAM. The principal exception of the defendants is that there was not sufficient evidence to support the findings of the jury, but upon an examination of the record we are of opinion there was evidence, direct and circumstantial, sustaining the verdict, and that there is no reversible error.

The action has been tried in accordance with the former opinion.

No error.

W. V. BOONE v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 1 May, 1918.)

Telegraph—Mental Anguish.

ACTION to recover damages for mental anguish caused, as alleged by the plaintiff, by the negligence of the defendant in the transmission of an interstate telegraph message.

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

W. L. Mann for plaintiff.
Tillett & Guthrie for defendant.

PER CURIAM. The judgment of the Superior Court is affirmed on the authority of *Askew v. Telegraph Co.*, 174 N.C. 261, and *Norris v. Telegraph Co.*, 174 N.C. 92.

No error.

Cited: Hardie v. Telegraph Company, 190 N.C. 47.

O. H. LUCAS, RECEIVER OF THE KEYSTONE MEDICINE COMPANY v. J. L. HARDIN.

(Filed 15 May, 1918.)

1. Vendor and Purchaser—Consignment—Evidence—Prima Facie Case—Trials.

Evidence that the purchaser of goods on consignment refused an accounting after demand made by the vendor, makes out a *prima facie* case in the latter's action to recover the price, the defense being put upon the ground that the goods were unsatisfactory and that plaintiff had been notified they were held subject to his order.

2. Limitation of Actions—Vendor and Purchaser—Consignment.

The Statute of Limitations began to run when the relationship between the parties became adverse, in an action by the vendor to recover for goods sold and delivered on consignment.

(719) APPEAL by defendant from *Cline, J.*, at the July Term 1917 of RANDOLPH.

This is an action brought by O. H. Lucas, receiver of the Keystone Farm Machine Company, to recover the value of certain plows or cultivators consigned to the defendant in 1907 or 1908, which were guaranteed to do good satisfactory work.

The action was commenced 5 July 1913.

The defendant does not allege a counterclaim for breach of guaranty, but did offer evidence tending to prove that the plows or cultivators were unsatisfactory and that he notified the machine company in 1908 that he held them subject to its order.

The jury returned the following verdict:

1. Were the cultivators in question shipped by the Keystone Farm and Machine Company to the defendant upon a consignment contract? Answer: "Yes."

2. Is plaintiff's cause of action barred by the Statute of Limitations? Answer: "No."

3. What amount, if anything, is the plaintiff entitled to recover of the defendant? Answer: "$100."

The first issue was answered by consent of parties, and the controversy was as to the Statute of Limitations.

The defendant excepted to the parts of the charge on the Statute of Limitations. Judgment was rendered in favor of the plaintiff on the verdict, and defendant appealed.

Bruce Craven and G. H. King for plaintiff.

Hammer & Moser for defendant.

PER CURIAM. When it was admitted that the defendant received the property of the machine company on consignment in 1907 or 1908, and evidence was offered tending to prove that he refused, after demand, to account for the same, the plaintiff made out a *prima facie* case and his Honor could not do otherwise than deny the motion to nonsuit.

The finding upon the plea of the Statute of Limitations depended upon the time when the relationship between the parties became adverse, the plaintiff contending it was in August, 1910, which was within three years of the commencement of the action, and the (720) defendant in 1908, more than three years, and this question was submitted to the jury under instructions free from error.

No error.

S. B. ALEXANDER v. AUTENS AUTO HIRE ET AL.

(Filed 8 May, 1918.)

Appeal and Error—Divided Court—Alleyways—Obstruction—Judgments.

On this appeal by both parties to an action between abutting owners on an alley, seeking to restrain defendants from obstructing it with a cross-action to prevent plaintiff from maintaining a fence across it, the court is equally divided, one member not sitting or taking part therein, and the judgment of the Superior Court restraining the plaintiff from maintaining the gate and defendants from obstructing the alley is affirmed.

CLARK, C.J., did not sit.

APPEAL by both parties from *Webb, J.*, at the October Term 1917 of MECKLENBURG.

This is an action to restrain the defendants from parking automobiles in or otherwise obstructing a certain alley, and a cross-action to prevent the plaintiff from maintaining a gate across or partly across the alley.

The plaintiff and defendants own adjoining lots in the city of Charlotte, and there is a public garage on the lot of the defendants abutting on the alley.

Both parties claim title under Charles J. Fox, and in the deed under which the plaintiff claims the lot on which the plaintiff lives is conveyed, and also another lot "now used as an alley," twenty feet wide, which runs between the residence lot of the plaintiff and the lot of the defendants, and is the alley in question.

Following the description of the alley in the deed there is the following reservation: "Reserving to the said C. J. Fox, his heirs and as-

signs, forever the right of using and occupying the said twenty feet of land as above described as a street."

Upon the trial the plaintiff tendered the following issues:

1. Is the alleyway mentioned in the pleading a private alleyway?

2. Has the owner of the servient tenement the right to erect gates and fences across the alleyway?

His Honor declined to submit the issues, and the plaintiff excepted to the refusal to submit the second issue tendered.

Judgment was then rendered restraining the plaintiff from maintaining gates across the alley, and restraining the defendants from parking automobiles in or otherwise obstructing the alley, and both parties appealed.

(721) *Julian M. Alexander for plaintiff.*
Tillett & Guthrie for defendants.

PER CURIAM. The *Chief Justice* has declined to participate in the consideration of these appeals because of his relationship to the plaintiff. The other members of the Court are unanimous in the opinion that there is no error in the appeal of the defendants, and being equally divided as to the correct disposition of the appeal of the plaintiff, both appeals must be affirmed under the precedents, which require a majority of the Court to reverse a judgment of the Superior Court.

Two members of the Court are of opinion that while the alley is not strictly a public one, as between the parties to the deeds and those claiming under them the right of using and occupying all of the twenty feet as a street is reserved in the deeds and, if so, the plaintiff cannot interfere with the use or occupation of any part of it by erecting gates; while the other two members of the Court are of opinion that the alley is a private way; that the defendants are only entitled to a reasonable use of it, and that the question ought to be submitted to a jury as to whether erecting gates by the plaintiff will unreasonably interfere with the rights of the defendants.

Affirmed on both appeals.

Cited: Jacobs v. Jennings, 221 N.C. 26; *Basnight v. Basnight,* 242 N.C. 645.

PICKETT JONES v. PIEDMONT AND NORTHERN RAILWAY COMPANY.

(Filed 8 May, 1918.)

Railroads — Negligence—Evidence—Nonsuit—Infants—Minors—Release —Damages—Comparative Negligence—Trials.

In this action the plaintiff, a section hand of defendant railroad company, sues to recover damages for a personal injury received by jumping off a loaded motor car, to start it by running and pushing it and then jumping thereon, under the order of the superior. There was a finding by the verdict that he signed a release during his minority, and, upon defendant's motion to nonsuit, it is held that the evidence in the case was sufficient for the determination of the jury upon the issue of defendant's actionable negligence, and also to sustain a recovery of damages under the doctrine of comparative negligence allowed by statute.

ACTION, tried before *Webb, J.*, at January Term 1918 of GASTON, upon these issues:

1. Did the plaintiff, Pickett Jones, sign the release and receipt offered in evidence? Answer: "Yes."

2. Was the plaintiff, Pickett Jones, 21 years old when he (722) signed the said release? Answer: "No."

3. Did the defendant by undue advantage procure the plaintiff to sign the release offered in evidence? Answer: "No."

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

5. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: "Yes."

6. What damage, if any, is the plaintiff entitled to recover? Answer: "$166.50."

From the judgment rendered defendant appealed.

R. C. Patrick and P. W. Garland for plaintiff.
Osborne, Cocke & Robinson for defendant.

PER CURIAM. The plaintiff, a boy under 21 years old, was injured while in employ of defendant as a section hand. In obedience to orders he jumped off a loaded motor car to start it by running and pushing it and then jumping on again, when he was thrown off and injured.

There is sufficient evidence of negligence to justify the court in submitting the issue to the jury, and, therefore, the motion to nonsuit was properly overruled.

The jury found plaintiff guilty of contributory negligence and evidently considered the same in diminution of damages under the statute.

The four exceptions to the charge relate to the issue of negligence and are without merit. The judge submitted the case to the jury under instructions in line with the settled decisions of this Court.

We find

No error.

STATE v. EMANUEL RODERICK, JR.

(Filed 3 April, 1918.)

Homicide—Murder—Evidence—Trials—Questions for Jury.

Evidence that the prisoner, on trial for murder of his wife who was expected to return home from a visit to relations and friends, stated she would return "home that morning, and there was going to be hell to play"; that he, as soon as she returned and entered the house, cursed and abused her, and said he was going to kill her, and the fatal shot was fired fifteen or twenty minutes later: *Held*, sufficient of premeditation and deliberation to sustain a verdict of murder in the first degree.

APPEAL by defendant from *Devin, J.*, at the September Term 1917 of NEW HANOVER.

(723) The prisoner appeals from a sentence of death pronounced upon a verdict of guilty of murder in the first degree.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

No counsel for defendant.

PER CURIAM. No brief has been filed for the prisoner, but as it is a capital case we have nevertheless carefully examined the record.

The deceased, who was the wife of the prisoner, was killed on 20 July 1917, by a pistol shot wound near the center of the forehead.

The evidence for the State tends to prove that the deceased was on a visit to relations from Wednesday preceding the killing until Friday, the day of the killing, when she returned home; that on the day of the killing the prisoner said "his wife was coming home that morning, and there was going to be hell to play"; that the wife of the prisoner brought to her home some bundles and a half-bushel of clams; that the prisoner began cursing and abusing her as soon as she entered her home; that she started to get the clams to take in the house and the prisoner said, "You need not bring them damn clams in here; they will never do you any good. God damn you, I am going to kill you

anyhow"; that the fatal shot was fired by the prisoner fifteen or twenty minutes later.

The absence of provocation, the conduct of the prisoner, and his declared purpose to kill preceding the killing furnish evidence of premeditation and deliberation, which was submitted to the jury under instructions free from error.

The only exceptions are to parts of the charge which follow numerous precedents in this Court.

We find no error in the record.

No error.

Cited: S. v. Hammonds, 216 N.C. 75.

(724)

STATE v. CLARENCE DAVIS.

(Filed 22 December, 1918.)

1. Homicide—Evidence—Intoxication—Cursing.

Upon the trial for a homicide, where the evidence tended to show that the prisoner was beaten in a drunken row by his associates, then went to a house near by, got his pistol, and, returning, shot and killed the deceased, evidence as to whether he was cursing before the altercation took place is immaterial.

2. Appeal and Error—Homicide—Prejudice—Harmless Error.

An unanswered question ruled out upon the trial will not be held as reversible error, especially when from the nature of the evidence adduced and the admissions respecting the answer no prejudice to the appellant was likely to have resulted.

3. Homicide—Evidence—Self-defense—Character of Deceased—Circumstantial Evidence.

Where, upon a trial for homicide with a pistol, there is no evidence of self-defense, and the evidence is not circumstantial, evidence of the character of the deceased for violence is properly excluded.

4. Courts—Discretion—Excluding Witnesses—Witness Remaining.

It is within the discretion of the trial judge to permit a witness who had remained in court when the others had been excluded from the courtroom to testify. *Lee v. Thornton,* 174 N.C. 288, cited and applied.

5. Instructions—Intoxication—Appeal and Error.

Where the defendant on trial for murder in the second degree has been convicted of manslaughter and has received full benefit of the defense of intoxication under the court's instruction, a reference therein to unconsciousness by voluntary drunkenness for the purpose of illustrating the charge will not be held as error.

6. Homicide—Deadly Weapon—Malice—Presumptions.

The law presumes malice from the killing of a human being with a deadly weapon and places the burden upon the defendant to satisfy the jury as to any matter of mitigation or excuse.

7. Homicide—Self-defense—Cooling Time—Evidence.

Where the evidence tends only to show that the defendant, after having been beaten by his associates, went to a near-by house and immediately returning with a pistol shot and killed the deceased, the question of self-defense does not arise and that of "cooling time" was not relied on.

8. Homicide—Evidence—Questions for Jury—Trials.

Where there is conflicting evidence as to whether the deceased was killed by a pistol shot of the defendant, or met his death from another source by being stabbed with some sharp instrument, the question is for the jury under a proper charge from the court.

9. Appeal and Error—Instructions—Contentions—Objections and Exceptions.

Objection to an erroneous statement of a party's contention should be called to the attention of the trial judge at the time so that he may have an opportunity to make the proper correction, and an exception thereto otherwise taken will not be considered on appeal.

10. Appeal and Error—Technical Error—New Trials.

A new trial will not be granted on appeal for a technical error of the trial court when it clearly appears that it was not substantial and could not have affected the result.

CLARK, C. J., concurring.

(725) INDICTMENT for the murder of Lewis Shew, tried before *Carter, J.*, and a jury, at August Term 1917 of WILKES.

Defendant was convicted of manslaughter, sentenced to three years imprisonment and appealed.

On Sunday afternoon, 22 October 1916, the defendant had gone to the home of Isaac Clark for a visit, and later went to the home of Mrs. Lucy Clark near-by. At about dark the deceased Lewis Shew and two brothers and a man named Porter came down the road in the direction of Mrs. Clark's "hollering and cursing." Mrs. Clark went out and asked them to go away; defendant and Julius Clark then went out to where the boys were. Defendant gave the Shew boys some liquor, and Porter complained that he had been slighted. Defendant then started toward Porter with the bottle, whereupon Porter knocked him down, jumped on him and beat him. Defendant then went back to the home of Mrs. Clark and said to her son, "Julius, give me my gun; those boys have not treated me right." He then went back to the scene of the fight. One witness stated: "Just after defendant left

the house I saw a pistol in his hand. He went back up the road towards the granary or lumber house I spoke about awhile ago; he passed by me, went up there and met up with the other boys, and the pistol fired. I can't say which one of the boys was closest; I don't know who it was; I don't know whether I heard Davis or Shew say anything before the pistol fired or not. The pistol fired three or four times, I could not say which. Clarence Davis fired the pistol. He was three or four steps, or about that distance, from either one of these boys when the pistol fired. After the pistol fired I saw one of them kind of go down. At that time I heard some cursing, and heard some one say, "God damn him, he has killed my brother and I am going to let him lay down by the side of him and die too!"

There was evidence of medical experts that the death was caused by a gun-shot wound in the right breast, going through the lung and the right cavity of the heart, and that the wound might have been caused by a long sharp, round instrument, but there was no evidence that such an instrument had been used.

Simon Peyton Shew, brother of deceased, testified that with his brothers and Porter he was coming toward Mrs. Clark's house when the defendant and Julius Clark came up to them in the road. Defendant offered them some liquor, and Porter complained because he had not been offered any; then he knocked defendant down and got on top of him. After they were parted, defendant went to Mrs. Clark's house and returned with a pistol and shot deceased. The witness then stated: "I caught the gun and it fired out through the field; the next time I caught it and jerked it out of his hand and hit him with it. . . .
After I hit Clarence Davis a lick or so I went and looked at (726) Lewis, and he drew up a little bit. I saw he was dead and went back and hit Clarence Davis several times."

There was much conflicting evidence as to details, but none as to the fact of the homicide, and all showed that it resulted from a drunken brawl in which all the participants were more or less intoxicated.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

John R. Jones and Hackett & Gilreath for defendant.

WALKER, J., after stating the case: The defendant contended that he did not kill the deceased, but that he was shot by someone else, present at the time of the killing and who had a pistol of smaller calibre than the one he carried, and offered evidence, including medical testimony, as to the nature and extent of the wound, to prove his contention. During the trial he entered numerous exceptions to the rul-

ings of the court, as many as sixty-three in all, but has abandoned twenty-eight of them; and of those that are left there are several which are pointed to the same question, and we will, therefore, consider them in groups. There are some of them so plainly irrelevant or immaterial as not to require separate discussion, and others taken to rulings which, if erroneous, were manifestly harmless, though we do not mean to imply that they were erroneous.

We will consider and discuss those which are vital or substantial, and make only brief reference to some others which could not have affected the result even if there had been error.

1. Whether the defendant was cursing or not before the altercation took place was immaterial. It was contended by the State that he was, and the evidence offered could throw no light upon the question whether—after he had gone to the house and got his pistol, and then returned to the place of the homicide—he fired his pistol and killed the deceased. There was no evidence that he had cursed up to the time when he was knocked down by Porter, who thought that he had been slighted when a bottle was being passed around. There was nothing to show that, until he was so assaulted, the defendant had acted otherwise than as a peaceable man. His guilt turned upon what he did from that time until the deceased was shot and killed.

2. The exclusion by the court of the question as to what a witness for the State had said during an examination of him and other State witnesses by defendant's counsel, with the permission of the court, is not reversible error, because it does not appear how the witness would have answered it, or that his answer would have been favorable (727) to defendant; but, on the contrary, there is strong presumption that he would have answered it unfavorably, and counsel admitted that if he did so they would not offer evidence to contradict him. It would not be fair to the State or to the witness, if we should permit him to be thus discredited by the mere form in which the question is asked, without some assurance that he will admit the contradiction, or conflict, between his present testimony and his former statement. But it sufficies to say that we are not informed as to what his answer would be. Under he circumstances, and with the admissions stated in the record, the defendant could hardly have expected him to say that he had contradicted himself, or, what is more, that he was prejudiced by the ruling. *Jenkins v. Long,* 170 N.C. 269, seems to be directly applicable, and shows that there was no reversible error because no prejudice, and there are other cases to the same effect. *Hollifield v. Telephone Co.,* 172 N.C. 714; *Rawls v. R.R., ibid.,* 211; *McMillan v. R. R., ibid.,* 853. This covers the five exceptions relating to this question.

3. The questions as to the character for violence of Lewis Shew, the deceased, and Ernest Porter, were incompetent, because the evidence was not circumstantial, nor was there any showing that the defendant fired the pistol in self-defense. *S. v. Turpin*, 77 N.C. 473; *S. v. Exum*, 138 N.C. 599; *S. v. Banner*, 149 N.C. 519; *S. v. Blackwell*, 162 N.C. 680.

It was said in *S. v. Banner, supra*: "The exceptions to the rule that the character of the deceased cannot be put in evidence are: (1) When there is evidence tending to prove that the homicide was committed in self-defense; (2) when the evidence is wholly circumstantial and the character of the transaction is in doubt," citing *S. v. Turpin, supra; S. v. Byrd*, 121 N.C. 688; *S. v. McIver*, 125 N.C. 646.

As to whether the witness G. Miller, who remained in court after an order had been made excluding witnesses, should be permitted to testify as to what occurred at the coroner's inquest, was a matter within the sound discretion of the court, the exercise of which is not reviewable here. We so held at the last term of this Court in *Lee v. Thornton*, 174 N.C. 288, where the question is fully considered and many authorities cited. In that case the witness was excluded by the court while here the State was allowed to examine him. See, also, *S. v. Hodges*, 142 N.C. 676, and *S. v. Lowry*, 170 N.C. 730, where it is said, at page 734: "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 courtroom during the trial, a witness for the State who remained in the courtroom 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 (728) shall be examined or not. 12 Cyc. 547. The same point was made in *S. v. Hodges*, 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 *Purnell v. Purnell*, 89 N.C. 42, and is stated as settled law in the text-books. 1 Greenleaf Ev., secs. 431 and 432 and notes, and 2 Bishop New Criminal Proceedings (2 Ed.), secs. 1191 to 1193a."

It was contended by the defendant in *Lee v. Thornton, supra*, that the court could not exclude the witness and thereby deprive him of his constitutional right to have the witness heard by the jury, but in this case the court did what the defendant insisted in that case it was legally right to do. So that, in any view of the ruling, the court in this case was correct.

4. Exceptions as to the reference of the court in its charge to unconsciousness produced by voluntary drunkenness should be disallowed,

as this was said merely for the purpose of illustration, and to properly discriminate between unconsciousness caused by the prisoner's voluntary act, and that not so caused. The judge distinctly charged as to the mental condition which would excuse the act of killing, when he said: "It would be sufficient for him to show that he was in a state of unconsciousness or insanity caused by the blow inflicted upon him," but what the defendant did and said after he had received the blow was so thoroughly inconsistent with such a state of mind as to render this excuse for the homicidal act inadmissible. *S. v. English,* 164 N.C., at p. 512; *S. v. Murphy,* 157 N.C. 614; *S. v. Shelton,* 164 N.C. 513. The defendant has had the full benefit of the contention that he was unconscious or not in such a state of mind that he could premeditate or deliberate or form any criminal intent, if that was material under the authorities just cited, as he was not tried for murder in the first degree, and was convicted only of manslaughter, where no specific intent is required to constitute the crime as in the higher felony of murder in the first degree. The doctrine is fully explained in *S. v. Murphy, supra,* and *S. v. Shelton, supra.*

5. There are many objections to the charge, but none of them, in our opinion, is sound. The court instructed the jury fully as to every phase of the case upon which there was evidence and explained the law fully and clearly. It is a familiar rule that when the State has shown that the defendant killed the deceased with a deadly weapon, the burden shifts to him, and he must satisfy the jury as to any matters of mitigation or excuse, or the jury should convict him of murder in the second degree, as the law in such a case implies the malice. The charge as to the several degrees of homicide and as to the burden of
(729) proof was strictly in accordance with precedents. *S. v. Brittain,* 89 N.C. 481; *S. v. Simons,* 154 N.C. 197; *S. v. Rowe,* 155 N.C. 436; *S. v. Yates, ibid.,* 450, and *S. v. Heavener,* 168 N.C. 156. Besides, the conviction was of manslaughter, and the question of malice is not involved in that crime. But, if the verdict had been one for murder in the second degree, we think the charge upon malice with reference to that degree of the homicide, was quite favorable to the accused, as the judge referred to his former instruction and finally placed the burden to show it upon the State. The defendant surely has no reason to complain.

There was really no element of self-defense. After the defendant went to the house and got his pistol and then returned to the field of combat, he assumed the character of an aggressor as the evidence shows. He could easily have avoided another conflict, and instead of acting in self-defense, the proof tends to show that his motive was one of revenge, or of satisfaction, for the supposed wrong inflicted upon

him, the question of cooling time not being presented, as in *S. v. Merrick*, 171 N.C. 788. The case, therefore, was not within the rule stated as to the nature and extent of the right of self-defense in *S. v. Barrett*, 132 N.C. 1005; *S. v. Blackwell*, 162 N.C. 672, at 683; *S. v. Johnson*, 166 N.C. 392, at 395, cited by the learned counsel of the defendant.

The exceptions to the instructions as to the nature of the wound, whether inflicted by a pistol or long and sharp instrument, as bearing upon the question whether the defendant actually killed the deceased, cannot be sustained, as these matters were for the jury and were submitted to them under proper instructions. If the judge failed to state the contentions of the defendant properly, his attention should have been directed to the error at the time, so as to afford opportunity for correction. *McMillan v. R. R.*, 172 N.C. 853. Even if there is technical error, courts will not reverse where it clearly appears that it is not substantial and could not have affected the result. *Goins v. Indian Training School*, 169 N.C. 737; *Elliott v. Smith*, 173 N.C. 265.

Some of the objections in this case are purely technical in character, and, while we do not think any error is made to appear, yet, if it had been, in the respect alleged, we are satisfied that no harm has resulted and that there is nothing to justify a belief that, except for the error, the verdict would have been different from what it is. *Goins v. Indian Training School, supra; Elliott v. Smith, supra; Schas v. Assurance Co.*, 170 N.C. 420. We have given full and careful consideration to the record and the argument of the learned counsel, and have found no reason for disturbing the judgment.

No error.

CLARK, C.J., concurring: In *S. v. Craine*, 120 N.C. 601, it was (730) held, approving *Smith, C.J.*, in *S. v. Grady*, 83 N.C. 683, and *Ruffin, C.J.*, in *S. v. Stanton*, 23 N.C. 424, that on an appeal from a conviction of a lesser degree of homicide upon an indictment for murder, if the case is sent back for a new trial, "it would be had for the offense of murder in the first degree, as charged in the indictment." This case has been cited and approved on this point in *S. v. Groves*, 121 N.C. 568; *S. v. Freeman*, 122 N.C. 1016; *S. v. Matthews*, 142 N.C. 622. The same is held in *Trono v. U. S.*, 199 U.S. 521, which "has reviewed the authorities and sustained the principle that a new trial in a capital case goes to the whole case, regardless of the former verdict." *S. v. Matthews, supra.*

It may, therefore, be well for the prisoner that he has escaped a new trial, for there is evidence that after leaving the fight he procured the deadly weapon and returned expressing his intention to use it. If the jury should find, and there is evidence to justify it in so finding,

that there was sufficient "cooling time," this would warrant, on another trial, a verdict of murder in the first degree, or at least murder in the second degree. As it is, the conviction is only of manslaughter with a punishment of three years in the State's Prison.

Possibly the prisoner may not have fully considered the fact that the result of a new trial might have been less favorable to him.

This was a drunken row in which one man was killed and several were badly injured. It is rarely that a homicide is brought on appeal to this Court in which intoxicating liquor was not the cause of the slaying of a fellow being. The people of the State in 1907 by 44,000 majority decided to put an end to the traffic and numerous statutes have been passed since by the Legislature to cure defects which have been found by the courts, from time to time, to prevent the efficient execution of the law. The Federal Government has since passed a statute conferring full power upon each State to prevent the importation of liquor from other States as well as its manufacture and sale in its own orders, and an amendment to the United States Constitution has passed to apply to the whole Union and is now pending adoption by the requisite number of States.

The enormous profit in the violation of our statutes alone stands in the way of the prevention of crime caused by this illicit traffic. It rests with the officials of the State and counties by an efficient execution of the law to prevent such lamentable occurrences as that presented in this record.

Cited: S. v. Johnson, 176 N.C. 723; *Manufacturing Co. v. Building Co.,* 177 N.C. 106; *S. v. Keefer,* 177 N.C. 116; *Bank v. Wysong & Miles Co.,* 177 N.C. 292; *S. v. Beal,* 202 N.C. 270; *S. v. Taylor,* 213 N.C. 523.

(731)

STATE v. EARL NEVILLE.

(Filed 21 February, 1918.)

1. Constitutional Law—Criminal Law—Evidence—Identification.

Testimony that defendant was placed for identification in the same relative position to a witness as the perpetrator was seen by her just before committing a criminal offense is not objectionable as forcing the defendant to give evidence against himself in denial of his constitutional rights; and the fact that the witness was not so certain of the identity on the day the crime was committed goes only to her credibility, which is for the determination of the jury.

2. Evidence—Impressions.

Where relevant testimony has been introduced by the State that the prisoner's hat or cap had been found in witness's kitchen, which would require the unlatching and opening of the door, it is incompetent for the prisoner to ask the witness, not an expert, if she thought she would have heard any one there, as such would be only the impression of the witness and not the statement of a fact.

3. Evidence—Character—Witnesses.

Where a character witness for a witness for prisoner has stated that he had not heard any one say anything about the character of the witness, the exclusion of a question as to whether he had heard his character discussed is not erroneous or to prisoner's prejudice, the witness afterwards testifying as to good character.

4. Evidence—Character—Witnesses—Specific Statements — Cross-Examination.

Proof of character of a witness must be elicited by general questions, and not by specific statements of the witness as to what another person has said respecting it; and a party may not ordinarily cross-examine his own witness upon the subject.

5. Criminal Law—Evidence—Corroboration—Appeal and Error—Harmless Error.

Testimony of the husband of the prosecutrix in a criminal action that he told the officer, "I believe you have got the right man": *Held*, competent as corroborative in this case and harmless in any view of it.

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

Where upon trial of a criminal action the judge has properly charged the jury on the presumption of prisoner's innocence and the burden of proof required of the State, his statement, if erroneous, of defendant's contention, not properly objected to, that the question of prisoner's identification arose from a mistake of the prosecutrix and not from false testimony, is not reversible error.

BROWN, J., concurring; WALKER, HOKE, and ALLEN, JJ., concurring therein.

APPEAL by prisoner from *Connor, J.*, at October Special Term 1917 of WAKE.

The prisoner was convicted on an indictment for rape and (732) upon the sentence of death being imposed, appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

W. B. Jones and A. T. Shaw for prisoner.

CLARK, C.J. The prisoner was charged and convicted of rape committed upon Mrs. Sybil Sealey at her residence in the suburbs of the

city of Raleigh on the night of 19 September 1917. She testified that she was alone with her three young children about 11 o'clock at night, her husband not being at home. It is unnecessary to narrate the details further than to point the exceptions of law which are presented for our consideration.

The counsel for the prisoner, in the argument here, presented with ability and forcefully the objections urged in behalf of their client. But after giving full consideration to their argument, we are convinced that the prisoner has had a fair trial and that there is no just ground for exception.

The exception chiefly pressed is that the prisoner was taken to the home of the woman assaulted the day following the crime and placed in a position at the window which corresponded to the position in which the party committing the crime, according to the testimony of Mrs. Sealy, was standing just prior to the commission of the crime. And in that position he was identified by her. The argument for the prisoner is that being placed in such position he was forced to furnish evidence against himself in violation of his constitutional rights and privileges. This proposition, however, has been repeatedly decided against such contention in this and other Courts. *S. v. Holt,* 218 U.S. 245.

It was no more a violation of the constitutional rights of the prisoner to present him to Mrs. Sealy for identification in the place where the perpetrator stood than to make him stand up in court for the same purpose. Indeed, it was fairer to him to present him to her amid the surroundings where the occurrence took place. Moreover, unless she identified him there was no ground to hold him in jail. The correctness of her identification was a matter for the jury.

In *S. v. Graham,* 74 N.C. 646, *Judge Rodman,* for the Court, said: "The first exception is because the judge permitted the officer who had the prisoner in custody to testify that he made the prisoner put his foot in the tracks found in prosecutor's field, and that his foot fitted the tracks perfectly. It is argued that to make the prisoner put his foot in the track was procuring evidence by duress, and the (733) case of *S. v. Jacobs,* 50 N.C. 259, is cited. The object of all evidence is to elicit the truth. Confessions which are not voluntary, but are made either under the fear of punishment if they are not made, or in the hope of escaping punishment if they are made, are not received as evidence, because experience shows that they are liable to influence by those motives and cannot be relied on as guides to the truth. But this objection will not apply to evidence of the sort before us. No fears or hopes of the prisoner could produce the resemblance of his track to that found in the cornfield. This resemblance was a fact calculated to aid the jury and for their consideration.

"Evidence of this sort is called by the civilians 'real evidence,' is always admissible, and is of greater or less value according to the circumstances. In Best on Evidence, sec. 183, the following instances of its value are given: 'In a case of burglary, where the thief gained admittance into the house by opening the window with a pen-knife, which was broken in the attempt, and a part of the blade left sticking in the window frame, a broken knife, the fragment of which corresponded with that in the frame, was found in the pocket of the prisoner. So, where a man was found killed by a pistol, the wadding in the wound consisted of a part of a printed paper, the corresponding part of which was found in the pocket of the prisoner. In another case of murder, a patch on one knee of the prisoner's breeches corresponded with an impression found on the soil close to the place where the murdered body lay. In a case of robbery the prosecutor, when attacked, struck the robber on the face with a key, and a mark of a key with corresponding wards was visible on the face of the prisoner, etc. Similar instances might be cited indefinitely. The exception, however, is that the officer made the prisoner put his foot in the track in order to test the resemblance. It has been seen that this could not alter the fact of the resemblance, which is the only matter that would have weight in evidence."

In *S. v. Thompson*, 161 N.C. 238, the following testimony was found to be admissible: "Clifford Fowler, witness for the State, testified in regard to the tracks found outside the window and to following them to the house of the prisoner. He stated that when the coroner's jury was at the house of the deceased, the prisoner went to the house with his gun and was put in the tracks, and that the prisoner was of sufficient height to have fired the gun. He was then asked, "Tell how the prisoner acted in taking these measurements,' to which witness answered: 'I like not to have got him up there. He didn't want to go there at all.'

"Q. What did he do? A. Some one handed me a gun. I took him around to the window and handed him the gun. I said, 'Sam, get up there; I want to see if you are high enough to do the (734) shooting.' I said, 'You must take the gun.' He did, and stepped up and put the gun over his shoulder. I said, 'Put it to the shoulder just like you were going to shoot it.' He fetched the gun up and did like this (witness crouches down). He put his feet within 3 or 4 inches of the track. I said, 'Measure it and put your gun up there.' The gun looked like it might have been that distance, about 7 inches from the window.

"Q. State to the jury, after he put it on his shoulder and pointed, if you got behind and sighted to see where it sighted with reference

to where deceased was sitting. A. It was on a line, and the shot was on the line.

"The testimony of the constable giving the result of the observation of the pirsoner standing at the window and pointing his gun in the direction in which it is known that the deceased was at the time he was shot, is a physical fact or condition as to which he could testify as in the case of the comparison of shoes and footprints. Wigmore on Ev., secs. 2263, 2265."

S. v. Graham, supra, was approved in *S. v. Mallett,* 125 N.C. 725, which on writ of error was approved by the United States Supreme Court in 181 U.S. 589, which United States decision is printed in 128 N.C. 619. The above and other cases are cited with approval in *S. v. Lowry,* 170 N.C. 733, 734.

Exception on this ground was not taken of the trial, but in our discretion we have permitted it to be entered here and argued.

The prisoner's counsel also urged that when the prisoner was presented to Mrs. Sealey the same night the crime was committed, she was not so positive of his identity, but the next day a, crowd being present, she identified him fully. This was a matter for the jury and was doubtless fully argued before them by his able counsel. The fact that when presented to her the first time she was not so clear as to the identity of the prisoner certainly is not a matter of which the prisoner can complain. It was to his interest and not to his harm that this matter was brought out. What she said on both occasions was competent to elaborate or contradict her testimony of identification of the prisoner at the trial.

Zilphia Jones, the witness for the prisoner, at whose house they found the hat or cap alleged to be worn by the prisoner at the time the crime was committed, testified regarding the premises where she lived and stated that "nobody could have gotten in at the kitchen unless they had unlatched the door and pushed it open." The counsel for prisoner then proposed to ask this question: "Do you *think* you would have heard anybody there?" The court sustained the objection by the State and excluded the question. The witness had not (735) qualified as an expert, and there was no ground to except her from the general rule that witness may testify only to facts. *S. v. McLaughlin,* 126 N.C. 1080. She was not expressing an impression created on her mind as to what she saw (*S. v. McDowell,* 129 N.C. 524), but was asked simply an abstract question as to what she thought as to the extent to which sound could be heard at that place. Besides there is not set out what answer the witness would have given nor its relevancy. *S. v. Rhyne,* 109 N.C. 794. This and several other exceptions are abandoned by being omitted in the brief. Rule 34, 164 N.C.

Exception 2 is that a witness on being asked as to the character of Olivia Baucom, a witness for the prisoner, stated that he had never heard any one say anything about her character. Counsel then asked "You never heard her character discussed?" The Court excluded this question, but the witness being further questioned stated that "Her character was good."

The court also properly excluded a question by prisoner to same witness as to character of Olivia Baucom: "What did you hear your sister say about her?" Proof of character must be elicited by general questions, but not by specific statements. *S. v. Hairston,* 121 N.C. 579. Nor can a party thus cross-examine his own witness. The other exceptions down to 8 require no discussion and were doubtless taken out of "abundant caution."

Exception 8 is that the witness Sealey (the husband) testified that he had said to Captain Brown of the police, "I believe you have got the right man." This was in corroboration of his testimony and in any view was harmless. Few of the other exceptions require any discussion for the case turned upon the testimony of the woman as to whether the crime was committed, and if so as to the identity of the prisoner. These were matters eminently for the jury.

The court, in stating the contentions of the defendant's counsel, said that he did "not understand that it is contended that Mrs. Sealey has knowingly and intentionally testified falsely as to the identification, but that she is mistaken. The defendant contends that upon all the evidence Mrs. Sealey is greatly interested, and naturally so, about this unfortunate episode," etc. If the court erred in saying this, counsel should have asked him to state their contention correctly (*S. v. Fogleman,* 164 N.C. 458), nor can we consider the exception now taken to the charge as to matters in regard to which the court was not asked to charge.

The entire charge shows a careful regard for the rights of the prisoner and reiterates at its close the following which had been previously stated in effect in the course of the charge:

"In passing upon this evidence, I instruct you that you ought (736) to give full force and effect to the great principle which prevails in our criminal procedure that any and every man charged with crime is presumed to be innocent, that is, from the very moment he is put on trial and up until you render your verdict, he is presumed to be innocent. The protection with which the law thus surrounds him can not be taken away from him until the State has satisfied you, thoroughly by evidence, beyond a reasonable doubt, of all the facts necessary to be found by the jury in order to establish the guilt of the defendant. Now, gentlemen, counsel have argued to you, and argued

to you correctly, that the law is that unless you are satisfied beyond a reasonable doubt of the guilt of this defendant, that you ought to return a verdict of not guilty."

After full consideration of all the exceptions, the Court finds no error. There was strong evidence of corroborating facts.

And now, speaking for myself only, and not for the Court: In *S. v. Trull,* 169 N.C. 370, we called attention to the fact that the appeal ought to have been docketed at the preceding term, and that the consent to the extension of time by the solicitor "was an irregularity and was beyond his authority." In this case, if the statute had been complied with, this appeal would have been docketed in time to have been heard at the "end of the docket" at last term. Rule VI, 164 N.C. 432 (Anno. Ed.).

Revisal, 591, requires that the statement of the case on appeal should be "served on the solicitor within 15 days," who shall return the case with his exceptions, if any, "within 10 days," and that the appellant "shall immediately request the judge to fix the time and place for settling the case, 'who shall' forthwith notify the attorneys, which time shall be not more than 20 days from the receipt of such request, and that at that time and place the judge shall settle and sign the case and file a copy in the office of the clerk, who shall within 20 days transmit the transcript to the Supreme Court." The special term began 8 October. The sentence and appeal were entered 13 October. With reasonable diligence, the case could have been docketed at last term in time to have been heard and disposed of at the call of the end of the docket, even if the entry "by consent 30 days to serve case and 30 days to serve counter case" had been valid.

But we have repeatedly held that the time fixed by the statute cannot be extended by the judge (*Cozart v. Assurance Co.,* 142 N.C. 522, and cases cited; *Gupton v. Sledge,* 161 N.C. 213), and we intimated very plainly that it is not advisable that it should be done by counsel in civil cases and that the solicitor is without authority to extend the time any more than the judge could. *S. v. Trull, supra.*

(737) It is in the interest of justice that criminal actions especially should be disposed of promptly. Speedy disposal of cases is recognized in Magna Carta as a right of the defendant. It is no less the right of the State in all criminal proceedings. If delay is necessary for a defendant to procure a fair trial before the jury, that is a matter vested in the discretion of the trial judge for which he bears the responsibility if the delay is unnecessarily granted. But there can be no reason why after the trial there should be delay in settling and transmitting the case on appeal beyond the time allowed by law except the convenience of counsel, which cannot avail against the express and clear intent of the law.

On this occasion the prisoner, a negro, was charged and imprisoned for rape upon a responsible white woman in her little residence on the edge of Raleigh, where she was alone with her three little children. The Governor of the State was called out of his bed at midnight to face a crowd of men who were assaulting the jail in Raleigh to take the prisoner out and execute him summarily. Their motive was because they feared that by the dilatoriness of justice, if not its uncertainty, the preventive and needed protection of prompt and certain punishment against such crimes would be lost. The Governor thought such was their motive, for he pledged those men that "a special term would be at once called, the man promptly tried and if found guilty beyond a reasonable doubt by a jury of 12 men, he should be promptly executed." The Governor kept his word. A special term was at once called in the shortest time allowed by law. A judge from another district was sent here to hold the term. Grand jurors and jurors were called here at great inconvenience to themselves and the expense of the term was incurred to redeem the Governor's pledge. The writer has not investigated nor does he seek to apportion or place the blame, but it is certain that the pledge was frustrated and the object of the extra term not attained. If the law in regard to time in settling the case had been observed, it would have been docketed and disposed of before Court adjourned on 23 December. The trial began 8 October, and the appeal was taken 13 October. Two months and eleven days elapsed between those dates—which was ample time if the statute had been complied with in which to settle and send up the case on appeal.

Courts are not above public criticism. Their officials are servants and agents of the people, and like the Centurion, they are" under authority and law," and not above it. The writer, like any other citizen, has a right to notice, and as Chief Justice of this Court it is his duty to call attention to any defects or inefficiency in the administration of justice. The object is not to censure any official but, as in *Trull's* case, to prevent repetition of prejudicial delays in the courts.
The Constitution prescribes that the Supreme Court has super- (738)
visory power and control over the inferior courts, which makes this Court to a certain extent responsible if such defects as are brought to our attention are passed by unnoticed and therefore with our *quasi*-approval.

Of what avail will any promise on such occasions be hereafter when the pledge of the Governor of the State, made in the Capital City, has thus amounted to nothing except useless expense to the public and added compensation to officials for the extra term? Such offenders need never fear speedy punishment and lonely women will have no protection from the brute's fear thereof. In view of such consequences, this

matter should not pass unnoticed. There is no desire to criticize any one official, for they must adjust the responsibility among themselves, but to condemn the fact.

In *S. v. Cameron,* 166 N.C. 385-7, I called attention to the fact that the administration of justice in this State was dilatory and inefficient as regards capital offenses, with the result that in some years we had had twice as many criminals executed by lynch law as by the courts, and that we had annually according to the Attorney-General's reports twenty times as many capital cases in this State in proportion to population as in London with its heterogenous population from all quarters of the globe, and that our percentage of homicides is greater even than in Sicily, notwithstanding its "Blackhand" and "Mafia." I exonerated then, as I do now, my associates from any responsibility for thus discharging what I believed my duty. The facts I there stated are not denied. Since then throughout the country the State and American Bar Associations and many judges and law writers have felt the necessity of giving ear to the growing dissatisfaction with the courts and of discarding the technicalities and unnecessary delays which have brought them under criticism.

There has been some slight betterment in the trial of capital cases in this State by some reduction in the enormous disproportion of peremptory challenges which has always made it impossible with us to convict any man of a capital offense if possessed of influence and of means to retain influential counsel.

The defect in this case has been in the usual "senatorial courtesy" which puts the convenience of counsel and officials above duty to the public. In this case, unlike the *Trull* case, there was notice to the public, and especially to the court officials that the Governor, by calling a special term, deemed that the public interests required prompt action and that if found guilty the prisoner should be promptly executed, which of course called for prompt review on appeal of any exceptions of law taken at the trial.

(739) Nothing is more destructive of the social order than lynching; nothing that is more completely anarchy than this taking human life, not by authority of law. When the Emperor Galba was told by one of his adherents that he had slain the leader of an insurrection against him, the stern Roman asked, "Who ordered you?" The prevalence of lynching in this State has been known to all men, outside of our borders as well as within, yet there are those who think it should not be mentioned by the courts because (in their opinion) it is little short of sacrilege to admit the inefficiency of officialdom which is responsible for it.

Nothing can prevent some crime occurring, but promptness and certainty of punishment can reduce it to a minimum. As long as human

nature is what it is, whenever men see that their courts do not repress crime by promptness and certainty of punishment, or believe that the pardoning power is overexercised, they will, on occasion of sufficient importance, take the law in their own hands, to secure the protection which the courts ought to give them.

This brutal crime was committed on 19 September 1917, now more than five months ago, and the man whom the jury have found committed the crime is still unpunished. The certificate of this opinion will not go down in regular course till the first Monday in March. The Governor, according to custom, may assign 30 days before execution, which will take place, therefore, after nearly seven months delay. By the combined power of an illegal mob and the Governor a trial was had within a reasonable time, but this has had no effect on the dilatoriness of the courts. There was no haste in the trial, and this Court has found no error was committed in its conduct. But an execution delayed for seven months does not produce the deterrent effect of promptness in the punishment of the guilty.

The victim of this brutal crime was not the wife of a banker, a lawyer, or a rich man, with attendants around her to prevent the possibility of its occurrence. She, like many thousands of good women throughout the State, was left alone with her little children during her husband's absence at his work. They need the protection of the terror of a prompt and speedy execution of the law. And that should not be withheld for the convenience of counsel or by the easy indifference of officials.

As a Legislature is to be elected this year, it is a matter for their consideration whether regulations shall not be prescribed for the more prompt sending up of appeals in criminal cases, and this Court might prescribe regulations for the more immediate sending down the certificate in cases of this kind, for the protection of the women of the State, and indeed in all capital cases. So necessary is promptness as a deterrent of crime that in England an act of Parliament requires that the appeal in every criminal case must be docketed within (740) ten days after trial, and ordinarily the court renders its decision in less than 20 days and in murder cases usually in much shorter time. Even in Germany the law requires that the argument on appeal in criminal cases must be had in the higher court within a fortnight after the verdict and the opinion is always promptly delivered.

Besides the solicitor was not required to take the full time allowed him to serve his counter-case of 10 days, nor was the judge required to take 20 days to set a time to settle the case on appeal, nor was the clerk required to take 20 days in which to transmit the transcript to the Supreme Court. *These were the limits.* The clerk cannot withhold

and presumably did not hold the case back for prepayment of his costs. *S. v. Nash,* 109 N.C. 822. If the case gets up to the Supreme Court by economy of the time allowed, it would have been heard at that term. This is fully discussed in *Caldwell v. Wilson,* 121 N.C. 424. The appellant had no power to prevent its being docketed for "An appeal is deemed docketed when the transcript is received by the Clerk of this Court. It then becomes a record of the Court, not subject to control of parties or counsel." *Brafford v. Reed,* 124 N.C. 345.

During the unnecessary delay of this case, on 12 January 1918, in this county, another rape upon a white woman by a negro was committed. It is probable that if there had been prompt action in regard to this case the subsequent crime would not have been committed. If punishment does not deter from crime, why impose a capital sentence at all?

Crimes of a capital nature are always committed under some powerful influence, and the occurrence of lynch law proves that the judgment of the common sense of the people is that the terror of prompt investigation and punishment of the guilty is necessary as a deterrent. We must either accept lynchings as a permanent evil or prevent it, like other countries, by making the courts prompt and efficient in the punishment of crime.

To prevent any possible criticism attaching to my brethren, I repeat, in the language of the great Apostle to the Gentiles, that "These things I say for myself, and not by commandment."

For the Court let it be entered that after a careful review of all the exceptions of the prisoner, we find

No error.

BROWN, J., concurring: I concur in the opinion of the Court rendered by the *Chief Justice* upon the matters of law presented upon the record, and am clearly of opinion that no error was committed upon the trial in the Superior Court that justifies us in directing another trial.

(741) With entire deference for the opinion of others, I do not think that the record discloses that there has been any justifiable delay in docketing the appeal in this Court or that the learned judge of the Superior Court who presided at this trial, or the diligent and able solicitor for the State have been guilty of any negligence or dereliction of duty whatever.

As the case was tried last October, under our statute the appeal was properly taken to the succeeding term of the Supreme Court, which is the present term. By consent of counsel for the prisoner, it was advanced and argued five weeks in advance of the regular call of the Seventh District.

The solicitor could not compel the prisoner's counsel to docket the appeal until the present term, and this Court could not properly issue a writ to compel such docketing in advance of the date fixed by law.

If however, the appeal had been docketed here at last term, it could have been then heard, but there is no law compelling such advanced docketing that I am aware of.

I am further of opinion that the solicitor has the right to consent to the enlargement of time within which to serve a case on appeal. I do not understand that *Trull's* case decides to the contrary. It holds that the solicitor has no right to consent to a postponement of the docketing of an appeal in the Supreme Court beyond the time fixed by law.

Formerly the statement of the case on appeal in criminal actions was prepared by the judge (*S. v. Randall,* 88 N.C. 611), but it is now provided by statute (Revisal, sec. 3277) that "the appeal shall be perfected and the case for the Supreme Court settled as provided in civil actions."

This change in the law makes it necessary to serve the case on appeal on the solicitor personally, as "the solicitor represents the State in criminal prosecutions and the statement of cases on appeal in such cases should be submitted to him for acceptance or objection." *S. v. Cameron,* 121 N.C. 572.

The solicitor may agree to a case on appeal detrimental to the cause of the State, and the judge cannot correct it, as held in *S. v. Chaffin,* 125 N.C. 664, in which *Clark, J.,* says: "The case on appeal was agreed upon by the solicitor and the counsel for the defendant. Such being the case, there is no ground for action by the judge (*S. v. Cameron,* 121 N.C. 572; The Code, sec. 1234), nor for a *certiorari* to correct the case by the judge's notes of the evidence on file; nor to permit the judge to correct the case."

With such absolute control over the statement of the case on appeal, it would be very remarkable if the law denied to the solicitor the right to agree to an enlargement of the time when necessary (742) to properly make up such case. He has the same power as counsel in civil cases, and their right to agree to such extension of time has never been questioned. Pell's Rev., sec. 591, and cases cited.

Why then question the right of the solicitor? It is derived from the same statute.

The existence of the power is necessary to protect the interests of society and of the State, as the solicitor cannot expect an extension of time if he cannot grant it, and if the solicitor is always held to ten days within which to serve his counter-case, the case of the defendant may be served on him at the beginning of a busy term when he could not give it attention during the ten days without neglecting other duties.

Again, there has been no delay. The appeal is here as soon as it would have been if no provision of the statute had been waived, and no extension of time granted. The prisoner was sentenced to death on 13 October 1917; the papers for settlement of case on appeal reached the judge on 8 December 1917, and the case was settled on 18 December 1917, showing a period of 67 days from the time the appeal was taken until the case was settled.

Under Revisal, sec. 591, the defendant had 15 days within which to serve his case; the solicitor 10 days to serve counter-case; the defendant 15 days to send the papers to the judge; the judge 20 days within which to fix its time for settling a case. The clerk of the Superior Court is allowed 20 days within which to transmit the transcript to this Court (Revisal, 592), making a total of 80 days given by the State within which to docket case here. This would have brought the record to this Court on 2 January 1918, some 10 days after its adjournment at Fall Term, 1917.

It cannot be justly charged that public officials are derelict in their duty when their acts are well within the statute enacted for their direction.

I know from long experience on the Superior Court bench something of the exacting nature of the duties of that office and how little time judges and solicitors have to make up cases on appeal, a very difficult and tedious character of work. In this case I think the judge and the solicitor acted well within the authority conferred on them by law, and I know they acted conscientiously and with a desire to serve the best interests of the State.

They, too, have been elected by the people, to whom they are responsible, not to this Court, and our supervisory jurisdiction over other courts is restricted by the Constitution (Art. 4, sec.8) to the issuing of remedial writs for which no application has been made, and (743) does not extend to the right to condemn public officers without notice and when they have not been heard and cannot defend themselves.

That our Superior Court judges and solicitors do their full duty is shown by the records of our courts and the manner in which business is dispatched in them. There is no unreasonable delay in the trial of criminal cases in North Carolina. On the contrary, there are few, if any, States in the Union where they are more rapidly disposed of.

I am authorized to state that Justices Walker, Hoke, and Allen concur in this opinion.

Cited: Bradley v. Manufacturing Co., 177 N.C. 155; *S. v. O'Neal*, 187 N.C. 24; *S. v. Godette*, 188 N.C. 503; *S. v. Brodie*, 190 N.C. 557;

S. v. Hickey, 198 N.C. 48; *S. v McGee,* 214 N.C. 186; *S. v. Tilley,* 239 N.C. 250, 251.

STATE v. JAMES LITTLE.

(Filed 22 December, 1917.)

1. **Contempt—Courts—Powers.**

Revisal, secs. 939 *et seq.*, regulating proceedings "for contempt and as for contempt," confer on courts all the inherent powers to attach for contempt that were recognized by the common law as essential to the due and orderly exercise of their jurisdiction and functions.

2. **Same—Definition.**

The power conferred by Revisal, secs. 939 *et seq.*, on courts to punish for contempt, etc., includes all cases of disorderly conduct, breaches of the peace, noise and other disturbance near enough and designed and reasonably calculated to interrupt the proceedings of the court then engaged in the administration of the State's justice and the dispatch of business presently before it.

3. **Same—Witnesses.**

The power of a court to attach for contempt, etc., includes its protection to all officers of the court, jurors, attorneys, and others who in the line of their official duty are assisting the court in the present dispatch of its business, and to all witnesses who are in attendance under subpoena to give evidence in causes pending before it.

4. **Same—Assault on Witness—Summary Punishment.**

Where the defendant in a criminal action has assaulted the State's principal witness during the term and before trial, for the purpose of hindering or delaying the administration of justice by the court, he is in direct contempt thereof, without right of appeal, trial by or to demand that his hearing be removed to another judge for determination. The distinction between proceedings "as for contempt" pointed out.

5. **Contempt—Findings—Evidence—Appeal and Error.**

Where the judge has found sufficient facts to attach the defendant for direct contempt of court, upon imposing punishment therefor, will not be disturbed on appeal.

6. **Same—Courts—Jurisdiction—Habeas Corpus—Appeal and Error—Certiorari.**

Where a defendant punished for direct contempt contends that a legal right has been denied him, and it is made to appear that the court was without jurisdiction of the cause or power to impose the sentence, his remedy is by *habeas corpus* proceedings, taken to the Supreme Court, if necessary, by writ of *certiorari.*

STATE *v.* LITTLE.

(744) ATTACHMENT for contempt, heard before *Long, J.*, at July Criminal Term 1917 of RICHMOND.

On notices issued, the court heard the evidence submitted on affidavits; made full and pertinent findings of fact, which are spread upon the record, and thereupon adjudged defendant guilty of contempt and imposed a fine and imprisonment.

Defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

O. L. Henry and F. W. Bynum for defendant.

HOKE, J. It appears from the findings of fact which accompany the case on appeal and are a part of it that, at the criminal term aforesaid, indictments were pending against defendant for illegal traffic in spirituous liquors and that a brother of defendant, Hector Little, was also indicted for similar offenses, and that a principal witness against these defendants was one W. E. Reynolds; that on Tuesday night of the term about 9 P. M., before the trial of the cases, at a cafe in the town of Rockingham, near the court house and near the hotel where the judge was staying, the said witness was violently assaulted and severely injured by the present defendant as the witness was endeavoring to go from the cafe to his boarding house, the brother Hector and a young man named Morgan, who was driving the car of defendant, being the only persons present at the time.

In regard to the person actually guilty of the assault, the purpose and motives prompting the same and some of the circumstances incident to the enquiry, the findings of the court are as follows:

From all the evidence the court finds as a fact that the defendant Little is the person who assaulted Reynolds, who was a witness against him; and the court also finds as a fact that his object and purpose was to defeat or impair and prejudice and delay the rights and remedies of the State in the indictments against him in which Reynolds was witness against him, and the court finds, also, the fact that his acts and conduct did tend to impede and hinder and interfere with

(745) the rights and remedies of the State and caused the court to delay in the transaction of the business at this term of the court, and to impair the respect and authority for the proceedings of this court. That after respondent made the assault on Reynolds, during the term, respondent was tried in two of the cases against him, and was convicted and sentenced in one case and acquitted in one, and two others were continued. His brother, Hector Little, was tried in one case for retailing, also, and was convicted and sentenced. Reynolds was a witness against both of them.

"The court finds that the defendant has been guilty of contempt of the court and of its lawful orders, process, and proceedings, and it so adjudges respondent to be in contempt of court and adjudges that he pay a fine of $100 and that he be imprisoned in the county jail for a period of thirty days."

There was ample evidence to support such findings, and we are of opinion that the court correctly adjudged the defendant guilty of direct contempt and administered summary punishment for the offense.

It is thus far understood and has been not infrequently decided that our statute, Revisal, ch. 17, secs. 939-945, inclusive, regulating proceedings "for contempt and as for contempt," purports to confer on the courts all the inherent powers to attach for contempt that were recognized by the common law as essential to the due and orderly exercise of their jurisdiction and functions. *In re Brown*, 168 N.C. 417; *Ex parte McCown*, 139 N.C. 95; *Ex parte Schenck*, 65 N.C. 366.

And in *McCown's case*, supra, it is held that "The provision of section 939 of said chapter, subsecs. 1 and 3; Code of 1883, sec. 648, were broad enough to extend to and include, and did include, all cases of disorderly conduct, breaches of the peace, noise, or other disturbance near enough and designed and reasonably calculated to interrupt the proceedings of a court then engaged in the administration of the State's justice and the dispatch of business presently before it."

McCown's case was one where a citizen, angered because he considered a sentence just imposed upon a prisoner convicted of manslaughter was too light, for that reason made an assault on the presiding judge at his hotel during a recess of the court and before adjournment. The judgment, imposing summary punishment for contempt, was upheld, not so much because the assault was made on the person of the judge, but because, on the facts presented, it was a breach of the peace designed and calculated to impede, embarrass, and obstruct the present administration of the State's justice in causes then pending before the court and a perusal of that well-considered case and many of the authorities cited will show that the position extends its protection to all officers of the court, jurors, attorneys, and others who in the line of official duty are assisting the court in the present dispatch of its business and to all witnesses who are in attendance under subpoenas to give evidence in causes pending before it. *S. v.* (746) *Moore*, 146 N.C. 653; *In re Gorham*, 129 N.C. 481; *In re Deaton*, 105 N.C. 59; *S. v. Mott*, 49 N.C. 449; *Ex parte Summers*, 27 N.C. 149; *Commonwealth v.. Dandridge*, 2 Va. Cases, 408; *Cartwright's* case, 114 Mass. 230; *S. v. Steube*, 3 Ohio C.C. 383; *In re Healy*, 53 Vt. 694; *People v. Wilson*, 64 Ill. 195; *Ex parte McLeod*, 120 Fed. 130; *U. S. v. Anonymous*, 21 Fed. 761; *U. S. v. Patterson*, 26 Fed. 509; *Ex parte*

King, 7 Vesey 315; *Ex parte Barrow,* 8 Vesey 535; *Williams v. Johns.,* 2 Dickens 477.

Thus in *U. S. v. Patterson,* case of an assault on an attorney, *Hammond, J.,* said: "The principle protects parties, jurors, witnesses, the officers of the court and all engaged in and about the business of the court, even from the service of civil process while in attendance, etc."

And the present *Chief Justice,* in his concurring opinion in *Gorham's* case, said: "The Constitution, Art. 4, sec. 12, provides: 'The General Assembly shall have no power to deprive the Judicial Department of any power of jurisdiction which rightfully pertains to it as a coordinate department of the Government.' If the General Assembly had expressly enacted that such acts as are here found to have been committed by the respondents, could not be punished by the courts, it would have been a nullity as an attempt to deprive the judiciary of a power which has belonged to it from the remotest antiquity, and which has never been denied to any other court, and which is an inherent power necessary to the very existence of any authority in the courts. If the moment a juror passes out of the court room, hired lobbyists in the pay of powerful and wealthy suitors can take them in charge, suborn them, bribe them, sleep with them, treat them, and snap their fingers with importunity at the court, then indeed the judiciary is worse than 'exhausted.' It will not avail that the parties can be tried for 'embracery' at the next term, if all the judge can do is to make a mistrial. The injuries done and the contempt of the court is most fully shown by preventing a trial at this term. The contempt could not be more direct or palpable if a band of armed men had followed the jury to the court house with threats of violence if their verdict was unfavorable, and had stood just outside the door to execute punishment if disappointed. It is equally a contempt of court whether a man meets a juror just outside the court room with a bribe or a bludgeon in his hand. If the court cannot prevent either because not done within the court room, the administration of justice is no longer free. The independence of the judiciary no longer exists."

The fact that several of the North Carolina authorities were in proceedings "as for contempt," under some special provisions of the statute on that subject, does not impair or in way interfere with the pow-

(747) ers of the court to deal summarily in cases coming also within the sections appertaining to direct contempt. And the same considerations which justify the imposition of summary punishment afford the basis for our devisions to the effect that in cases of this character breaches of the peace, noise, or other disturbance directly tending to interrupt the proceedings of the court, neither an appeal nor trial by jury nor, as a matter of right, a removal of the hearing be-

fore another judge is permissible. It would present a humiliating exhibit of helplessness if a court, holding a term and engaged in the present dispensation of the State's justice, could have its attorneys assaulted, its jurors bribed, or its subpoenaed witnesses intimidated or beaten and find its orders made in the effort to protect them and to enforce respect and obedience to its authority, stayed till they could be reviewed on appeal. The statute, Revisal, sec. 939, recognizes that no appeal shall be allowed in such cases and our decisions are to like purport. *In re Brown, supra; Ex parte McCown; Ex parte Deaton.*

No more should there be a trial by jury or a removal before another judge as a matter of right. Speaking to this question in *Brown's* case, the Court said: "While it is understood with us that in mere matters of procedure and in courts below the Supreme Court which comes under the influence of a special constitutional provision, the question presented may be to some extent regulated by legislation, it is also held that both as to direct and constructive contempts the trial is properly had by the court without the intervention of the jury, and usually by the court against which the offense has been committed. . . . The power in question is conferred to enable a court to command respect and obedience, and it would go far to weaken and, in case of direct contempt, would well-nigh destroy it if the occasion of its present exercise would have to be referred for decision to some other tribunal or agency." And it is in no sense the denial of a constitutional right that a jury trial is refused in such cases.

In *Brown's* case the Court said further: "At common law, the power of courts of record of general jurisdiction to punish for contempt, and in certain instances by summary procedure, has existed time out of mind, as said by *Judge Blackstone,* 'as far as the annals of the law extend,' " and by *C. J. Wilmot,* in *King v. Alman,* 8 State Trials, 53, quoted in *McCown's* case, *supra*: "The power which the courts in Westminister Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not to fine and imprison for a contempt of the court acted in the face of it (1 Vent. 1), and the issuing of attachments by the Supreme Courts of Justice in Westminister Hall for contempts out of court stands upon the same immemorial usage as support the whole fabric of the common law;
it is as much the *lex terrae* and within the exception of Magna (748)
Carta as the issuing any other legal process whatever. I have examined very carefully to see if I could find out any vestiges or traces of its introduction, but can find none; it is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it, and therefore it cannot be said to invade the

common law, but as act in alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society."

Well might the Massachusetts Court, therefore, in *Cartwright's* case, *supra,* say that "summary procedure in their cases is in accord with the law of the land," within the meaning of our declaration of rights, and when a person, as in this instance, is guilty of "breach of the peace, noise or other disturbance, directly tending to interrupt the proceedings of a court holding a term for the administration of the law, they may be summarily punished instantly and without further investigation if it occurs in the presence and view of the court, and on notice to show cause and proper proof had if further evidence is required, and in neither case is an appeal or trial by jury allowed." *Ex Parte Terry,* 128 U.S. 289.

If a defendant, in such case, has reason to believe that a legal right has been denied and it is made to appear that the court was without "jurisdiction of the cause and was manifestly without power to impose the sentence complained of, the same may be inquired into on *habeas corpus* proceedings, removed to this Court if necessary by writ of *certiorari.*" *In re Holly,* 154 N.C. 163.

The defendant having been adjudged guilty of direct contempt, and by reason of unlawful conduct tending to "interrupt and hinder the proceedings of the court and to impair the respect due to its authority," no appeal lies from the sentence imposed upon him, and this will be certified that the same may be duly enforced by process issuing from Superior Court.

Appeal dismissed.

Cited: In re Fountain, 182 N.C. 53, 54; *S. v. Hooker,* 183 N.C. 767; *Luther v. Luther,* 234 N.C. 432.

STATE v. AVERY BEAN.

(Filed 22 December, 1917.)

1. Intoxicating Liquors—Possession—Statutes—Prima Facie Case—Presumptions—Instructions—Burden of Proof.

Upon a trial for violating the prohibition laws of the State, when evidence is conflicting as to whether the defendant had in his possession at any one time a gallon or more of spirituous liquor, which is made *prima facie* evidence of its violation by chapter 44, Laws of 1913, the presump-

tion of innocence remains with the defendant throughout, with the burden on the State to show the fact of the possession or of the forbidden purpose; and a charge by the court that the defendant must prove to the satisfaction of the jury that he did not have it for sale, if he had it in his possession, is reversible error.

2. Instructions — Conflicting Charge — Intoxicating Liquors — Burden of Proof—Appeal and Error.

A charge of the court to the jury erroneously requiring the defendant to show that his possession of a gallon or more of spirituous liquor was not for forbidden purposes is not cured by an instruction elsewhere correctly given, and the conflicting instructions constitutes reversible error.

CLARK, C. J., dissenting.

Indictment for unlawful retailing spirituous liquors, tried (749) before *Justice, J.*, at August Term 1917 of CALDWELL.

There were counts in the bill for having in possession certain spirituous and vinous liquors in quantities greater than three gallons for the purposes of sale, contrary to law, and for receiving liquors, etc., in quantities greater than one quart, etc.

There was verdict of guilty, and defendant, having duly excepted, appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

W. C. Newland and M. N. Harshaw for defendant.

HOKE, J. Chapter 44, Laws 1913, provides that it shall be unlawful for any person other than druggists or medical depositories, duly licensed, to have in their possession for the purposes of sale spirituous, vinous or malt liquors, and makes the possession of one gallon of spirituous liquors at any one time *prima facie* evidence of a violation of this section of the statute.

On the record, there were facts in evidence permitting the inference that defendant had in possession at one time more than one gallon of spirituous liquors, and in reference thereto the court charged the jury as follows: "If the defendant did not have it in his possession, that ends it. He was not guilty; but if he had it in his possession when the officer went up there, then the law says that constitutes a prima facie case, that he had it in his possession for sale, and it devolves upon the defendant to prove to the satisfaction of the jury that he did not have it for sale."

To that part of the charge which says "It devolves upon the defendant to prove to the satisfaction of the jury that he did not have it for sale," the defendant excepted.

We think the exception is well taken. The power of the General Assembly to enact legislation of this character is fully established with us. *S. v. Barrett,* 138 N.C. 630.

(750) In construing this and other statutes of like kind, however, our Court has often held that while the guilty purpose may be inferred from the fact of possession established, and the court should instruct the jury to consider the evidence in view of the artificial weight given to such possession, the presumption of innocence is also present, and if on the entire testimony there is reasonable doubt of the defendant's guilt, either as to fact of the possession or of the forbidden purpose, the defendant should be acquitted. *S. v. Wilbourne,* 87 N.C. 529; *S. v. Woodley,* 47 N.C. 276.

His Honor in the closing portion of his charge gave recognition to this position, but not sufficiently so to correct the error indicated, which appears in the body of the charge more than once, and presents a case on conflict of instructions which entitles defendant to a new trial.

In a case at the present term *(Vanderbilt v. Chapman), Associate Justice Allen* quotes with approval from *Horton v. R. R.,* 162 N.C. 455, as follows: "In any view of the charge of the court, there are conflicting instructions on material points and, under such circumstances, this Court should direct another trial. *Williams v. Haid,* 118 N.C. 481."

The present case is further controlled by our recent decision of *S. v. Wilkerson,* 164 N.C. 432-36-38. And under the principles of that decision and the others cited, the defendant must be awarded a new trial.

While we fully recognize that our prohibition policy as expressed in the valid statutes of the State should be enforced, we are also well assured that the rights and liberties of an independent and well-ordered citizenship are of supremest importance to our social and political life, and that the safeguards established for their preservation and protection should at all times and under all circumstances be jealously maintained.

New trial.

CLARK, C.J., dissenting: It is with the greatest reluctance always that I dissent from the views reached by my brethren. In the matter of the prohibition of the sale of intoxicating liquors and the measures necessary for its enforcement the will of the people of this State has been expressed by a referendum and by a succession of statutes, each more and more searching in its nature as the necessity to procure efficient enforcemnt appeared. The United States Congress has also expressed its determination to aid in the enforcement of such laws, and since the Wilson Act was construed into innocuous desuetude by a decision of the Federal Supreme Court more stringent acts have been

passed, including the recent Reed-Smoot or "Bone-Dry" law, and still more lately by the submission to the States of a constitutional amendment.

The basis of our entire government, State and Federal, is that (751) it expresses the will of the people; and when that has been made plain by statute after statute intended to make effective the enforcement of the laws against the sale of intoxicating liquors, the courts, who are merely the agents of the people as fully as legislatures or Congress or the State and Federal executives, should construe these statutes to execute the evident intent of the law-making body "to repress the evil and advance the remedy." The execution of such law should be effective, disregarding as far as possible all evasions set up by the ingenuity of counsel who, of course, represent their clients, and not the will, however clearly expressed, of the Legislature.

Laws 1913, ch. 44, provides that it shall be unlawful for any person other than druggist or medical depositories, duly licensed, to have in their possession for the purpose of sale any spirituous, vinous or malt liquors, and makes the possession of more than one gallon of spirituous liquors at any one time *prima facie* evidence of the violation of that statute.

Judge Justice charged on this occasion as follows: "If he (the defendant) did not have it (the liquor) in his possession, that ends it. He was not guilty; but if he had it in his possession when the officers went up there, then the law says that constitutes a *prima facie* case that he had it in his possession for sale, and it devolves upon the defendant to prove to the satisfaction of the jury that he did not have it for sale. You have heard the testimony of the defendant bearing upon it and counsel contending upon the question of having it for sale, so that, in the first place, if you find that he had this liquor in his possession, then that would constitute *prima facie* evidence of guilt, that would be prima facie to call for testimony from the defendant, and the question upon all the testimony with that presumption of the law applying is, Has the State shown you *beyond a reasonable doubt* that he had it for sale? If it has, it is your duty to convict. However, if the State has not so satisfied you, it is your duty to return a verdict of not guilty."

It would seem that this is a substantial compliance with the formula generally used. This was the summing up and conclusion of the charge and could not be misunderstood by the jury.

It has been said by *Mr. Justice Walker* at this term in *S. v. Orr*, "The charge must always be viewed as a whole and considered in the relation of each part to every other part." This has been cited and ap-

proved by *Brown, J.*, in *Hargis v. Power Co., ante,* 31. Besides, this wholesome doctrine has been announced in many other cases.

The expression "beyond a reasonable doubt" is not a *fetish* that is superior to the power of legislation to change it, which it has
(752) done in very many instances by making the proof beyond a reasonable doubt or admission of a certain state of facts prima facie evidence of guilt, thus throwing upon the defendant the burden of satisfying the jury that such prima facie evidence was not true, and on failure of the defendant to do this the jury, under the statute, should bring in a verdict of guilty.

From time immemorial it has been held that when willful killing with a deadly weapon is shown or admitted, the law presumes malice, and the defendant is guilty of murder unless matters in defense of mitigation are proven to the satisfaction of the jury. That doctrine is what the Legislature applied in this case to the offense of retailing liquor contrary to law, and it cannot be contended even that it is *unconstitutional* for the Legislature so to enact. Similar statutes have been passed as to many other offenses because in the opinion of the Legislature the efficient administration of justice required this to be done, and have always been held valid.

In a very able opinion in *S. v. Barrett,* 138 N.C. 630, which has been cited and approved in many cases cited in the Anno. Ed., it was held that Laws 1910, ch. 434, which made "the possession of liquor in a quantity more than one quart *prima facie* evidence of having it for sale" was valid because "the Legislature has the power to change the rules of evidence and declare that certain facts or conditions, when shown, shall constitute *prima facie* evidence of guilt."

Connor, J., in that case cited many authorities in this State and elsewhere to support his conclusion. This, however, was hardly necessary, for the rules of evidence are subject to be changed by the Legislature in whatever manner it deems necessary for the suppression of crime, and such rules are more necessary to be rigorous as to some offenses than as to others, and of this discrimination the Legislature is the sole judge.

S. v. Barrett has been cited and approved since in many cases, among them by *Allen, J.*, in *Drainage Commissioners v. Mitchell,* 170 N.C. 325, and by *Walker, J.*, in *S. v. Randall, ibid.*, 757. In *Drainage Commissioners v. Mitchell,* just cited, *Allen, J.*, cites sundry crimes as to which the proof or admission of a certain state of facts "shall constitute prima facie evidence of guilt," the following: "Revisal, 3708, which makes the possession of a deadly weapon, named in the statute, about one's person, prima facie evidence of concealment; the statute making the possession of more than one gallon of intoxicating liquors

prima facie evidence of having liquor for sale," and states that there are many other statutes, both in criminal and civil matters, which apply the same rule.

The same legislation was upheld in an opinion by *Walker, J.*, in *S. v. Randall*, 170 N.C. 757, upholding the validity of the "Search and Seizure Act," which made the possession of more than one (753) gallon of spirituous liquor *prima facie* evidence of having it for sale.

In *Fortune v. Hunt*, 149 N.C. 358, the Court held that when the law raises a presumption from a fact shown or admitted the burden to show the contrary rests upon the other side. To the same effect *Smithwick v. Moore*, 145 N.C. 110. In *Benedict v. Jones*, 129 N.C. 470, the Court went so far as to hold that the presumption that a certificate of probate was correct could be overcome only by "clear, strong, and convincing evidence." To the same effect, *Lumber Co. v. Leonard*, 145 N.C. 341, cited and approved by *Mr. Justice Hoke* in *Odum v. Clark*, 146 N.C. 550, and also in *Glenn v. Glenn*, 169 N.C. 730.

In this case, the jury found the defendant was in possession of the liquor contrary to law, beyond a reasnable doubt, for the judge charged them that if they did not so find, the defendant was not guilty. He also charged them, in the terms of the statute, that if they found this fact then it called for testimony from the defendant that he did not have it for sale (which was a matter resting peculiarly within his knowledge) and then added: "The question upon all the testimony with that presumption of the law applying is, Has the State shown you beyond a reasonable doubt that he had it for sale? If it has, it is your duty to convict. However, if the State has not so satisfied you, it is your duty to return a verdict of not guilty."

There was ample evidence to support the finding of the jury that the defendant had the liquor in his possession, and that beyond a reasonable doubt he had it for sale. Indeed a perusal of the evidence will show that the jury could not fairly have come to any other conclusion unless they intended "To distinguish and divide a hair betwixt south and southwest side."

There is more or less a disposition in some localities to evade the strict execution of the expression of the public will in the suppression of the illicit sale of intoxicating liquors, and the Legislature therefore has from time to time adopted more stringent measures to make the execution of the law effective, and one of these measures is that before us, making the possession of such liquors *prima facie* evidence of an intent to sell. It is not for us to judge of the wisdom or necessity of such enactment, but to take the law as it is written by those empowered to make the law.

The primary object of the criminal law is not to secure liberty or privileges, but to take them away from those who have shown a contempt of the law by violating it. The statute provides that when the jury find the defendant is in possession of more than the permitted quantity (which of course must be found beyond a reasonable doubt), it is *prima facie* proof of having it with intent to sell. If, as the (754) court construes it, the jury must further find beyond a reasonable doubt that the defendant had the intent to sell, this is an express contradiction of the statute and the Legislature passed it without effecting anything. The intention of the law-makers was plain that the possession of the forbidden article should be *prima facie evidence* of the intent, and that the intent did not need to be proven, but it was incumbent upon the defendant to negative the prima facie case. If this was not the purpose of the statute, why was it enacted? The construction placed upon it by the Court leaves the matter exactly as it was before the statute was passed.

Cited: S. v. Baldwin, 178 N.C. 697; *S. v. Helms,* 181 N.C. 569; *S. v. Hammond,* 188 N.C. 607; *S. v. Bryant,* 245 N.C. 647.

STATE v. JOHN R. HERRON.

(Filed 22 December, 1917.)

1. Bigamy — Criminal Law — Defense — Divorce—Judgments—Constitutional Law—Residence—Fraud.

Where a marriage has been contracted in this State and a party thereto who has married in another State, but resides and cohabits here, and thereafter is indicted under ch. 26, Laws of 1913, amending Revisal, sec. 3361, and offers in defense a divorce granted in the other jurisdiction, it is not in contravention of the "full faith and credit" clause of the Federal Constitution, and may be shown in the courts of our State that the residence required by the laws of such other State was not acquired in good faith, but in fraud, and that the decree therein was therefore void.

2. Bigamy—Criminal Law—Defense—Divorce—Evidence—Trials—Questions for Jury.

Proof of a divorce granted in another State, upon a trial for bigamy, in our own courts is only evidence which should be submitted to the jury under proper instructions.

3. Bigamy — Criminal Law—Defense—Divorce—Residence—Instructions —Burden of Proof.

Where a decree of divorce in another State is solely relied on as a defense on a trial for bigamy which is attacked by the State for insufficient

residence in such other State, with supporting evidence, the defendant must satisfy the jury of the *bona fide* of his residence for the required time, but not beyond a reasonable doubt.

4. Marriage—Divorce—Residence.

Where the laws of another State require that a party seeking a divorce must show a residence of twelve months preceeding the commencement of the suit, he may not obtain a *bona fide* domicile there by remaining a few days or weeks while spending practically all of his time in this State.

5. Appeal and Error.

Exception taken to three and half pages of the record of the judge's charge is a "broadside attack" and will not be considered on appeal.

ALLEN, J., concurring.

APPEAL by defendant from *Lane, J.*, at July Term, 1917, of (755) BUNCOMBE.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

J. W. Haynes and Mark W. Brown for defendant.

Clark, C. J. The defendant was convicted for the violation of the following paragraph which was inserted as an amendment in Revisal, 3361, by chapter 26, Laws 1913: "If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and punishable as in cases of bigamy."

On the trial the defendant admitted that he was first married to Lizzie V. Hunsucker in this State, who is still living, and that he afterwards obtained a divorce in Georgia and was married to Stella Taylor. The court ruled that the admission in regard to the divorce was a matter of defense to be proven by the defendant. He then put in evidence the transcript of a record from the Superior Court of Georgia purporting to be the record of the divorce proceedings of John R. Herron v. Lizzie V. Herron, and also certain sections of the laws of Georgia in regard to divorce, and rested.

The State offered evidence that the defendant had never been a resident of Georgia, but had maintained his residence in this State; that he had married said Stella in Georgia and afterwards removed to this State, and they had lived as man and wife in Asheville. The defendant then offered depositions that he was a resident of Georgia for twelve months preceding the beginning of divorce proceedings, as required by the laws of that State.

Exceptions 1, 2, and 3 raise the question whether a decree of divorce can be attacked in a criminal action for bigamy in a State other than that in which the divorce was secured. In *Haddock v. Haddock,* 201 U.S. 882, after an exhaustive review of the law in the several States as to the faith and credit to be given to a decree of divorce in another State, *Chief Justice White* said: "The mere domicile within the State of one party to the marriage does not give the courts of that State jurisdiction to render a decree of divorce enforcible in all the States by virtue of the full faith and credit clause of the Federal Constitution against a nonresident who did not appear and was only constructively served with notice of the pendency of the action."

Chief Justice White, in classifying the States in respect to the degree of credit which they accord to decrees of divorce in other States,
(756) said that he would classify North Carolina among the States "which decline, even upon principles of comity, to recognize and enforce as to their own citizens within their own borders of divorce rendered in other States when the court rendering the same had jurisdiction over only one of the parties," but for a doubt derived from a suggestion in *Bidwell v. Bidwell,* 139 N.C. 402. An examination of that case does not show that North Carolina should be taken out of the class of States which decline to recognize the validity of a divorce rendered, in a court which had jurisdiction over only one of the parties. In that case the decree was rendered in South Dakota where both parties appeared personally and by counsel.

In the *Bidwell case* our Court said: "Where neither party has a domicile in the State of the forum, such court having no jurisdiction of the subject-matter of the controversy, a decree of divorce is *void* though both parties may have appeared and voluntarily submitted themselves to the jurisdiction of the court."

The suggestion referred to by *Chief Justice White* so having created a doubt in his mind is the following paragraph in *Bidwell v. Bidwell:* "The better doctrine, however, now seems to be that where the domicile of the defendant *has been acquired in good faith,* and not in fraud or violation of some law of a former domicile, a divorce of this kind should be recognized as binding everywhere, certainly within the jurisdiction of the United States, or any one of them."

But that suggestion does not conflict with the contention of the State in this case that the domicile in Georgia set up by the defendant was not a *bona fide* domicile, but was obtained by fraud, and not acquired in good faith as the defendant's wife was only constructively served with process by publication. In the *Bidwell case* it is laid down that the

domicile must have been acquired *"in good, faith and not in fraud or violation of some law of a former domicile."*

It necessarily follows, therefore, that when the defendant set up the defense of the divorce in Georgia, the State could allege and prove bad faith and fraud of the defendant in attempting to acquire a domicile in Georgia. In *Andrews v. Andrews,* 188 U.S. 14, it is said that a State may hold invalid "A decree of divorce procured by its own citizens, who while retaining their domicile in the prohibiting State have gone into another State to procure a divorce in fraud of the law of the domicile."

The defendant stresses the decision of *S. v. Schlacter,* 61 N.C. 520, which is not in point, for in that case the marriage was in New York, and in that State the divorce was obtained, and the second marriage was also in that State—that is, "the marriage, the divorce, and the second marriage were all effected in the same State and in conformity with the laws of that State," as stated in *S. v. Schlacter, supra.*

In this case the first marriage took place in this State. The at- (757)
tempted divorce and the second marriage occurred in the State of Georgia, and the parties thereafter lived together in this State in violation of the amendment to Revisal, 3361, above set out, so that the validity of the defense depends upon the *bona fide* of the alleged domicile in Georgia.

In *Harris v. Harris,* 115 N.C. 587, it is held: "A decree of divorce obtained by a wife, resident in another State, without personal service of summons upon the husband is a nullity in this State." To same effect in *Bell v. Bell,* 181 U.S. 175, which held that "The Court in Pennsylvania had no jurisdiction of the husband's suit for divorce, because neither party had a domicile in Pennsylvania, and the decree of divorce was entitled to no faith and credit in New York or in any other State." That decision is based upon the evidence that the domicile of the husband in Pennsylvania was not bona fide and could not be inquired into a subsequent action.

In *Streitwolf v. Streitwolf,* 181 U.S. 179, it is said: "A judgment of divorce rendered in another State may be collaterally attacked by showing that the court was without jurisdiction either of the subject-matter of the suit or of the person of the defendant. Thus the validity of the decree may be overcome by proof that the parties were not domiciled within the territorial jurisdiction of the foreign court."

In *Haddock v. Haddock,* 201 U.S. 573, it is said: "It is elementary that where the full faith and credit clause of the Constitution is invoked to compel the enforcement in one State of a decree rendered in another, the question of the jurisdiction of the court by which the de-

cree was rendered is open to inquiry. And if there was no jurisdiction either of the subject-matter or of the person of the defendant, the courts of another State are not required by virtue of the full faith and credit clause of the Constitution to enforce such decree."

The Court has held in *Arrington v. Arrington,* 127 N.C. 197: "In all cases where the defendant is not served with legal notice, and not present in person or by attorney, the original judgment in another State is a nullity."

And in *Miller v. Leach,* 95 N.C. 229: "By virtue of the Constitution of the United States and acts of Congress in pursuance thereof, the judgments of other States are put upon the same footing as domestic judgments. They are conclusive of all questions involved in them, except fraud in their procurement, and whether the parties were properly brought before the court."

14 Cyc., 816 states: "If a foreign divorce is void because the court was without jurisdiction of the subject-matter or of parties, the decree is given no effect whatever in the courts of another State," and cites to sustain the proposition *Thompson v. State,* 28 Ala., 12, which (758) held that a void divorce obtained in another State was no defense to a prosecution for subsequent adultery, and *Com. v. Bolich,* 18 Pa. Co. Ct., 401, which held that a foreign divorce is no defense to a prosecution for desertion.

When a divorce is set up as the sole defense to an indictment, as in this case, the invalidity of such defense is not a collateral matter, but a legitimate reply by the State directly impeaching the defense set up.

"The courts of one State cannot determine the status of the citizens of another State. To give validity to a decree of divorce therefore at least one of the parties must be a resident of the State of the forum. Otherwise the courts of that State have no jurisdiction, and the decree will not be given extra-territorial effect." 14 Cyc., 816.

In *Thompson v. Whitman,* 85 U.S. 457, it is held that the constitutional provision "does not prevent inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered. The record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction, and if it be shown that such facts did not exist, the record will be a nullity notwithstanding it may recite that they did exist."

In this case the judgment does not so recite, and while the petition does state that the petitioner (the defendant herein) had been a citizen of Georgia for twelve months, it is not even verified by his oath. The jury find "that sufficient proof has been submitted to our consideration to authorize a total divorce," but this may have been erroneous con-

clusion of law or an erroneous finding of fact by the jury. Certainly it is not an estopped upon the State in this proceeding to prove the invalidity of the decree by showing, as the jury in this case have found, that in fact the defendant in the divorce was not a bona fide citizen of Georgia, and therefore the divorce now set up is invalid as a defense.

Indeed, the defendant in his brief frankly says: "The Supreme Court of the United States has held that the full faith and credit clause does not apply to actions for divorce, and that the States alone have the right to determine what effect shall be given to the decrees of other States in this class of cases. *Atherton v. Atherton,* 181 U.S. 170; *Haddock v. Haddock,* 201 U.S. 604."

As to exceptions 4, 9, 11, and 13, the charge was proper, as otherwise a decree of divorce could have been alleged which was entirely fraudulent, and the jury, though knowing this, would have been compelled to accept it. The mere offering of a decree of divorce does not prove it was valid. The court properly submitted this to the jury under the instructions given.

It was not error for the court to charge that the defendant must prove "to the satisfaction of the jury, but not beyond a reasonable doubt," that he obtained a divorce after residence for the statutory period of twelve months in Georgia. The defendant espe- (759) cially stresses the concluding paragraph of the charge as follows: "If a reasonable doubt remains in your mind as to the guilt of the defendant, or he has satisfied you in other words that he had obtained a *bona fide* divorce after he had been a bona fide resident of that State for twelve months, why then you will return a verdict of not guilty."

The fact of the former marriage and of the cohabitation in this State under the second marriage both being admitted, the defendant was guilty unless he showed to the satisfaction of the jury that he had a valid divorce, as alleged. The court told the jury that "the burden is upon the defendant to prove to the satisfaction of the jury, not beyond a reasonable doubt, but to the satisfaction of the jury, that he obtained such divorce while a resident of the State of Georgia for twelve months before bringing the suit there, provided the jury find that was the law of the State of Georgia at the time," and added further, at the conclusion, "if a reasonable doubt remains in your minds as to the guilt of the defendant," to "return a verdict of not guilty."

The first marriage and the second cohabitation with another woman during the lifetime of the first being admitted, the only way to raise a reasonable doubt in the minds of the jury is, as the court charged, for the defendant to prove "to the satisfaction of the jury, but not beyond a reasonable doubt," that the defendant had obtained a valid divorce—

that is, he must satisfy the jury of such fact—otherwise he was guilty beyond a reasonable doubt.

Exceptions 6, 7, 8, and 12, in regard to domicile, cannot be sustained. The defendant could not leave this State, go to Georgia, remaining there a few days or weeks at a time, but spending practically all of his time in this State, and thereby obtain a *bona fide* domicile in Georgia.

Exception 8 is to 3½ pages of the printed charge relating to more than twenty separate and distinct subjects. This is a "broadside attack" upon the charge, and cannot be considered. *McKinnon v. Morrison*, 104 N.C. 354, and cases cited thereto in Anno. Ed.; *S. v. Cameron*, 166 N.C. 379; *S. v. Wade*, 169 N.C. 306.

The defendant further cites *S. v. Cutshall*, 110 N.C. 538, and *S. v. Ray*, 151 N.C. 710, as authority, but it was to change the statute in that respect so as to embrace cases of this kind that the amendment was made to Revisal, 3361, by ch. 26, Laws 1913. The undisputed evidence shows that the defendant and Stella Taylor, after the second marriage, did cohabit and live together as man and wife, which was in violation of the statute unless it was shown to the satisfaction of the jury, but not beyond a reasonable doubt, that the divorce set
(760) up as a defense was valid.

This case was here before upon appeal from the conviction of the defendant, *S. v. Herron*, 173 N.C. 801, and for a second time the defendant has been found guilty by the jury.

No error.

ALLEN, J., concurring: In divorce proceedings, the marriage, relation is the thing in litigation, the *res*, and each State has exclusive jurisdiction over the marriage status of its citizens.

If the parties are not residents of the State where the decree is entered, the court has no jurisdiction of the subject-matter, and the decree is void notwithstanding the due service of process, and the question of jurisdiction may be inquired into in the courts of the State of the residence without doing violence to the full faith and credit clause of the Constitution. The question is discussed and the authorities collected in 9 R.C.L. 508, *et seq.*, and in the note to *Haddock v. Haddock* (201 U.S. 562), 5 Anno. Cases, 1.

A doubt is expressed in *S. v. Schlacter*, 61 N.C. 520, as to whether this inquiry may be made in a criminal prosecution, but the authorities in England and in this country hold that it can be done. *Rex v. Lolley*, R. & R.C.C., 237; *Rex v. Brinkley*, 4 Ont. L.R., 434; *Hood v. State*, 56 Ind., 263; *People v. Dawell*, 25 Mich., 247; *People v. Baker*, 76 N.Y. 78; *VanFossen v. State*, 37 Ohio St., 317; *S. v. Westmoreland*, 76 S.C. 145.

If the record in the divorce proceeding shows that the question of residence was passed on, or it is recited in the decree, the presumption is in favor of jurisdiction, and the burden is on the party attacking the decree to prove that the plaintiff was not a resident when it was granted; but if there is no recital and no finding and the record shows that the question of residence was not considered, the burden is on him who relies on the decree to prove residence, as otherwise it would appear that the court had jurisdiction.

The record relied on by the defendant in this prosecution not only does not show that the question of residence was passed on, but the clear inference is that it was not considered. It is stated in the petition, which is not verified, that the petitioner has been a resident of Georgia for twelve months and the question of residence is not again referred to in the proceeding. No issue as to residence was submitted to the jury, nor is there any recital or adjudication in the decree, and on the contrary the language of the verdict and of the decree show that the cause for divorce was alone considered. I therefore think, in this condition of the record, and when it was admitted that the defendant married the first time in this State and had been a resident here, that there was no error in imposing the burden on the defendant to prove residence in Georgia.

Again, while there is a conflict of authority (see note 5, Anno. (761) Cases, 28 and 29), North Carolina is in line with the court holding that a decree for divorce rendered in another State on substituted process is invalid. *Irby v. Wilson,* 21 N.C. 568; *Harris v. Harris,* 115 N.C. 588.

The Court says in the last case: "The decree of divorce obtained by the wife, without personal service upon him is a nullity in this State. *Irby v. Wilson,* 21 N.C. 568."

The decision in *Bidwell v. Bidwell,* 139 N.C. 402, is not in conflict with the earlier decisions. In the *Bidwell case* the wife brought her action for support and maintenance, and the defendant, her husband, set up as a defense a decree of absolute divorce granted by the courts of North Dakota, and also a decree of the courts of Massachusetts, in an action instituted by the wife against the husband for divorce, in which the North Dakota decree was adjudged to be valid. The wife appeared and answered in the North Dakota action and was awarded $10,000 for the care and custody of her minor child, and in the Massachusetts action both parties appeared, so that the question of the effect of a decree rendered upon substituted process could not be raised as to either action as the husband and wife appeared in both.

The expression in the opinion relied on by the defendant is based on two decisions of the Supreme Court of the United States, which were

either misunderstood or they have been since modified by the case of *Haddock v. Haddock.*

Cited: S. v. Bryant, 178 N.C. 708; *Pridgen v. Pridgen,* 203 N.C. 541; *Tyson v. Tyson,* 219 N.C. 619; *S. v. Williams,* 220 N.C. 460, 463; *S. v. Williams,* 224 N.C. 187; *S. v. Beatty,* 226 N.C. 765; *S. v. Jones,* 227 N.C. 96; *S. v. Atkins,* 242 N.C. 296; *Carpenter v. Carpenter,* 244 N.C. 307.

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STATE v. PETER McIVER.

(Filed 22 December, 1917.)

1. Criminal Law—Manslaughter—Automobiles—Speed Limits—Trials—Questions for Jury—Negligence.

The driver of an automobile truck while greatly exceeding the speed ordinance of a town and of the general statute, and without signal or warning, ran into a boy on his bicycle at a cross street, and death resulted to the boy. Upon trial for manslaughter, *held,* the ordinance and statute are intended to protect the life and limb of the citizen, and the defendant should reasonably have anticipated meeting some one at the crossing, and the evidence of his reckless violation of the ordinance and statute, under the circumstances, was sufficient to carry the case to the jury.

2. Same—Negligence—Contributory Negligence.

Where one recklessly drives an automobile without signal or warning, in excess of the speed limit fixed by ordinance and the general statute, and thereby injures or kills another at a street intersection of the town, his violating the law in this manner makes him criminally liable for the injury without regard to the exercise of his judgment at the time in endeavoring to avoid the injury or contributory negligence on the part of the one injured or killed.

3. Criminal Law—Automobiles—Evidence—Mistake of Judgment—Appeal and Error.

Where one is run upon and killed by the reckless and unlawful driving of an automobile, beyond the speed limit fixed by law, it is not error for the court to reject testimony of a witness that it was a mistake of judgment of the defendant in turning in a certain direction, being merely the inference of the witness, and also immaterial, as such mistake would not excuse him.

4. Appeal and Error—Trials—Improper Remarks—Harmless Error.

It is improper for the prosecuting attorney to argue to the jury that the defendant, upon indictment, did not go upon the stand, but such error was cured in this case by the attorney's withdrawing his remarks and the court's instruction that the jury must not consider them.

5. Instructions—Singling Evidence.

The mere calling the name of a witness by the judge in reciting the contention of the parties is not objectionable as singling out the testimony of a witness when the appellant's contentions are fairly stated at length, free from bias.

APPEAL by defendant from *Lane, J.*, at the July Term, 1917, of BUNCOMBE.

The defendant is charged with manslaughter on account of a collision on Phifer Street in Asheville between an auto-delivery wagon operated by defendant and a bicycle ridden by deceased. The defendant is a negro boy employed by M. V. Moore & Co., of Asheville, and was in the performance of his duties with his employer at the time of the accident. The deceased Percy Morris, was a white boy eleven years old. The collission occurred on 20 June, 1917.

Ashland Avenue runs south from Patton Avenue for a short distance. It is paved north of Phifer, but south of Phifer is not paved *"and sort of runs out there"* at Phifer. Phifer Street is paved its entire length and there is a good deal of travel with machines on Phifer Street. Both of the streets are paved with bithulithic. From Ashland west on Phifer is a grade of four or five per cent, and from Phifer north on Ashland is a steep grade, and a bicycle picks up a great deal of momentum going down the hill to Phifer. At the northwest corner of Ashland and Phifer is a building, and "one coming down Phifer cannot see a person coming down Ashland, and a person coming down Ashland cannot see another coming down Phifer because of the store." Ashland is 24 feet wide and Phifer is 24½ feet wide.

Just before the accident the defendant was traveling east on Phifer and was about to cross Ashland when the deceased came down Ashland and turned into and across Phifer to the south side of (763) Phifer, where the collision occurred. As soon as the deceased came in sight of defendant, he (defendant) and his companion yelled "Look Out!" or "Get out of the way!" The automobile was coming down Phifer near the center of the street, and the left hind wheel skidded near the center of the street. When the deceased came in sight the defendant immediately turned the machine further to the right, and when the accident occurred, was nearer the right curb—"Not more than eighteen inches" from the curb. When defendant applied his brake the left wheel made a mark for a distance of 87½ feet.

The truck ran over the boy and killed him. The evidence tended to prove that the defendant was driving the motor truck at thirty miles an hour; that after the brakes were appiled the truck skidded 50 or 55 feet before it struck the boy, and in all 87 feet before it stopped; and

that no gong or other signal was sounded as the truck approached the intersection with Ashland Avenue.

It was also in evidence that the deceased turned into Phifer Street a short distance in front of the truck, and that if defendant had turned to the left instead of the right he could have avoided the deceased.

The ordinance of Asheville limited the speed of motor trucks, automobiles, etc., to seven miles an hour.

A witness for the State testified that the defendant turned to the right and struck the deceased, and that if he had turned to the left he would have missed him. He then said: "It was a mistake in the judgment of the boy (defendant) in turning to the right instead of to the left." The court ruled out this part of the testimony and defendant excepted.

At the conclusion of the evidence the defendant moved for judgment of nonsuit, which was denied, and he excepted.

The defendant requested his Honor to charge the jury as follows:

"1. The court instructs the jury that if you find that the deefndant and the deceased came to or near the intersection of Ashland Avenue and Phifer Street at about the same time, and traveling at about the same rate of speed, and the accident could have been averted by the defendant turning his automobile to the left instead of to the right, and that such failure on the part of the defendant caused the collision and the death of the deceased that such failure was a mistake in judgment on the part of the defendant and is not evidence of any criminal intent on his part. If you find that the collision between the automobile driven by the defendant and the bicycle ridden by deceased was the result of a mistake of judgment on the part of one or both, then the court instructs you that it would be your duty to acquit defendant.

"2. If the jury shall find from the evidence that the cause of the death of the deceased was that the defendant made a mistake of
(764) judgment in turning his automobile to the right to avoid a collision, and that the collision and death resulted because of such mistake of judgment on the part of defendant then it would be the duty of the jury to return a verdict of not guilty.

"3. It is the duty of the State to satisfy the jury beyond a reasonable doubt of every element necessary to convict defendant of the charge of manslaughter, and if the jury is not so satisfied beyond a reasonable doubt of the guilt of defendant upon all of the evidence, it will be the duty of the jury to return a verdict of not guilty.

"4. If the jury shall find from all of the evidence that the defendant was operating his automobile at an excessive rate of speed in violation

of the law, and that deceased was operating his bicycle at an unlawful rate of speed in violation of the law, and that the death of deceased was caused by the joint acts of the defendant and the deceased, then it will be the duty of the jury to return a verdict of not guilty, unless the jury is satisfied beyond a reasonable doubt that the death of deceased was directly and solely caused by defendant.

"5. If the jury finds from all the evidence that the death of deceased was caused by the unlawful act of either deceased or the defendant, but the jury is unable to decide whether the unlawful act of the defendant or the unlawful act of the deceased was the cause of the death of the deceased, then it will be the duty of the jury to return a verdict of not guilty.

"6. If the jury shall find from the evidence that the deceased in coming down Ashland Avenue reached a point near the intersection of said avenue and Phifer Street, where he saw the defendant approaching said intersection with his automobile, which said automobile was being operated at a rapid rate of speed, and the deceased, after so seeing said automobile, proceeded on his bicycle to a point in front of said automobile and as a result thereof was injured and killed, it would be the duty of the jury to return a verdict of 'not guilty.'

"7. If the jury shall find from the evidence that the deceased rode his bicycle down Ashland Avenue at a rapid rate of speed, without giving any alarm by sounding his horn, or otherwise, to vehicles approaching on Phifer Street, and that when he reached a point at or about the intersection of Ashland Avenue and Phifer Street, he saw the defendant approaching with an automobile and that after seeing the defendant approaching the deceased suddenly precipitated himself in the path of said automobile, and that the death of the deceased was due to the act of the deceased in so suddenly precipitating himself in the path of said automobile, then it will be the duty of the jury to return a verdict of "not guilty."

One of the attorneys for the prosecution, while addressing the (765) jury called attention to the fact that defendant had failed to take the stand as a witness on his own behalf and deny any of the statements made by the witnesses for the State. Counsel for defendant, as soon as they could make themselves heard, objected. The court told said attorney for the State that he had no such right and cautioned the jury not to consider anything that had been said about defendant's failure to take the stand in his own behalf. Said attorney for the State then resumed his argument, saying that he would withdraw all that he had said about defendant's failure to go upon the stand and testify,

and asked the jury not to consider anything that he had said in that connection. The court then told the jury that the failure of the defendant to testify in his own behalf must not be used to his prejudice in any manner whatsoever. The defendant excepted.

The court refused to give the prayers for instruction, except as to reasonable doubt, and the defendant excepted as to each. The defendant also excepted to certain parts of the charge.

There was a verdict of guilty and a judgment of imprisonment for three years and to be worked on the roads, from which defendant appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

A. Hall Johnston and Mark W. Brown for Defendant.

ALLEN, J. There are two grounds upon which his Honor could properly deny the motion for judgment of nonsuit.

The first is that, according to the evidence for the State the defendant approached an intersecting street in the city of Asheville without slowing down, or giving any signal and running at thirty miles an hour, which was a violation of the law of the State (Laws 1913, ch. 107) and of the ordinance of the city, and the next that independent of a violation of a statute or ordinance, he was guilty of such negligence as would make him criminally liable.

The principle is generally stated in the textbooks that "if one person causes the death of another by an act which is in violation of law it will be manslaughter, although not shown to be willful or intentional." (McClain Cr. L., vol. 1, sec. 347), or that "When life has been taken in the perpetration of any wrongful or unlawful act, the slayer will be deemed guilty of one of the grades of culpable homicide, notwithstanding the fact that death was unintentional and collateral to the act done" (13 R.C.L. 843); but on closer examination of the authorities it will be seen that the responsibility for a death is sometimes
(766) made to depend on whether the unlawful act is *malum in se* or *malum prohibitum,* a distinction noted and discussed in *S. v. Horton,* 139 N.C. 588.

It is, however, practically agreed, without regard to this distinction, that if the act is a violation of a statute intended and designed to prevent injury to the person, and is in itself dangerous and death ensues, that the person violating the statute is guilty of manslaughter at least, and under some circumstances of murder.

The principle is recognized in *S. v. Horton, supra,* and in *S. v. Turnage,* 138 N.C. 569; S. v. Limerick, 146 N.C. 650, and *S. v. Trollinger,*

162 N.C. 620, and has been directly applied to deaths caused by running automobiles at an unlawful speed.

In 2 R.C.L. 1212, the author cites several authorities in support of the text that "One who willingly or negligently drives an automobile on a public street at a prohibited rate of speed or in a manner expressly forbidden by statute, and thereby causes the death of another, may be guilty of homicide; and this is true although the person who is recklessly driving the machine uses, as soon as he sees a pedestrian in danger, every effort to avoid injuring him, provided that the operator's prior recklessness was responsible for his inability to control the car and prevent the accident which resulted in the death of the pedestrian."

Again there is evidence of negligence amounting to recklessness, and "where one by his negligence has caused or contributed to the death of another he is guilty of manslaughter." McClain Cr. L., vol. 1, sec. 349.

The negligence must be something more than is required on the trial of an issue in a civil action, but it is sufficient to be submitted to a jury in a criminal prosecution if it is likely to produce death or great bodily harm (*S. v. Tankersley*, 172 N.C. 955), and in this case the defendant could reasonably anticipate meeting some one at the crossing, and to approach it at a rate of speed twice that allowed by the State statute and four times that allowed by the ordinance without reducing the speed and without signal is evidence of recklessness which justified submitting the question of guilt to the jury.

These principles of the common law and the provision of the statute are intended to protect the life and limb of the citizen using the streets and highways of the State, and those who violate them may be prosecuted for an assault if personal injury, and not death, is the result, and for manslaughter or murder if death ensues.

The exception to the ruling of his Honor withdrawing the opinion of the witness that it was a mistake of judgment of the defendant in turning to the right instead of to the left cannot be sustained. It was a mere inference of the witness and not a statement of a fact, and was immaterial as the defendant could not be excused on account of a mistake of judgment brought about by his own reckless con (767) duct. This also disposes of the first and second prayers for instruction.

The third prayer for instruction was substantially given.

The fourth, fifth, sixth, and seventh prayers for instruction, except as given in the charge, bear on the contributory negligence of the deceased, which while relevant in the trial of a civil action is no defense to a criminal prosecution.

"It is immaterial that there was negligence on the part of the deceased himself contributory to the result, the doctrine of contributory

negligence having no place in the law of crimes." McClain Cr. L., vol. 1, sec. 349; 2 R.C.L. 1212; *Schultz v. State,* Ann. Cases, 1912, c. 496, and note.

There is also no evidence that the deceased precipitated himself in the path of the automobile, and the evidence is that he could not see one coming down Phifer Street because of a store on the corner. The reference by counsel to the fact that the defendant did not testify in his own behalf was improper, but any error in doing so was cured by the statement made by the judge and by the withdrawal of the remark by counsel.

We have examined the charge and find it free from error.

It is not subject to the objection that his Honor singled out the testimony of a witness and gave undue importance to it, as his Honor did no more than call the name of the witness while reciting the evidence, and it states the contentions of the defendant at length, and is fair and free from bias.

The complaint that very little is said about the law of the case is answered by the fact that outside of an explanation of a death as the result of an unlawful act or negligence the case resolved itself into an issue of fact.

No error.

Cited: S. v. Gash, 177 N.C. 597, 598; *S. v. Gray,* 180 N.C. 700; *S. v. Rountree,* 181 N.C. 538; *S. v. Sudderth,* 184 N.C. 755; *S. v. Shepherd,* 187 N.C. 609; *S. v. Whaley,* 191 N.C. 390; *S. v. Leonard,* 195 N.C. 254; *S. v. Palmer,* 197 N.C. 137; *S. v. Eldridge,* 197 N.C. 627; *S. v. Satterfield,* 198 N.C. 684, 685; *S. v. Durham,* 201 N.C. 730; *S. v. Agnew,* 202 N.C. 757; *S. v. Stansell,* 203 N.C. 72; *S. v. Cope,* 204 N.C. 30; *S. v. Huggins,* 214 N.C. 570; *S. v. Lowery,* 223 N.C. 603; *S. v. Triplett,* 237 N.C. 607; *S. v. Smith,* 238 N.C. 87; *S. v. Bournais,* 240 N.C. 312.

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STATE v. W. L. GRIFFIN.

(Filed 22 December, 1917.)

1. Criminal Law—"Crime Against Nature"—Statutes.

The unnatural gratification of the passion by one of mature years with the mouth is punishable within the meaning of "a crime against nature" under the provision of Revisal, sec. 3349, though the pathic be a youth of 9 years before reaching the age of puberty.

STATE *v.* GRIFFIN.

2. Same—Instructions—Requests—Trials—Questions for Jury.

Upon trial of defendant for the "crime against nature" of matured years and married and with children, a special request which assumes as a fact that such unnatural intercourse would more likely occur when the defendant was developing into manhood is properly refused, this being for the determination of the jury.

INDICTMENT for committing the "crime against nature" under section 3390, Revisal, tried before *Whedbee, J.*, at October Term, 1917, of VANCE.

The defendant was convicted and sentenced to five years in the State's Prison. From the verdict and judgment defendant appeals.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

T. T. Hicks for defendant.

BROWN, J. The evidence for the State tends to prove that defendant offered Jimmie Mustian, a boy of nine years of age, five dollars to go with him into a neighboring corn field in the suburbs of Henderson and let defendant have intercourse with the boy by the mouth. The boy went with defendant, who took the boy's penis in his mouth and continued the act for about five minutes, when he desisted. He did not pay the boy, who complained of the offense.

The defendant's evidence tends to prove that he is fifty-two years of age and has a wife forty-two years of age, that they have seven children from twenty-seven years old, that he has been a man of good character, except for getting drunk, and has never been accused or suspected of such crime before this.

The defendant testified "that he was drunk that afternoon and the only recollection he had after about 3 o'clock was of lying on the ground in the cornfield in the dark, and of a boy 'peeing' in his face; and that the next thing he knew was coming to himself in the jail; that he had never done such a thing as he was accused of."

The defendant at the close of the State's testimony, and again at the close of all the testimony, demurred and asked his Honor to hold: (1) "That the crime is not complete upon the testimony, since the law contemplates the insertion of the private parts of the defendant into the person of the pathic or other party to make out the crime, and that the insertion of the penis of the boy into the mouth of the defendant does not constitute the crime. (2) That the statute and the nature of the case require that to constitute the crime the party of the second part must be capable of an emission, which a boy of nine years is not."

The motion was denied and the defendant excepted.

We think the demurrer was properly overruled. The statute reads as follows: "If any person shall commit the abominable and detestable crime against nature with mankind or beast, he shall be im-
(769) prisoned in the State's Prison not less than five nor more than sixty years." Revisal of 1905, sec. 3349.

The statute does not define the crime against nature, but it has been done by the courts, and in declaring what indecent and unnatural acts come within the denunciation of the law, the courts have differed to some extent, as pointed out by *Mr. Justice Allen* in *S. v. Fenner,* 166 N.C. 248. In that case it is held that having carnal knowledge of a man by inserting the sexual organ of the defendant in his mouth is an indictable offense under the statute.

The only difference in that case and this is that this defendant took the boy's penis in his mouth and undertook by that unnatural and indecent method to gratify a preverted and depraved sexual instinct. We think the one method is as much a crime against nature as the other.

While the crime against nature and sodomy have often been used as synonymous terms, our statute is broad enough to include in the crime against nature other forms of the offense than sodomy and buggery. It includes all kindred acts of a bestial character whereby degraded and preverted sexual desires are sought to be gratified. The method employed in this case is as much against nature, in the sense of being unnatural, indecent, and against the order of nature, as sodomy or any other bestial and unnatural copulation. It is the identical act for which the accused was convicted in *Honselman v. The People,* 168 Ill., 175, which is cited and approved in *Kelly v. The People,* 191 Ill., 305.

Under a statute similar to ours the Supreme Court of South Dakota declared that the words crime against nature not only included the common-law crime of sodomy, but any kind of unnatural copulation by the mouth or any other kind of unnatural carnal copulation. *S. v. Whitmarsh,* 26 S.D. 426.

Another case exactly on all fours with the one at bar is *S. v. Start,* 65 Ore., 178, where the Court also holds that both parties and all who are present aiding and abetting the act are guilty.

S. v. Vicknair, 52 La. Ann., 1921, holds that the act committed with the mouth is included in the "crime against nature," and that it is immaterial which of the parties committed it. "Whether he was agent or pathic is immaterial. Even those who are present aiding and abetting the offense are all principals." Other pertiment cases are *Herring v. S.,* 119 Ga., 709; *Glover v. S.,* 45 L.R.A. 473 (Ind); *Ausman v. Veal,* 10 Ind., 355; *S. v. Means,* 125 Wis., 650.

The second ground of demurrer is also untenable. It is not necessary that the boy should have attained the age of puberty so as to be capable of an emission. Such a construction of the law would permit such degrading practices to be carried on with impunity with those whose tender years and inexperience render them ignorant of their evil effects. The statute aims to protect the young and innocent as (770) well as to punish the hardened criminal who seduces them into such filthy and detestable conduct.

Defendants counsel contended and argued to the jury and asked the court to charge that the crime being a sexual one, would naturally appear and be practiced by defendant, if at all, soon after attaining puberty, and in youth and in young manhood, and that one guilty of it would naturally be averse to matrimony and to woman and to the natural relations of the sexes; and that the defendant having married in his youth and reared a large family would constitute evidence to be considered by them and in defendant's favor and in support of his denial that he had been guilty of the crime charged. This prayer could not well be given. It assumes certain facts and conditions to be true which are matters in evidence and solely for the consideration of the jury. These matters were properly argued to the jury and the defendant had the full benefit of them. It was for the jury and not the judge to draw the proper inferences from and give the proper weight to them.

We regret that the importance of this question, covering as it does a matter wherein the courts of other States are in conflict, renders it necessary to soil the pages of our reports with the discussion of a subject so disgusting.

The learned and humane judge who tried this case seems to have been impressed by the defendant's evidence that he was so drunk that he was unconscious of the act charged against him, for he imposed the minimum sentence of the law.

It is to be deplored that there is no minimum punishment for the defendant's unfortunate wife and children. Their sufferings cannot be mitigated.

No error.

Cited: S. v. Williams, 247 N.C. 273.

(771)

STATE v. GEORGE KIRKLAND AND JAMES WILSON.

(Filed 22 December, 1917.)

1. Actions—Severance—Conspiracy—Courts—Discretion—Criminal Law.

Upon the trial of two defendants, one for assault and the other for conspiracy therein, the question of severing the actions upon defendant's motion is one addressed to the discretion of the trial judge and his refusal is not appealable in the absence of abuse of his discretion.

2. Criminal Law—Conspiracy—Evidence—Admissions—Instructions.

Upon trial for an assault and conspiracy, admissions of each of the defendants are competent against the one making them, though not made in the presence of the others, it being required that the trial judge by proper instructions and admonitions to the jury protect the rights of each defendant by confining the declarations to the proper parties.

3. Instructions—Courts—Expression of Opinion.

Reversible error will not be found for expression of opinion on the evidence by the trial judge, when he refers to certain evidence as a fact as testified to by a witness and so fully understood by the jury, and not as a statement made by the court that such evidence had been established as a fact.

Indictment, tried before *Shaw, J.*, at August Term, 1917, of MACON.

The defendant Kirkland was convicted of a secret assault with a deadly weapon upon R. L. Barnett, with intent to kill. The defendant Wilson was convicted of conspiring with Kirkland to commit said assault. James Taylor was charged in same bill and was convicted of an attempt to commit the crime of accessory after the fact. Kirkland and Wilson were sentenced to six years in State's Prison at hard labor and from such judgment appealed to the Supreme Court.

As to James Taylor, prayer for judgment was continued until the succeeding term of the Superior Court.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

J. Frank Ray, H. G. Robertson, and Sisk & West for defendants.

BROWN, J. The defendants Kirkland and Wilson in apt time moved the court to grant a severance. This motion was denied. It was renewed at close of State's evidence and again renewed at close of all the evidence and denied. Defendants duly excepted.

The grounds for such application are that much of the evidence was competent as against one defendant and not competent against the

other and that "although the court charged the jury that much of this was not evidence against Kirkland, or not evidence against Wilson, yet it had its weight with the jury and the defendants seriously insist that the court should have ordered a severance so that the cases might be tried upon the proper testimony as against each defendant."

It has been frequently held that a motion for a separate trial of defendants charged in the same bill of indictment is a matter that must necessarily be left to the sound discretion of the trial judge. To undertake to review such rulings is impracticable and would result in great delay in the disposition of criminal actions. It is only when there appears to have been an abuse of such discretion that this Court will entertain such exceptions and review the rulings of the trial judge. Nothing of that nature appears in this record. *S. v. Dixon,* 78 N.C. 558; *S. v. Parrish,* 104 N.C. 689; *S. v. Hastings,* 86 N.C. 597; *S.* (772) *v. Haney,* 19 N.C. 390; *S. v. Murphy,* 84 N.C. 742.

The defendant Kirkland objected to the admission of the declaration of James Wilson, his codefendant, to witness Barnett that about a week previous to the shooting the defendant Wilson came to him and told him that Jim Nelson was laying a plan to shoot witness. There are a number of other exceptions in the record to declarations of Kirkland and Wilson upon same ground.

The court carefully instructed the jury that such declarations are evidence only against the defendant who made them. The individual declarations of defendants tried together are competent as against the defendant making them, although the other defendants be not present when made.

The judge should carefully instruct the jury, as was done in this case, that they must disregard such declarations as to the defendants who were not present when they were made and that they are competent only against the person making them. *S. v. Collins,* 121 N.C. 667; *S. v. Cobb,* 164 N.C. 418.

If the declarations of a defendant could not be taken as evidence against him because he is indicted and tried with others, it would be impossible to try persons together who are charged with a common offense. This would greatly clog the wheels of justice. It is true that declarations by one defendant, competent only against him, may tend to show his codefendant's guilt, but that is no ground for excluding them in a joint trial. *S. v. Brite,* 73 N.C. 26.

The judges always endeavor to protect the rights of each defendant by proper instructions and admonitions to the jury, and it is reversible error if he fails to do so.

There are other exceptions to the evidence, all of which we have examined, and think that they are without merit and that it is needless to

discuss them. The assignments of error directed to the charge cannot be sustained. We find nothing in it that can reasonably be construed into an expression of opinion as to whether a material fact is proven. In referring to the conversation between Ledford and defendant Wilson, we do not think the language of the judge is open to that criticism. He evidently referred to the conversation as a fact testified to by the witness.

We do not think the jury could reasonably have misunderstood the matter. They fully understood that it was their exclusive prerogative to determine whether such conversation ever took place.

The charge in full is set out in the record and appears to be a very clear, full and impartial presentation of the case to the jury.

Upon a review of the whole record, we find

No error.

Cited: S. v. Southerland, 178 N.C. 677.

(773)

STATE v. J. A. LANCE.

(Filed 22 December, 1917.)

Criminal Law — Obstructing Cartway — Dedication — Adverse User—Evidence.

Where the indictment for willfully and unlawfully obstructing a cartway charges that it had been "duly dedicated for public use and enjoyment," and it appears upon the trial that the defendant obstructed it upon his own land, and there is no evidence of such dedication, or of continuous user by the prosecuting witness for the period required by law to give him an easement, the prosecutor will fail.

INDICTMENT for unlawfully and willfully obstructing a cartway, tried before *Lane, J.*, at November Term, 1917, of BUNCOMBE, the bill of indictment charging that the said cartway had been "duly dedicated as such for public use and enjoyment." The defendant was convicted and from the judgment of the court appeals.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

V. L. Gudger and Mark W. Brown for defendant.

BROWN, J. It is stated in the brief for the State that " the evidence does not show any dedication of the obstructed cartway to the public

use, nor any adverse use of the cartway by the defendant which would give him an easement."

An examination of the record corroborates the conclusion of the Attorney-General. If there is no evidence of dedication to the public, or any evidence of an adverse continuous user by the prosecuting witness for the period required by law to give him an easement, then the defendant could not be guilty of unlawfully and willfully obstructing the road, as the obstruction was on that part of the road where it crosses the defendant's land.

The case is governed by what is said in *S. v. Norris*, 174 N.C. 808.

Reversed.

(774)

STATE v. ANDY ORR AND ROBERT GRANT.

(Filed 22 December, 1917.)

1. Homicide — Murder — Manslaughter — Deadly Weapon—Malice—Presumptions — Conspiracy — Arrest—Officer—Evidence—Questions for Jury.

The two defendants, a special policeman and his friend, were tried for murder in the second degree, upon agreement with the solicitor, with evidence tending to show that the officer ran after the deceased after being struck by him, calling on the bystanders, especially his friend, to help in the arrest; that he caught the deceased and upon request of his friend to turn him loose, turned so as to expose the deceased to the pistol his friend had drawn on him, who then fired the fatal shot: *Held*, some evidence to be considered with other facts of a conspiracy to kill, and the law presuming malice from the use of the deadly weapon, other evidence was at least sufficient to sustain a verdict of manslaughter against the officer, and murder in the second degree for his coconspirator; and *Held further*, that a remark made by the former to the latter that he should not have fired should only be considered by the jury in the officer's favor, and was not conclusive.

2. Homicide—Criminal Law—Instructions—Reasonable Doubt.

Where the charge of the court upon a trial for a homicide clearly gives the prisoner the full benefit of the doctrine of reasonable doubt, and of the presumption of innocence, construing it as a whole, it is not necessary that the judge should repeat the instruction regarding reasonable doubt as his preface to each of his other instructions upon the relevant evidence.

INDICTMENT, tried before *Adams, J.*, and a jury, at March Term, 1917 of GRAHAM. The defendants were convicted, and from the judgment appealed to this Court.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Bryson & Black and R. L. Phillips for defendants.

WALKER, J. The defendants were indicted for the murder of Ples Birchfield. When the case was called for trial, the solicitor elected to prosecute them for murder in the second degree or manslaughter, and that course was adopted with the consent of the court. The jury convicted the defendant Andy Orr of murder in the second degree and the other defendant, Robert Grant, of manslaughter.

We see no ground upon which the defendant Andy Orr can ask for a reversal of the judgment. The assignments of error are substantially confined to the guilt of Robert Grant, and the defendant Andy Orr principally relies on his motion to nonsuit, or on the request to charge as to both of the defendants that there was no evidence that they acted in concert in killing Birchfield. A careful examination of the evidence convinces us that there was such evidence, and moreover that there was ample evidence to support the verdict in all respects.

The defendant Grant contends that he was a special police officer, and arrested or attempted to arrest Birchfield because the latter had committed a breach of the peace by assaulting him; while the State, not denying the correctness of his contention, if he was an officer and was discharging his duty as such in arresting Birchfield—con-
(775) tends that he was not so acting, but that he assaulted Birchfield with another a personal motive, and that Birchfield, after striking Grant, ran away and Grant pursued him and struck him with a stick, and finally overtook him and held him within his grasp, calling upon the bystanders and especially his codefendant, who was his "pal," to help him, crying out, "Come and help me boys, I have got him." Andy Orr came up, with his pistol in his hand, and said, "Turn him loose," whereupon Grant, who had his back towards Orr, with his body between him and Birchfield, turned his side towards Orr, thereby exposing Birchfield to Orr's fire, and the latter fired and wounded Birchfield in the shoulder, from which wound he afterwards died in the hospital.

The defendants further contended that there was not only no concert of action, or conspiracy, between them to kill or injure Birchfield, but that Grant needed help to make the arrest complete and to shield him from the attack of Birchfield, and that Orr intervened solely for this purpose, as a felony was about to be committed and the life of Grant was in serious jeopardy from the assault of Birchfield. All these contentions were fairly and exhaustively submitted to the jury, with a full

explanation of the evidence and the law arising thereon—and, too, very favorably for the defendants. It is true that Grant stated to Orr, after the latter had wounded Birchfield, that he should not have done it, referring to his firing the pistol, as he had killed him; but this was left to the jury as a part of the evidence favorable to Grant, but was not conclusive of his innocent or unlawful purpose. There was evidence from which the jury could reasonably have inferred that Orr and Grant were concerting against deceased at least to do him harm.

The good faith of each of the defendants, that of Orr in entering into the affray, and that of Grant in professing to act as a peace officer, were properly submitted to the jury, but as to neither of these last contentions on the part of the defendants, that is, as to their good faith, was there much more than a scintilla of evidence. The conduct of both tended to show that they were not acting in any lawful capacity, the one as an officer of the law and the other as a peacemaker, but, on the contrary, that both were acting together and from some bad motive, or for some unlawful purpose. If Grant, instead of acting as an officer of the law in arresting Birchfield, engaged in an affray with him and afterwards assisted Orr in causing his death, he is at least guilty of manslaughter, of which he was convicted.

If Orr did not intervene for the purpose of preventing the commission of a serious felony, or of assisting Grant to make the arrest, and he intentionally fired the pistol and killed Birchfield, he is guilty of murder, for he had no other lawful excuse for killing him, and in that case the law implied the necessary malice to constitute the killing a murder; that is, in the second degree. *S. v. Worley*, 141 N.C. 764; (776) *S. v. Robertson*, 150 N.C. 837; *S. v. Fowler*, 151 N.C. 731; *S. v. Rowe*, 155 N.C. 436. There was, therefore, no error as to Orr, the jury having undoubtedly found that he killed with a deadly weapon without any lawful excuse, provocation, or mitigating circumstances.

As to Grant, it may be further said that, professing to be acting as an officer, he pursued and beat Birchfield, and finally afforded him no protection as his prisoner, after he had caught him, but actually exposed him to the attack of his codefendant Orr, who took his life. There was other evidence of the common design of these two men not necessary to be considered. The charge of the court was unusually clear and direct, explaining the evidence and the law in every conceivable aspect of the case, and especially presenting to the jury all the contentions of the defendants most favorably for them.

Defendant Grant, in support of his contention that Orr acted independently of him in killing Birchfield and that he was not criminally responsible for Orr's act in any degree, relied upon *S. v. Greer*, 162

N.C. 640, but from an examination of that case it appears to have no application. The court there said: "Although one may have had some difficulty with the deceased, he is not liable for a homicide committed at or about the same time by a third person, who was acting independently, without any conspiracy or common design, even though the altercation brought on the fatal encounter and the third person interfered to aid him," citing, Title "Homicide," 21 Cyc., 692; Wharton on Homicide, secs. 50-51; *S. v. Kendall,* 143 N.C. 659; *S. v. Goode,* 132 N.C. 982; *S. v. Finley,* 118 N.C. 1161; *S. v. Howard,* 112 N.C. 859; *S. v. Scates,* 50 N.C. 420.

It will be observed that, according to that statement of the law, the party who committed the homicide must have acted independently of the other party, who had merely had some trouble with the deceased, and the principle is not pertinent where there is evidence of a common design, as in this case. The language of the Court is that the slayer must have acted "independently, without any conspiracy or common design, even though the altercation brought on the fatal encounter, and the third person interfered to aid him."

There was evidence of murder in the first degree as to Orr, and of murder, at least in the second degree, as to Grant, but the State mercifully declined to prosecute Orr for the highest grade of the homicide, and the jury have dealt leniently with Grant, giving him the full benefit of any doubt as to the degree of his guilt.

The point is made that the judge did not repeat the words "beyond a reasonable doubt" in his preface to each instruction upon the evidence as to their finding thereupon, but the position is not tenable (777) when the charge is viewed as a whole, which must always be done, and considered in the relation of each part to every other part of it. *Kornegay v. R. R.,* 154 N.C. 389; *S. v. Cooper,* 170 N.C. 719. He did give the defendants the full benefit of the doctrine of reasonable doubt, and of the presumption of innocence in such a way that the jury could not have misunderstood the meaning of his language, nor fail to take it as applying, throughout the charge, to each instruction when a finding was called for. A similar objection was made in *S. v. Killian,* 173 N.C. 793, where we said: "The objection to the charge is without real merit. The judge, in opening his charge, told the jury that the burden of proof was upon the State, and that they must be satisfied of the guilt of the prisoner beyond a reasonable doubt before they could convict him. It was not necessary that he should repeat this rule of law every time he referred to any finding from the evidence as he had sufficiently instructed them as to the burden and the quantum of proof, and this applied to his charge throughout. We should construe the

charge as a whole," citing *Kornegay v. R. R., supra; McNeill v. R. R.*, 167 N.C. 396; *McCurry v. Purgason*, 170 N.C. 463.

We find no error in the record.

No error.

Cited: S. v. Brinkley, 183 N.C. 723; *S. v. Pasour*, 183 N.C. 794; *S. v. Hall*, 183 N.C. 814; *S. v. Rideout*, 189 N.C. 163; *S. v. Allison*, 200 N.C. 196; *S. v. Tyndall*, 230 N.C. 175.

(778)

STATE v. ERNEST BYNUM.

(Filed 27 February, 1918.)

1. Homicide—Deliberation—Premeditation.

It is not required that deliberation and premeditation be of any perceptible time to constitute murder in the first degree.

2. Same—Evidence—Questions for Jury.

Where there is evidence sufficient to convict the prisoner of a homicide, with further evidence that the prisoner, in a wagon, followed the deceased, a woman, who was walking, stopped his wagon for an hour near the place the homicide occurbred, from which, during that time, female screams of terror were heard; several days thereafter the body of the deceased was found, her throat cut with a razor or knife, with wounds upon her face evidently made by stick or club, with blood on it; indication that a knife had been wiped on leaves or bushes, that the body had been dragged along the ground, and that the woman's clothes were disarranged and so arranged as to indicate rape, etc.: *Held*, sufficient evidence of deliberation and premeditation to sustain a verdict of murder in the first degree, there being no evidence of a quarrel between the prisoner and the deceased, or that they were acquainted.

3. Homicide—Criminal Law—Prisoner—Voluntary Witness—Statutes—Circumstances.

While the failure of the prisoner charged with homicide to take the witness-stand voluntarily will not create a presumption against him, the fact that he did not testify, under the circumstances of this case, was a circumstance, though not evidence, which with the evidence introduced may have had some weight with the jury as to the nature of what occurred in bringing in a verdict of guilty of murder in the first degree.

APPEAL by prisoner from *Whedbee, J.*, at August Term, 1917, of NORTHAMPTON.

The prisoner was convicted of murder in the first degree. There is no exception to the evidence nor to the charge, except that the court

permitted the jury to consider the question of murder in the first degree. The case on appeal states: "The prisoner excepted to the judge's permitting the jury to consider murder in the first degree on the ground that there was no evidence, as he claimed, or murder in the first degree, therefore the judge's charge is not sent up in full. The court in its charge among other things, instructed the jury fully and correctly as to what in law constituted murder in the first degree, murder in the second degree, and manslaughter, and that under the evidence they could render one of four verdicts: murder in the first degree, murder in the second degree, manslaughter, or not guilty, as they found the facts to be, applying the law as stated by the court and fully and correctly placed the burden upon the State of proving beyond a reasonable doubt each fact to constitute the prisoner's guilt."

The prisoner offered no evidence. The evidence for the State is that the body of Lala Lassiter was found Thursday, 10 May, 1917, in the woods in Garris' Field. Her throat was cut from ear to ear and she had been hit a hard blow on the head and her nose was broken in, and a club near-by had a knot with blood on it which corresponded with the break in the nose, and there was a cut on her finger. There was also evidence that a knife or razor had been wiped on the grass. When found, the body had evidently lain in the woods for two or three days, during which time there had been rain, which demoved many evidences of the transaction. Her clothing was much disarranged, her dress being up to her knees, and also on her back. There was evidence that she did not know the prisoner, who is a negro boy.

On the Monday preceeding the finding of the body, the deceased was seen going on foot from her home to Conway and returning and the prisoner driving his wagon was just behind her. She was not seen again until her dead body was found. This wagon had stopped not far from where the murder occurred for about an hour, and while it was stopped a woman was heard screaming and hollering about the spot where the murder occurred. The team and wagon stood there about an hour (779) with no one in attendance. There was evidence that the tracks were found in the ditch, and the shoes which were taken from the prisoner exactly fitted the tracks at the place where the body was found. C. J. Garris also testified that when he went to help arrest the prisoner, the prisoner saw him coming and ran. Thad Davis testified to having seen the defendant in possession of a knife which he claimed to be his own, and Garris testified that he found a lot of leaves which had wiped a knife blade and looked like the knife blade had been run through them. The doctor testified that the throat of the deceased had been cut from ear to ear, probably with a knife or razor, cutting the jugular vein.

The deceased was a married woman and was returning to her home along the road that ran through this field. On the Wednesday after the Monday the prisoner came to Sam Flythe and tried to borrow a shovel. The prisoner was seen on the other side of the fence coming from the ditch, back of which the body of the deceased was found, at the time that the team had stood idle in the road about an hour. Two witnesses testified to having heard a hollering in that field about that time. Mrs. Munford testified that it was a screaming and hollering, and it was a woman's voice in distress. Two witnesses testified that the tracks leading to the scene of the murder fitted the shoes of the prisoner exactly, both the left shoe and the right, "A mold would not have fitted better." At places where the ground was hard there were no tracks, but leaves had been broken off. In one place the witnesses found buds pulled off, and it looked like lots of them had been wiped on the hands. When the prisoner was arrested in Courtland, Va., the tracks made by him fitted the same shoes that fitted these tracks. He ran, but was caught high up in a tree. The sheriff said he made no threats and asked no questions, but when the prisoner got down he said: "You are after me for killing that woman," and added that he did not do it. The sheriff testified that he asked the prisoner where he was when his team was standing in the road, and he replied that he went back to Pete Joyner's, to which the sheriff asked him. "You did not do that, for they said you did not go there that morning." Sheriff Joyner also testified: "Charles Garris pointed out the tracks to me. He fitted one shoe and I fitted the other. We found tracks that were staked off; they were in the field; these tracks extended across that plowed field. We fitted these shoes for 150 yards and they fitted the tracks exactly. The tracks we put these shoes in were distinct. There was absolutely no mistake about that. The tracks had gone deep enough to rain there. My recollection is that these tracks were coming from the woods in which we found the body."

Mr. Bridgers testified that he was with Sheriff Joyner and Garris when they searched for the tracks. "We did not find any tracks until we got to the first opening. (The witness here explains the (780) map, showing where the body was found.) We found leaves there that looked like they had been bruised or something drawn through them, and had what looked like blood on them. We examined the piece of wood it is supposed she was hit with. We noticed something that looked like blood on the knot. We saw some bushes that were broken; some bruised down, and picked up many of the leaves, which compared with those that were broken from the bushes along where something seemed to have been dragged."

J. P. Garris testified that he was with the party who went to arrest the prisoner before he left the State; when the prisoner saw them he whipped up his mule and went pretty fast, going through two gates; when his party jumped out of the automobile and started for the prisoner, the prisoner jumped off the wagon and went into the woods; that they had not let this man know that they were coming after him; that the tracks they saw in Southampton County, Va., when they caught the prisoner were the same as those in the field where this body was found. The husband of the deceased testified that when his wife did not return Monday he thought she had gone to her mother's.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

J. A. Worrell for prisoner.

CLARK, C. J. Our statute of 1892, now Rev., 3361, provides: "A murder which shall be prepetrated by means of poison lying in wait, imprisonment, starving, torture, or any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration of or attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree."

It has been repeatedly held by this Court that the deliberation and premeditation need not be of any perceptible length of time. *S. v. Jones,* 145 N.C. 466; *S. v. Banks,* 143 N.C. 652; *S. v. Daniel,* 139 N.C. 549.

"It is not essential in order to show prima facie premeditation on the part of the prisoner that there should be evidence of preconceived purpose to kill formed at a time anterior to the meeting when it was carried into execution. It is sufficient if the prisoner deliberately determined to kill before inflicting the mortal wound. If there were such purpose deliberately formed the interval, if only a moment, before its execution is immaterial." *S. v. McCormack,* 116 N.C. 1033, where it is also said, approving Kerr on Homicide, sec. 79: "The question
(781) whether there has been deliberation is not ordinarily capable of actual proof, but must be determined by the jury from the circumstances. It has been said that an act is done with deliberation, however long or short a time intervenes after the intent is formed and before it is executed, if the offender has an opportunity to recollect the offense."

In *S. v. Booker,* 123 N.C. 713, there was evidence which, in the language of the Court, "tended to show that the prisoner went to the

home of the deceased on the morning of the day she was killed and got some black pepper; that he went off, and came back in about an hour with a gun and without provocation shot the deceased in the back of the head killing her instantly." The Court in that case adopted the words of the Court in *People v. Conray*, 97 N.Y. 72: "We are of the opinion that the jury was justified in inferring from the facts and circumstances proved that the death of the deceased was the result of deliberation and premeditation."

In *S. v. Adams*, 138 N.C. 697, the husband of the murdered woman on his return home found his wife dead in the cotton field near the house with her skull crushed. There was evidence in that case, as in this, of the prisoner's tracks leading to and from the dead body. The Court said: "Murder may be committed without any motive. It is the intention deliberately formed, after premeditation, so that it becomes a definite purpose to kill. And a consequent killing without legal provocation or excuse constitutes murder in the first degree. The existence of a motive may be evidence to show the degree of the offense, or to establish the identity of the defendant as the slayer, but motive is not an essential, nor is it indispensable to a conviction of the person charged with its commission. *S. v. Wilcox*, 132 N.C. 1143; *S. v. Adams*, 136 N.C. 620."

In *S. v. Banks*, 143 N.C. 652, the Court reiterates the repeated decisions of this Court as follows: "No particular time is necessary to constitute premeditation and deliberation for the conviction of murder in the first degree under the statute, and if the purpose to kill has been deliberately formed, the interval which elapses before it execution is immaterial."

In this case, there is evidence that the deceased was walking along the road in front of the wagon driven by the prisoner; that he stopped his wagon, which stood idle for about an hour; that during that time a woman was heard screaming where the body was found, and at the end of that time he was seen returning from that direction; that tracks leading to and from that direction and also near the body were identified as fiitting the prisoner's shoes; that the victim's throat was cut from ear to ear, her head bruised up, her nose broken in and a knot on a club nearby had blood on it and fitted the indentation on her nose; that the prisoner was known to have a knife and the (782) grass showed that a knife had been wiped upon a bunch of it. There was indications that the body had been dragged through the bushes and that leaves and grass had been bent down; and that buds and leaves from the trees had been pulled off as if some one had wiped his hands; when a party went to arrest the prisoner, he whipped his

team and endeavored to escape, but finally jumped off his wagon and ran through the woods. Under extradition proceedings officers were sent who found him in Virginia. Seeing the party approaching the prisoner again fled and when overtaken was up a tall tree. When he came down before any charge was made the prisoner said, " You have come to arrest me for killing that woman," and denied it.

The evidence is circumstantial. It was for the jury to say whether the prisoner committed the homicide. There was evidence from the above testimony, taken in connection with the disordered state of the dress of the victim, that the homicide might have been committed in an attempt to rape which would make it murder in the first degree. There was an absence of any altercation or quarrel which might point to a killing with malice and without deliberate intent to kill. The manner of the killing, cutting the throat from ear to ear, the beating up of the head and the breaking in of the nose would indicate, or at least was evidence from which the jury could infer that the killing was not merely from malice (which would make it murder in the second degree), but was a deliberate intent to kill in order to conceal his crime or his intent to commit crime, against the person of the victim. These were matters for the jury.

In *Hill v. Commonwealth*, 2 Grattan (Va.), 594, it is held: "Where a homicide is proven, the presumption is murder in the second degree. If the Commonwealth would elevate it to murder in the first degree, it must furnish evidence to justify such finding, and if the prisoner would reduce it to manslaughter, the burden of proof is on him. A man shall be taken to intend that which he does, or which is the immediate or necessary consequence of his act. A mortal wound given with a deadly weapon, in the previous possession of the slayer, without any or upon very slight provocation, is prima facie willful, deliberate, and premeditated killing, and throws upon the accused the necessity of proving extenuating circumstances. This is quoted and followed in *Longley v. Commonwealth*, 99 Va. (December, 1900), 807, and is also quoted and followed in *S. v. Welsh*, 36 W. Va., 690, and the same doctrine is well established in other Courts. There could hardly have been any provocation to cause the beating up a woman and cutting her throat from ear to ear but the deliberate intent to kill.

(783) If this evidence satisfied the jury that the prisoner committed the homicide, the attendant circumstances of the killing by cutting her throat from ear to ear, beating her head, and breaking her nose with a club, the wiping of the knife-blade in the grass and the hands with buds and leaves, if believed, was evidence from which the jury could infer that the killing was deliberate and purposeful, and not a

sudden access of rage and such permeditation, if only for a moment, is sufficient to make it murder in the first degree. Certainly the judge could not tell the jury, without invading their province, that there was no evidence of murder in the first degree. It is stated that the charge defined the difference between murder in the first degree and in the second degree, and that there was no exception to it in any respect except in leaving the jury to pass upon the evidence as to murder in the first degree.

Formerly the defendant in a criminal proceeding was not allowed to go upon the stand in his own defense. But under our act of 1881, now Code, 1634, "The person charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him." This latter clause is omitted from the statute in England and in most of our States, in which failure of defendant to testify in a criminal action raises a presumption against him as in a civil action.

If the prisoner could have given testimony to acquit himself of this charge or to reduce it to a lesser degree of homicide, it is unfortunate that he did not go upon the stand to give the jury the benefit of his testimony. His failure to do so did not create any presumption against him and the judge must have so charged the jury, for it is stated that the charge was unexceptionable in every other respect than in permitting the jury to consider the evidence in the light of murder in the first degree. The fact that he did not testify was a circumstance, like the bearing of a witness on the stand, or other conduct in the trial, which though not a matter of evidence (for it was a matter in the observation of the jury) may have had some weight with the jury as to the nature of the transaction of which there was no eye-witness, unless the prisoner was such. Whether he was or not he alone could testify.

The existence of premeditation and deliberation is for the jury, not for the court, if there is any evidence, and it may be inferred from the manner of the killing and the use of the weapon whether the slaying was deliberately done or in a transport of passion. *S. v. Daniel,* 139 N.C. 549.

Whether certain evidence shows premeditation and deliberation is a fact to be found by the jury, and not a conclusion of law to be drawn by the court. *S. v. Daniels,* 134 N.C. 676, citing *S. v.* (784) *Freeman,* 122 N.C. 1012.

The conviction of the prisoner of the homicide is largely due to his being near the spot at the time, the identification of his tracks, the outcry of the woman and the prisoner's flight. When the jury found

the prisoner to be the slayer, the manner in which he used the knife and club and the absence of previous acquaintanceship and the cries of the woman were competent for the jury to consider on the question whether there was a deliberate intent to kill.

No error.

Cited: S. v. Baity, 180 N.C. 725; *S. v. Tucker,* 190 N.C. 709; *S. v. Allen,* 197 N.C. 686; *S. v. McLeod,* 198 N.C. 652; *S. v. Spivey,* 198 N.C. 658; *S. v. Beal,* 199 N.C. 293; *S. v. Coffey,* 210 N.C. 563; *S. v. Taylor,* 212 N.C. 523; *S. v. Dee,* 214 N.C. 511; *S. v. Jordan,* 216 N.C. 365, 366; *S. v. Kelly,* 216 N.C. 645; *S. v. Farrell,* 223 N.C. 806; *S. v. Stanley,* 227 N.C. 655; *S. v. Church,* 231 N.C. 43; *S. v. Bovender,* 233 N.C. 689.

STATE v. TOM McKINNEY.

(Filed 6 March, 1918.)

1. Husband and Wife—Criminal Law—Evidence—Witness—Third Party.

A witness may testify to a conversation between husband and wife, on the trial of the former for a criminal offense, tending to incriminate him occurring at the time of the arrest and in the presence and hearing of the witness.

2. Same—Spirituous Liquors—Sale.

Where there is sufficient evidence of the possession of more than a gallon of spirituous liquor in the defendant's possession, it is competent for a witness to testify that in his presence at the time of the arrest the prisoner's wife said to the prisoner that she had repeatedly told him about selling whiskey, to which he told her to shut her mouth, "he would attend to his own business," the reply being in the nature of a rebuke and not a denial and evidence of an unlawful purpose of sale.

3. Evidence—Character—Voluntary Qualifications.

A character witness may voluntarily qualify his evidence as to the character of a party, as in this case, "Yes, it is bad for selling liquor," the offense for which he was being tried.

INDICTMENT, tried before *Calvert, J.,* and a jury, at August Term, 1917, of PITT. Defendant was convicted and appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Julius Brown and R. T. Martin for defendant.

WALKER, J. The charge was that the defendant had in his possession for the purpose of sale, and in violation of the statute, more than one gallon of spirituous liquor, and upon his conviction in the Superior Court he was sentenced to eight months imprisonment in (785) the county jail and to be assigned to work on the public roads.

Appellant has raised two questions only.

1. E. L. Hobgood testified: "I am constable of Farmville Township and I obtained a search warrant to search Tom McKinney's house. I found in his house six quarts of bottled in bond whiskey. Three quarts was under the bed and three quarts was inside the folding couch. I also found some empty bottles in and around the house. I also found some cork stoppers in a drawer of a washstand, some of the stoppers were new and some old. When we arrested Tom his wife was present and on her seeing Tom arrested she made a statement." Question: "What did Tom McKinney's wife say to him when he was arrested and in the presence of you?" (Objection by the defendant; overruled; and defendant excepted.) Answer: "She said to him, 'I have told you a thousand times about selling whiskey and that you would get caught.' Tom said to her, 'You hush your damned mouth. I will attend to my own business.'" Defendant moved to strike out the answer; motion overruled; and defendant excepted.

There was other evidence of a like kind. The testimony was competent upon the question whether the defendant was keeping the liquor, which the officer found in his possession, for sale. The answer was not a denial of guilt, as contended by the defendant, but was rather in the nature of a confession. He did not say that he was not guilty, or take issue with the assertion of his wife, but, on the contrary, rebuked or chided her for having divulged to the officer his previous illegal traffic. The jury might well have found that when he ordered her "to hush her damned mouth," he meant that she should stop accusing him of having violated the law by selling liquor and keeping it for sale. When she said to him. "I have told you a thousand times about selling liquor and that you would get caught," she meant that he had been caught with liquor in his possession for sale, as he was being arrested for that particular offense. What they both said, when considered together, bore directly upon the issue, as it referred to his being engaged in the illegal traffic of selling and necessarily having liquor for sale.

We have held that a third person may testify to an oral communication between husband and wife, although he was not known to be present, and it was said that the authorities seem to be uniform to this effect. *S. v. Wallace*, 162 N.C. 629. To the same effect is 1 Wharton's Cr. Evidence, par. 398, which is as follows: "Confidential communica-

tions between husband and wife are so far privileged that the law refuses either to be interrogated as to what occurred in their confidential intercourse during their marital relations, covering, therefore, admissions by silence as well as admission by words. The privilege, (786) however, is personal to the parties. A third person who happened to hear a confidential conversation between husband and wife may be examined as to such conversation. . . . The privilege also extends only to confidential communications and does not cover topics incident to general intercourse."

The point was directly involved in *S. v. Randall,* 170 N.C. 757. There the defendant was indicted for a violation of the prohibition law, and a witness testified: Q. "What was said to him by his wife in your presence?" A. "She told him that she had upheld him for quite a while and tried to help him get the home, and that she had worked like a poor negro and tried to keep him up; and she told him that he ran around and boot-legged and kept them down, and that she was through with him. He did not deny it." Defendant's objection to all this evidence was overruled and he excepted. The court said: "We do not see why this testimony was not competent. Conversations between husband and wife are not privileged as confidential, so as to prevent a third person, who overheard them, from being competent as a witness to relate them to the jury," citing *S. v. Wallace,* 162 N.C. 622; 2 Chamberlayne on Evidence, sec 1430, p. 2339; Wharton on Cr. Evidence, sec. 398; 40 Cyc., 2359; 6 Enc. Evidence, 907. These authorities would seem to fully and effectually answer this objection, but other cases bearing more or less upon the point may be added, *S. v. Seahorn,* 166 N.C. 373; *S. v. Record,* 151 N.C. 695; *Powell v. Strickland,* 163 N.C. 393; *S. v. Bowman,* 80 N.C. 432; *S. v. Burton,* 94 N.C. 947.

2. The other exception is that the State offered Andrew Moore, as a witness to the character of defendant, the latter having testified in his own behalf. He was asked if he knew the general reputation of defendant, to which he replied: "Yes, it is bad—for selling liquor." The same kind of answer has been held admissible in *S. v. Hairston,* 121 N.C. 579, where the Court said: "A party introducing a witness as to character can only prove the general character of the person asked about. The witness, of his own motion, may say in what respect it is good or bad. He may have to do this in justice to himself—in other words, to tell the truth; as for instance, that the party spoken of had a general good character for some things and a general bad character for other things; the witness could not truthfully say it was bad or that it was good without qualification; or the opposite party may, on cross-examination, test the witness as to what it is bad for or what it is good

for," citing *S. v. Laxton*, 76 N.C. 216; *S. v. Daniel*, 87 N.C. 507. See, also, *S. v. Wilson*, 158 N.C. 599, 601, where *S. v. Hairston, supra*, is approved and *S. v. Efler*, 85 N.C. 585. Following *S. v. Hairston, supra*, and *S. v. Wilson, supra*, we must overrule this objection.

No error.

Cited: S. v. Butler, 185 N.C. 626; *S. v. Reagan*, 185 N.C. 714; *S. v. Graham*, 194 N.C. 467; *S. v. Nance*, 195 N.C. 49; *S. v. Freeman*, 197 N.C. 379; *S. v. Portee*, 200 N.C. 147; *S. v. Banks*, 204 N.C. 238; *S. v. Wilson*, 205 N.C. 380.

(787)

STATE v. A. W. FAULKNER.

(Filed 6 March, 1918.)

1. Appeal and Error—Certiorari—Correcting Case.

A *certiorari* will not issue for correcting the record of a criminal case sent up on appeal agreed to by the solicitor, when the statement of the trial judge is only that the evidence was incorrectly stated therein, with indication that he would not be able to either recollect the evidence or correct it, and in the absence of allegation of misconduct on the part of the solicitor; especially when it appears that the defendant was a man of good character and the judge has stated he was not to blame for the offense charged.

2. Criminal Law—Cottonseed Meal—"Sale"—Broker—Statutes.

One who sells cottonseed meal for the manufacturer, upon commission, who neither handles nor sees the seed but has it shipped direct to the purchaser, is not a seller thereof within the intent and meaning of Revisal, sec. 3814, making it a misdemeanor to sell such seed contrary to the requirements of section 3958, that it shall have not less than 7½ per cent of ammonia; and when it is shown upon the trial that he received the order and sent it to the manufacturer, stating that it should have not less than the required amount of ammonia and the proper N. C. tags, he is not guilty when, in no default himself, the manufacturer ships the seed in violation of the statutes. *Johnson v. Carson*, 161 N.C. 373, construing section 3960, cited and applied.

APPEAL by defendant from *Allen, J.*, at November Term, 1917, of WAYNE.

This is an indictment under section 3814 of the Revisal, the charge being that the defendant sold cotton and meal containing less than 7½ per cent of ammonia.

The evidence, which is agreed upon, is in substance as follows: That the defendant A. W. Faulkner, who is a duly licensed broker in Golds-

boro, Wayne County, North Carolina, sold, as broker, to J. R. Jones, of the firm of Jones & Kornegay, on 10 October, 1916, 60 tons of prime cottonseed meal, 7½ per cent North Carolina tags. That the said J. R. Jones had bought for a considerable length of time other merchandise from the defendant A. W. Faulkner, and well knew that he was a merchandise broker and that the defendant while in Mount Olive had a conversation with J. R. Jones, of the firm of Jones & Kornegay, and stated to the said Jones that he thought he could give him a good price on cottonseed meal; that said Jones stated to him that he would give so much per ton for prime 7½ per cent cottonseed meal, North Carolina tags, and the defendant Faulkner told him that he would wire and see if he could secure this price; that the defendant Faulkner did wire to W. Newton Smith, of Baltimore, Md., submitting to him the offer made by the said John R. Jones, which offer was accepted by the said W.
(788) Newton Smith, and the defendant notified Jones & Kornegay of the confirmation of the order and mailed to Jones & Kornegay sales ticket for the goods in the following words and figures to wit:

Goldsboro, N. C., Oct. 10, '16

W. NEWTON SMITH, *Baltimore, Md.*

Book Jones Kornegay Co., Mt. Olive, N. C., 60 tons 7½ per cent C.S. Meal, N. C. tags. Nov., Dec., Jany. shipts.

Sold by phone. Confirmed, A. W. FAULKNER.

The defendant, acting purely as a broker in bringing the parties together upon this trade, and that the defendant had no meal of his own nor any interest in this meal, but simply received a brokerage of 25 cents per ton for negotiating the sale. That after the sale was made and before the meal reached the said Jones & Kornegay the said W. Newton Smith, of Baltimore, Md., sent North Carolina tags, mentioned in the order to Jones & Kornegay by parcel post, the tags to be attached to the meal by the said Jones & Kornegay upon its arrival. That after Jones & Kornegay had received the meal and after a portion of meal had been sold by them it was analyzed by the State Chemist and found to contain less than 7½ per cent ammonia, varying in analysis from the small per cent under 7½ to a considerable extent under 7½ per cent. It is admitted that the defendant did not have the meal in his possession, or that he had ever seen the meal, and that the same was not billed to the defendant, but shipped and billed direct to Jones & Kornegay.

It is further admitted that the defendant is a man of good character and has been engaged in the brokerage business for a number of years.

His Honor instructed the jury to find the defendant guilty, if they believed the evidence and the defendant excepted.

There was a verdict of guilty, and from a judgment imposing a fine of $25 and the costs, the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

J. L. Barham for defendant.

ALLEN, J. The Attorney-General, representing the State, concedes that the defendant is entitled to a new trial on the case on appeal sent to this Court, to which the solicitor has agreed, but he contends that the case has not been correctly stated, and he moves for a *certiorari* directed to the judge before whom the action was tried to esttle the case.

In support of the action he files a letter from the judge stating that he does not think the statement of the evidence is correct, but he says in one place: " I cannot remember the facts fully," and in another, speaking of the evidence, "I cannot remember it."

He does not state that he would change the case if it was re- (789) ferred to him, but suggests that the notes of the stenographer be sent to this court, and a letter from the stenographer is filed in which she says that her notebook has been lost in a change of offices and that she cannot reproduce the evidence.

In this uncertainty, and in the absence of any allegation of misconduct on the part of the solicitor, the difference between him and the judge being one of recollection, we are not inclined to grant the motion of the State, if we have the power to do so, and especially so when it is stated in the case on appeal that the defendant is a man of good character and by the judge in his letter that the defendant was himself imposed on in the sale of the meal by the seller.

In *Barbee v. Justice,* 138 N.C. 22, the Court said that "It is only when the judge has settled the case, in the exercise of his proper jurisdiction, that upon affidavit of error therein and a letter from the judge that he will correct it if given the opportunity, the Court will give him such opportunity," and in *S. v. Chaffin,* 125 N.C. 664, "The case on appeal was agreed on (as in this case) by the solicitor and the counsel for the defendant. Such being the case, there is no ground for action by the judge, *S. v. Cameron;* 121 N.C. 572; The Code, sec. 1234; nor for a certiorari to correct the case by the judge's notes of the evidence on file, nor to permit the judge to correct the case."

The motion for a *certiorari* is therefore denied, and dealing with the case as it appears in the record, we agree with the Attorney-General

that there is error in the charge to the jury, and that a new trial must be ordered.

The charge in the indictment is the sale of cottonseed meal containing less than 7½ per cent of ammonia.

The Revisal, sec. 3958, forbids the sale of meal with less than 7½ per cent ammonia, and section 3814 provides that, "If any person shall sell or offer for sale any cottonseed meal which has not been inspected and branded as required by law, or shall sell any cottonseed meal containing a less quantity of ammonia than is authorized by law, or shall violate any regulation or rule made by the State Board of Agriculture regulating the sale, inspection, branding, or tagging of cottonseed meal, he shall be guilty of a misdemeanor."

The purpose of these statutes and of those following section 3958 imposing penalties, is to promote agriculture by insuring the sale of fertilizers containing plant food in certain proportions and of sufficient quality and quantity and to protect those who cultivate the soil from imposition and fraud.

(790) The same persons who are forbidden to sell or to offer for sale, and upon whom penalties are imposed by section 3958 *et seq.*, are made indictable under section 3814, and it has been held in *Johnson v. Carson*, 161 N.C. 373, under section 3960, which forbids any person from selling or offering to sell or *removing* any fertilizer not having the tags attached required by the statute, that it does not include a farmer who brought and removed such fertilizers and that the penalties apply "to the manufacturer or any one, either as principal or agent, who sells or offers to sell or remove."

The fact that neither knowledge of the defect nor an intent to defraud is made an element in the criminal offense is strong reason for confining the statute to the manufacturer, who should be held to have knowledge of the composition of the fertilizer he offers for sale, and to the owner, not a manufacturer, and his agent with authority to sell, who have the opportunity to test the fertilizer before they sell it.

A sale imports a transfer of title, and one who sells transfers the title. It is defined to be "the transfer of the property in a thing for a price." 35 Cyc. 25.

The defendant, if the evidence is believed, had neither title nor possession, nor did he have any authority to sell and transfer the title. He was a mere broker, a negotiator between the parties, who, as said by *Clark, C. J.* in *Latham v. Fields*, 160 N.C. 337, "does not have possession, disposal, and control of property."

A full and elaborate note to *Walker v. Osgood*, 93 A.D. 171 *et seq.*, collects the authorities on the duties and liabilities of a broker, and

shows that he does not purport to sell and transfer the title, that he has no authority to collect the purchase price, and that his duties consist in bringing the minds of the vendor and the vendee to one agreement.

People v. Morse, 131 Mich. 68, is in point. In that case the defendant was indicted under the pure-food law, and the evidence tended to prove that the defendant took an order for pure pepper to be shipped by a wholesale dealer at Chicago to a dealer at Muskegon, and that the pepper when shipped was not pure. The Supreme Court held that the defendant was not guilty, and said: "The transaction in which the order was taken did not involve an immediate delivery of pepper, then and there present. It is not shown that the sample, if there was one, was the same as the pepper subsequently sent, or that it was in the least impure. If it be conceded that the agent acted in good faith—and we understand that it is not questioned—he took an order for pure goods, and in doing that certainly committed no offense. It is now urged that the exigencies of the enforcement of this law are such that we should hold that this innocent and lawful action may be made a crime by the subsequent act of the principal, either intentional or inadvertent, in departing from instead of performing the contract which his agent had innocently made. We think this is not so, and we are also of the opinion that this does not necessarily do violence (791) to section 17. This transaction as an entirety may have been a sale of impure pepper, under the statute, as to the principal, and not as to the agent. If the order had been taken with knowledge on the part of the agent of a practice to send impure pepper on such orders, a different question would be presented."

Also see *Hall Baker Grain Co. v. U.S.* 198 Fed., 614.

In this case the evidence shows that the defendant was a broker, that he had neither title nor possession, that he had never seen the cotton-seed meal, that the order he transmitted was for meal containing 7½ per cent ammonia, and that the violation of the statute was due to the act of the seller in Baltimore in failing to ship according to the terms of the order, and that this was without the knowledge of the defendant.

If this evidence is true, and it does not seem to be contradicted, the defendant is not guilty.

New trial.

Cited: S. v. Thomas, 184 N.C. 667; *Edwards & Leatherwood v. McCoy*, 206 N.C. 205; *S. v. Dee*, 214 N.C. 512.

STATE v. BOSTON N. BOYD.

(Filed 13 March, 1918.)

1. Courts — Constitutional Law — Statutes — Jurisdiction — Appeal and Error.

The creation of county courts by statute is not inhibited by our Constitution, and such statutes are valid. The legislative authority to create such courts with jurisdiction in matters of contract, and tort also, with concurrent civil jurisdiction with a justice of the peace, is not presented on appeal from judgment in a criminal action.

2. Criminal Law—Bawdy Houses—Leases—Knowledge—Misdemeanors—Particeps Criminis.

One who leases a house to be kept as a bawdy house, with knowledge of the continued use to which it was put, is *particeps criminis* in the commission of the misdemeanor, and is punishable as a principal therein.

3. Same—Evidence.

The fact that one who leased a house used as a bawdy house knew of and acquiesced in the use to which it was put may be shown by its continued use as such, and the reputation it bore in the community.

4. Same—Instructions—Verdict Directing—Trials—Questions for Jury—Burden of Proof—Appeal and Error.

Where the evidence is conflicting as to whether the lessor knew that the house leased was used as a bawdy house, from the circumstances existing, the question raised is one of fact for the jury, with the burden on the State to show the guilty knowledge beyond a reasonable doubt; and it is reversible error for the court to direct a verdict of guilty upon the evidence as a matter of form.

(792) APPEAL from *Calvert, J.*, at November Term, 1917, of PITT.

The defendant was tried in the County Court of Pitt on a warrant charging him with keeping a disorderly house, commonly called a bawdy house, by leasing the house where illicit sexual intercourse was habitually carried on to one Ethel Lee, a female prostitute, with knowledge of the immoral purpose for which the house was to be used.

Upon conviction the defendant appealed to the Superior Court.

The appeal was tried at November Term, 1917, of Pitt, *Calvert, J.*, and from a verdict and judgment of guilty the defendant appeals.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Harry Skinner for defendant.

BROWN, J. A large part of the elaborate brief of the learned counsel for defendant is devoted to an attack upon the constitutionality of the act of the General Assembly creating the County Court of Pitt County.

The argument is presented with much force and has received our careful consideration. We are of opinion that the constitutionality of such courts has been settled by repeated decisions of this Court and cannot now be brought in question. We cite a few of them: *S. v. Baskerville,* 141 N.C. 811; *S. v. Lytle,* 138 N.C. 738; *S. v. Collins,* 151 N.C. 648; *S. v. Tate,* 169 N.C. 373; *Oil Co. v. Grocery Co.,* 169 N.C. 522.

The contention that the act is a violation of the constitution in that it gives the court civil jurisdiction in matters of tort and contract, also concurrent jurisdiction with a justice of the peace may be worthy of serious consideration, but such points are not raised by this appeal.

We are now dealing with the criminal jurisdiction of the court. The power of the court to exercise the civil jurisdiction conferred on it is not before us.

The position that the warrant fails to charge a criminal misdemeanor is untenable.

The warrant charges substantially that Ethel Lee kept a bawdy house when illicit sexual intercourse was habitually carried on and that the defendant leased the house to her with full knowledge of the purpose for which the house was to be used .

It cannot be questioned that keeping a bawdy house is a misdemeanor and punishable as such. The person who leases a house for that purpose with knowledge of the use to which the house is put is *particeps criminis* and is treated as a direct offender, for in misdemeanors all who aid and abet in the commission of the offense are principals.

It is an indictable offense to keep house of ill fame or to be in any way concerned in it. Therefore, letting a house for that purpose necessarily makes the lessor an aider and abettor in the crime. (793) 2 Wharton Crim. Law, p. 1892; *People v. Erwin,* 4 Denio (N. Y.), 129; *Stevens v. People,* 67 Ill. 587; *Smith v. S.,* 31 Md., 425; *Commonwealth v. Harrington,* 3 Pick (Mass.), 26.

In discussing this question, the Supreme Court of Indiana says, in *Graeter v. State,* 105 Ind., 271: "In a prosecution for letting a house to be kept as a house of ill fame, evidence of the general reputation of the house and its inmates for chastity is competent. In such case actual knowledge on the part of the defendant of the kind of house kept, from having seen acts of prostitution therein need not be shown. It is sufficient to prove knowledge by circumstantial evidence. The owner of a house so kept may not shut his eyes to that which is patent to the community around him, and stop his ears from that which has become notorious among his neighbors, and say he has no actual knowledege."

The Supreme Court of Maine says, in *S. v. Frazier,* 79 Me., 95: "One who has authority to let a tenement and receive the rents has control

of it, within the meaning of the statute; but the mere fact of control is not sufficient to charge a person with aiding in the legal use thereof as a house of ill fame. He must consent to it, *though knowledge of the illegal use and inaction to prevent it may be evidence of consent* which is a fact to be proved in each case."

The motion to nonsuit was properly overruled.

The State's evidence tends to prove that the defendant is the owner of the house and rented it to Ethel Lee. There is evidence that the house is a house of prostitution. There is circumstantial evidence tending to put the defendant on inquiry and from which it may be inferred that he had knowledge of the purpose for which the house was to be used.

The defendant excepted to the following instruction to the jury:

"I think it fair to say, gentlemen of the jury, that this case is what we call first impression, so you will return a verdict of guilty, if you find the facts as testified to by the State's witnesses and admitted by the defendant himself, and the State takes this position so that the Supreme Court may have an opportunity to pass upon the case and to say what the criminal law is in regard to the renting of this property for that purpose. If you should disregard the instruction of the court you would in effect give the impression that you think the witnesses of the State lied, and that the defendant himself had lied about the manner in which he rented his house, so that I give the case to you as a matter of form to return the verdict".

The exception is well taken. The court could not legally direct the jury to return a verdict of guilty in this case as a matter of form.

The burden of proof was on the State to satisfy the jury beyond a reasonable doubt, not only that the house was kept as a bawdy
(794) house by Ethel Lee, but also that the defendant leased it to her with knowledge of the immoral and illegal use to be made of it.

It is admitted that the defendant leased the house, but he testified that he had no knowledge of the immoral use to which it was to be put.

The judge manifestly erred in directing a verdict of guilty. He should have submitted the case to the jury under proper instructions and let them draw such inferences from the facts and circumstances in evidence as they thought reasonable and proper.

New trial.

Cited: S. v. Singleton, 183 N.C. 739; *S. v. Saleeby,* 183 N.C. 741; *S. v. Estes,* 185 N.C. 754; *S. v. Arrowood,* 187 N.C. 716; *S. v. Horner,* 188 N.C. 473; *S. v. Rawls,* 203 N.C. 438; *S. v. Dickens,* 215 N.C. 306; *S. v. Herndon,* 223 N.C. 210.

STATE v. JESSE BOWDEN.

(Filed 13 March, 1918.)

1. Criminal Law—Confessions—Evidence—Custody.

Confessions made by the prisoner charged with a criminal offense, voluntarily and free from coercive influences, are properly admitted as evidence against him upon the testimony of a witness; and the fact that they were made while in the custody of an officer does not alone render them incompetent.

2. Burglary—Rape—Intent—Evidence—Criminal Law.

Upon trial for burglary in the first degree evidence is sufficient to show the prisoner's intent to commit rape at the time of breaking into the dwelling, which tends to show that the prisoner entered the room in which the daughter of the owner was sleeping, placed his hand upon her person, and secreted himself beneath her bed when the alarm was given.

3. Same—Instructions—Appeal and Error—Reversible Error.

A charge, on a trial for burglary in the first degree, which reiterates and emphasizes that the entry into the dwelling by the prisoner must have been with the intent to commit rape, will not constitute reversible error because from an expression in one part it may be inferred that the prisoner would be guilty of the offense charged if such intent had been formed afterwards.

4. Burglary—Instructions—Rape—Intent—Acquiescence.

Where the judge has charged the jury that the prisoner, on trial for burglary in the first degree, must have had the intent to have carnal intercourse with the female forcibly and against her will, and that the act must have been conceived with a felonious intent, is not objectionable upon the ground that this included a purpose of having intercourse with her consent, under the evidence in this case.

INDICTMENT for burglary, tried before *Calvert, J.*, at September Term, 1917, of CRAVEN.

The defendant was convicted of burglary in the first degree and from the sentence of death appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Ward & Ward for defendant.

BROWN, J. The defendant is charged in the bill with a burglarious entry into the dwelling house of one W. A. Wilson, with (795) to ravish Evelyn and Mary Edna Wilson, his daughters.

The two exceptions to the evidence are taken to the admission of confessions to one Wood by the defendant while in custody and on the way to prison.

The usual preliminary examination of the witness was taken as to the circumstances under which the confessions were made, and it appears clearly that no threats were used, no inducements offered and no compulsion exercised in order to secure them. It is manifest that if the witness is believed the confessions were voluntary. The voluntary confessions of a person charged with crime are not only competent, but are regarded as a high class of evidence. The judges should be careful to see that they are voluntary and free from coercive influences.

The objection that defendant was in custody of an officer and on the way to prison is not alone sufficient to render the confessions incompetent. *S. v. Johnston*, 76 N.C. 209; *S. v. Horner*, 139 N.C. 603.

The motion to nonsuit the State as to the charge of burglary in the first degree was properly overruled.

There is abundant evidence tending to prove that the defendant and one Lee Perkins entered the residence of W. A. Wilson on the night of 19 August, 1917, by removing a window sash, that they made their way to the room where his daughters were sleeping, that Perkins put his hands upon the bosom and limbs of a young daughter, Ruth, that she called out for her father, that this defendant was in the room where Mary Edna and Evelyn were in bed and when about to be detected secreted himself under their bed and was then discovered and shot at by their father.

The State's evidence tends to prove every essential of burglary in first degree. The ground upon which the motion is based is that there is no evidence of an intent to commit rape upon Evelyn or Edna Wilson.

The defendant was caught in the sleeping room and under the bed of his intended victims. His companion had evidently commenced to carry out his purpose upon Ruth in the adjoining room when her cries frightened defendant and he crawled under the bed. From this evidence and the circumstances surrounding defendant, it would be difficult to draw any other conclusion than that the intent of defendant and
(796) his companion was to commit rape. This is too manifest to need discussion.

The defendant excepts to the following part of the charge: "Now, if you find beyond a reasonable doubt from the evidence that at the time he broke and entered that house, if you find beyond a reasonable doubt that he did break and enter, that he had felonious intent or purpose of having carnal intercourse with either one of these girls, it would be burglary in the first degree, although he may have gone into the house for some other reason and after entering formed the purpose of having

that carnal intercourse with either of the girls, forcibly and against their wills."

We are not impressed by the criticism that the words imply that the defendant may be convicted although his purpose was to have sexual intercourse but not forcibly and against will. The entire charge negatives that position. The judge repeatedly told the jury that the intent must have been to have carnal intercourse with one of the females "forcibly and against her will," and that the act must have been perpetrated with a "felonious intent."

The concluding part of the instruction excepted to may be erroneous, standing alone, as the authorities agree that the felonious intent must exist at the time of breaking and entering, but a review of the entire charge clearly demonstrates that the jury could not have been misled by the inadvertence of the judge. The evidence clearly shows beyond dispute that the intent existed when the defendant broke and entered the house.

If we thought it possible that the jury could have been misled by this error, we would without hesitation grant a new trial. But a review of the entire charge, as well as the evidence in the case, leaves no doubt whatever in our minds that the error was harmless and could not have influenced the minds of the jury in the least. Preceeding the instruction excepted to, the court charges:

"Before you can render a verdict in the first degree you will have to find from the evidence beyond a reasonable doubt that the defendant in the night time broke and entered the dwelling house and that at the time of breaking and entering said dwelling, he intended to commit rape upon either Mary Edna or Evelyn Wilson and carnally know one of them notwithstanding any resistance she might make."

Again the court charged: "If you find that he broke and entered into this dwelling house for the purpose of committing a felony, the felony referred to, that is, to have carnal intercourse with one of the two young ladies referred to, forcibly and against her will, and that he had that intent in breaking and entering the dwelling house in the night time," etc. Similar instructions are to be found in other parts of the charge. (797)

In *concluding* his charge, the judge instructed the jury: "In that connection, I may further instruct you that before you can find the defendant guilty of burglary in the first degree, you must find from the evidence, beyond a reasonable doubt, that at the time of the breaking and entering the defendant broke and entered in at that time with the intention of having carnal knowledge with one of the ladies mentioned, forcibly and against their wills, notwithstanding any resistance she might make."

There is no evidence whatever indicating that defendant formed the intent to commit rape *after* he entered the house.

In his own evidence he disclaims any such purpose at any time. Such theory is inconsistent with all the evidence. That the defendant and his companion Perkins entered the building for the deliberate purpose of forcing the girls to yield to them is an irresistible and unavoidable conclusion from all the evidence except that of defendant himself.

He testified that he was very drunk, that Perkins led him to the house "to have some fun"; that he remembered nothing about it, that he had no intent to do any harm, that he crawled under the bed to sleep off his drunk and was awakened by the words "Shoot him under there."

This defense was put to the jury by the judge very clearly, fully and fairly and defendant was given the full benefit of it. It was no fault of the judge that the jury refused to give credence to it.

The other assignments of error are without merit and need not be discussed.

Upon a review of the whole record, we are of opinion that no substantial error has been committed that will justify us in directing another trial.

No error.

Cited: S. v. Johnson, 176 N.C. 723; *S. v. Bridges,* 178 N.C. 736.

(798)

STATE v. J. J. FORD, E. R. CARSON, AND WILLIAM DAVENPORT.

(Filed 13 March, 1918.)

1. Larceny—Criminal Law—"Recent Possession"—Presumptions.

The doctrine of recent possession, as applied under indictment for larceny, should be kept within proper limits, and a presumption of guilt will only apply when the possession is of such character as to manifest that the stolen goods came to the possessor by his own act, or with his undoubted concurrence.

2. Same—Facts.

The presumption of larceny from "recent possession" when it exists, is one of fact, and is stronger or weaker as the possession is more or less recent, and as the other evidence tends to show it to be exclusive or otherwise.

3. Same—Instructions—Trials.

When "recent possession" is relied upon to convict for larceny, on a Saturday night, and there is evidence that the goods were found on Sun-

day in a warehouse at the rear of a store of a partnership of which one defendant was a member, and that a certain third person committed the theft at night with an unidentified person, under this and the further evidence of this case, it is *Held* that there was sufficient evidence for conviction; but, as there was evidence that the warehouse was readily accessible by others, and the store had been left in charge of a clerk, etc., it was reversible error for the trial judge to instruct the jury that the "recent possession" of the goods in the warehouse raised the presumption of guilt of the defendant, a member of the firm. The guilt of the other partner was not involved in the case.

4. Larceny—Evidence—Trials—Questions for Jury.

Where the evidence, in a prosecution for larceny, tends to show that one of the defendants with an unidentified person, took the goods at night and carried them away with the cart and horse of his codefendant and put them in a warehouse, where they were found the next day; that the cart was driven to the house of the codefendant, where both of them were carousing or drinking that night, etc., it is sufficient to sustain a verdict of conviction for them both.

5. Courts—Trials—Prejudice—Instructions—Appeal and Error.

Upon this trial for larceny, the child of defendant went into the court room while the defendant was a witness, when the solicitor remarked that it was for the purpose of influencing the jury; *Held*, the instruction of the judge relieved the situation of prejudice to the defendant, if any existed, and his requiring the child to be carried into another room was a matter within his discretion.

6. Instructions—Criminal Law—Several Defendants.

Where the judge instructs the jury that they could find any one of several defendants on trial for larceny, or any two or all three guilty, or they may render a verdict of not guilty as to all of them, it is not objectionable as an instruction to find them all guilty, if they so found one of them.

APPEAL by defendants from *Calvert, J.*, at January Term, 1918, of PITT.

This is an indictment for larceny against three defendants, Davenport, Ford, and Carson. A verdict of guilty was returned against all of the defendants. The defendant Davenport does not appeal.

The evidence for the State tends to prove that the railroad warehouse at Whitehurst, N. C. was broken into on Saturday night, 31 March, 1917, and that goods were stolen therefrom; that the defendant Davenport and one other, who is not identified by the evidence, were present and participated in the larceny; that the goods were carried from Whitehurst and were placed in a warehouse at Bethel belonging to Ford & Shelton, a horse and cart being used for that purpose, belonging to the defendant Carson; that the goods were placed in the (799) warehouse within two or three hours after they were stolen; that the warehouse at Bethel is about 10 by 14 feet in size and was within a

short distance of the store of Ford & Shelton; that Shelton, one of the partners, lived in the country and had very little to do with the management of the business of Ford & Shelton; that there was a front door to the warehouse which was fastened by a cheap lock with hasp and staple; that the staple had been broken and could easily be removed; that the key to this lock was kept on a nail near the office door inside the store and was found there on Sunday morning; that there was a back door to the warehouse which was fastened by a latch on the inside of the door and that there was a small window near the back door through which the latch could be reached; that Ford & Shelton had one clerk at the time of the larceny named Gregory; that he and Ford had the control and management of the business at that time; that on Sunday evening, the day of the larceny, Ford's wife was taken sick and he left the store about three o'clock and did not return until Sunday morning except for about a half-hour between seven and eight o'clock that night, and there is no evidence that he went to the warehouse; that on Saturday night Gregory was in charge of the store; that on Sunday morning Gregory took the key to the warehouse from the nail where it was hanging in the store and opened the warehouse for parties who were in search of the stolen property.

The evidence also tends to prove that after the goods were placed in the warehouse of Ford & Shelton, the horse and cart were driven to the home of the defendant Carson; that the cart was left at the back door of the defendant and the horse placed in his stable near the dwelling house; that the defendant Davenport lived on the premises of the defendant Carson and was at his home on Saturday night as late as eleven o'clock; that he was also at the home of Carson early Sunday morning and that when parties approached the home some one was seen to jump and run and that when the parties went to the place they found the defendant Carson and asked him if he had seen any one run and he said that he had not seen anybody.

There are also declarations of the defendant Carson which will appear in the opinion.

His Honor charged the jury as to the defendant Ford, among other things as follows: "The law says that when a person is found in possession of property which has been stolen and recently after the theft, the law presumes that the person found in possession of the property is the one who has stolen it, or that he is in some way criminally connected with the theft. . .If you find from this testimony, and beyond a reasonable doubt, that Ford, the defendant, had the con-
(800) trol and management of that business and was in the control and dominion of the warehouse in which those goods were found,

then he was in possession of the warehouse and consequently in possession of the goods, if you should find that they were found therein within the meaning of this rule with respect to the presumption from the possession." The defendant Ford excepted.

There was a motion for nonsuit in behalf of both of the defendants Ford and Carson, which was overruled and both defendants excepted. Each of the defendants, Ford and Carson, were sentenced to a term of imprisonment on the county roads, and they appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Albion Dunn and M. K. Blount for defendant Carson.

Julius Brown, Harding & Pierce and Evans & Evans for defendant Ford.

ALLEN, J. The doctrine of recent possession, as applied in the trial of indictments for larceny, frequently leads to the detection of a thief, when without it the guilty would go free, but the temptation to shift evidence of guilt from one to another, and the ease with which stolen property may be left on the premises of an innocent person, make it imperative that the doctrine be kept within proper limits, and as Lord Hale says 2 Pleas of the Crown, 289, "It must be very warily pressed."

Gaston, J., says in *S. v. Smith*, 24 N.C. 406, while discussing a charge to the jury that recent possession of stolen property raised a presumption of guilt: "From necessity, the law must admit, in criminal as well as civil cases, presumptive evidence; but in criminal cases it never allows to such evidence any *technical* or *artificial* operation beyond its natural tendency to produce belief under the circumstances of the case. Presumptions of this kind are derived altogether by means of experience from the course of nature and the habits of society, and when they are termed legal presumptions it is because they have been frequently drawn under the sanction of legal tribunals that they may be viewed as authorized presumptions. Among these is that which was in the mind of his Honor, the recent possession of stolen goods, in the case of larceny, raising the presumption of an actual taking by the possessor. But when we examine the cases in which such a presumption has been sanctioned, or consider the grounds of reason and experience on which the presumption is clearly warranted, we shall find that it applies only when this possession is of a kind which manifests that the stolen goods have come to the possessor by *his own act* or, at all events, with his *undoubted* concurrence."

In the *Smith* case tobacco was stolen Friday night, and was (801) found Saturday morning in a barn on the land of Smith and

within one or two hundred yards of his dwelling, and it was held error to charge that these facts raised a strong presumption of guilt, and the court lays no stress on the use of the word "strong" in the instruction and deals only with the question whether the facts raised a presumption against the defendant.

In *S. v. Graves,* 72 N.C. 485, *Pearson, C. J.,* says that the presumption does not arise except when "the fact of guilt must be *self-evident* from the *bare fact* of stolen goods," and *Hoke, J.,* in *S. v. Anderson,* 162 N.C. 571, that it is only when "he could not have reasonably gotten possession unless he had stolen them himself."

The principle is usually applied to possession which involves custody about the person, but it is not necessarily so limited. "It may be of things elsewhere deposited, but under the control of a party. It may be in a storeroom or barn when the party has the key. In short, it may be in any place where it is manifest it must have been put by the act of the party or his undoubted concurrence." *S. v. Johnson,* 60 N.C. 237.

The presumption, when it exists, is one of fact, not of law, and is stronger or weaker as the possession is more or less recent and as the other evidence tends to show it to be exclusive: *S. v. Rights,* 82 N.C. 675; *S. v. Record,* 151 N.C. 697.

Applying these principles, we are of opinion there is evidence to be submitted to the jury as against the defendant Ford, but that there is error in the charge.

His Honor charged the jury that the law presumed that the defendant had stolen the property or was criminally connected with the theft if he had control and management of the business and was in control and dominion of the warehouse, making his guilt depend on two facts that were not in controversy, and he failed to instruct the jury that this presumption could not, however, arise unless this control, management, or dominion was exclusive, or unless the jury was satisfied beyond a reasonable doubt that the goods were placed in the warehouse "by the act of the party or his undoubted concurrence." *S. v. Johnson, supra.*

The distinction is important and material. There are thousands of barns, stables, outhouses, warehouses, chicken-houses in this State under the control, management, and dominion of the owner, many of them open and easy of access, in which stolen property may be secreted without the knowledge or concurrence of the owner, and it is going far enough to permit possession under these conditions to be considered as a circumstance without giving it the additional weight of a presumption raised by law which is equivalent to saying to the jury that the

(802) experience and observation of those who have been administer-

ing the law for hundreds of years is that the owner of the premises is the thief.

In this case the defendant Ford, who is shown to be a man of good character, testified without objection and without contradiction that Davenport, who with one other not identified stole the goods from the warehouse at Whitehurst, told him that they intended to carry the goods to Edgecombe County, but when they got to Bethel day was breaking and they had to put them somewhere or be caught with them, and as he knew about the warehouse he went around and drew the staple and put them in there.

This is not an unreasonable statement, because it must be remembered that the goods were stolen on Saturday night and placed in the warehouse early Sunday morning, and it might be reasonably expected by the thieves that the warehouse would not be used on Sunday, and that the goods would not be discovered before they could remove them on Sunday night.

The evidence is also practically uncontradicted that Ford's wife was very sick on Saturday evening and Saturday night; that Ford left the store about 3 o'clock Saturday evening and did not return until the next day, except for about a half hour between 7 and 8 o'clock, and there is no evidence that he then went to the warehouse; that the warehouse was a small building 10 by 14 feet, situated a short distance from the store; that there was a back door to the warehouse which was fastened by a bolt on the inside; that there was a small window near the door with panes of glass broken in it, and that the bolt could be reached through this window; that there was a front door to the warehouse which was fastened with a cheap padlock costing about 10 cents and a hasp and staple, and that the staple had been broken off before the time of the larceny and could be easily removed; that the key to the warehouse hung on a nail on the outside of the office in the store, and that it was there on Sunday morning; that the defendant Ford had in his employment a clerk named Gregory, who was in charge of the store on Saturday night and was left there by Ford when he returned to his home.

Under these circumstances it may be true that Davenport drew the staple and placed the goods in the warehouse without the knowledge or concurrence of Gregory or Ford, or that Gregory opened the warehouse for Davenport, or that Davenport opened the back door of the warehouse by lifting the bolt of the back door through the window, and at most the evidence of possession is only a circumstance which can be considered against the defendant.

The case of the defendant Carson stands upon a different footing, as his Honor told the jury that he could not be convicted unless (803) he either took the property from the warehouse at Whitehurst, or participated in taking it, and the principal question presented by his appeal is whether there is any evidence of this fact.

All of the evidence shows that the defendant Davenport was present and aided in taking the goods from the warehouse at Whitehurst, and that the goods were carried to Bethel on a cart pulled by a horse, both belonging to the defendant Carson, and that after the goods were placed in the warehouse of Ford the horse and cart were carried to the premises of Carson, reaching his premises very early Sunday morning, The evidence also tends to prove that Davenport was at the home of Carson as late as 11 o'clock on Saturday night, and that they were drinking together; that the stable in which the horse was kept was but a short distance from the house in which Carson and his wife lived; that when the horse and cart were returned on Sunday morning the cart was driven near to the back door of Carson and the horse carried to his stable; that on Sunday morning when parties went to the home of Carson searching for the thief, as they went up they saw a man jump and run a short distance from the home on the edge of the woods, and that they went to the place and found Carson and asked him if he had seen any one run and he said that he had not seen any one run, and that shortly thereafter Davenport was found in the woods near the place; that Carson said to one of the parties on Sunday morning, "I am not going to suffer for what other folks done. Somebody else is *connected* in this thing, and I am going to suffer for what they did." And again he said, "They have got me right fair, but anyhow I can go on and serve my time out on the road like a man," and that he then laughed and said, "I am not going to suffer for what others have done. I have not done anything, and I do not expect to suffer for the doings of others."

These circumstances, while not necessarily conclusive, are sufficient to be submitted to the jury, and the motion for judgment of nonsuit was properly overruled.

The incident connected with the child of the defendant going into the courtroom while he was on the witness-stand is not reversible error. The remarks of the solicitor intimating that the child was brought in purposely to influence the jury does not appear to be warranted by anything appearing in the record, but his Honor immediately instructed the jury that they must not consider what had occurred, or the remarks of the counsel for the State, and that they should free their minds from any impression brought about by the scene which had transpired, and

we must assume that the jurors obeyed the instruction as the incident was not of such character that the impressions associated with it could not be easily removed. The order of the judge requiring (804) the child to be carried to another room was a matter within his discretion.

We have examined the other exceptions of the defendant Carson and do not find any error.

The direction of his Honor that they could find any one or any two, or all three, of the defendants guilty, or that they might return a verdict of not guilty as to all of them, could not be understood by the jury to mean that if they found one guilty they must find all guilty, as he distinctly told them that they might find one guilty or two guilty, which clearly implied a verdict of not guilty as to those not found guilty.

It is well to say, lest it might be misunderstood, that there is no claim or suggestion that the witness Gregory had any part or participation in the crime, and that his relation to the facts in evidence is referred to only for the purpose of showing the error in applying the presumption of guilt against the defendant Ford.

A new trial is ordered as to the defendant Ford and the judgment is affirmed as to the defendant Carson.

No error as to defendant Carson.

New trial as to defendant Ford.

Cited: S. v. Harrington, 176 N.C. 717; *S. v. Lippard,* 183 N.C. 788; *S. v. Reagan,* 185 N.C. 713; *S. v. Riley,* 188 N.C. 75; *S. v. White,* 196 N.C. 3; *S. v. Lambert,* 196 N.C. 530; *S. v. McFalls,* 221 N.C. 23; *S. v. Holbrook,* 223 N.C. 625; *S. v. Weinstein,* 224 N.C. 650; *S. v. Spencer,* 239 N.C. 612.

(805)

STATE v. LOUISE PRICE.

(Filed 20 March, 1918.)

1. Criminal Law — Amendments — Courts — Statutes — Bawdy Houses — Vagrancy.

The court has the power to allow a complaint and warrant for the violation of the vagrancy law (ch. 391, Acts of 1905; ch. 1, Acts of 1915; ch. 1012, Acts of 1917) to be amended in proper instances by the insertion of the words "bawdy house and assignation house" and adding the words "thereby becoming a vagrant in violation of the statutes." *S. v. Poythress,* 174 N.C. 809, cited and applied.

2. Criminal Law — Bawdy Houses—Vagrancy—Evidence—Nonsuit—Arrest of Judgment.

Where the affidavit and warrant for a violation of the vagrancy laws follow the language of the statute (ch. 391, Acts of 1915, etc.), and there is evidence upon the trial to support the charges therein made, motions to nonsuit and in arrest of judgment are properly denied.

3. Criminal Law — Bawdy Houses — Evidence — Reputation—Statutes—Constitutional Law.

By express statutory provision, the reputation that a house is kept as a bawdy house may be received in evidence on the trial of a person for keeping one, under an indictment for vagrancy, etc., and the statute is constitutional and valid. Pell's Revisal, sec. 3353a.

4. Criminal Law—Instructions—Bawdy Houses—Issues—Appeal and Error—Harmless Error.

Where the defendant is charged under the provisions of the statute with vagrancy and the keeping of a bawdy house, of which there is evidence upon the trial, and the court submits the case under the issue as to vagrancy alone, the charge of the court embracing the elements of keeping a bawdy house is not to the defendant's prejudice when it was so explained to the jury that they could not have been misled thereby, and when the court so confined the inquiry to vagrancy as to exclude all evidence not relating thereto.

ACTION, tried before *Calvert, J.*, and a jury, at January Term, 1918, of WAKE.

Defendant was charged with the offense of vagrancy, the complaint and warrant alleging that she "did unlawfully and willfully keep, and was an inmate of, a bawdy house, assignation house, lewd and disorderly house and place where illegal sexual intercourse was habitually carried on, and thereby became a vagrant, in violation of Acts of 1905, ch. 391, Acts of 1915, ch. 1, and Acts of 1917, ch. 1012, and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

She was tried before the City Court of Raleigh, convicted and sentenced to twelve months imprisonment in jail, to take effect at the expiration of a former sentence, this being the second offense. The defendant appealed from this judgment to the Superior Court, where she was again convicted. She moved for arrest of judgment and also for a new trial, which motions were overruled, and she was thereupon sentenced to thirty days imprisonment in the jail of the county, and appealed from the judgment.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

A. Jones & Son and J. C. Little for defendant.

WALKER, J., after stating the case: First. When the case was called for trial, the solicitor moved to amend the complaint and warrant by inserting the words "bawdy house and assignation house," and adding the words "thereby becoming a vagrant, in violation of the statutes" (enumerated in the motion and hereinbefore stated). The motion was allowed and the affidavit and warrant accordingly amended." Defendant excepted.

The original complaint and warrant, as they now appear in the record, have these words in them, and it may be that they are not the originals, but if this be so, the court clearly had the (806) power to allow the amendment. *S. v. Poythress,* 174 N.C. 809. In that case we said in regard to a much more radical and serious amendment of a criminal warrant: "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 of 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 cited 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, as appeared from the record, and both amendments abundantly supported and sustained by evidence offered at the trial." And we further said that "in those cases (referring to those presently to be cited) the affidavit, or original charge, was essentially changed, and yet it was held that the Superior Court had the power to amend it."

As has already been stated, two counts were added to the original charge. It is true they related to the sale of the liquor, but the original accusation was that defendant (1) had engaged in the business or occupation of selling liquor; (2) that he had liquor in his possession for sale; and (3) that he received more at one time and in one package than the law allows, all of them different offenses, and we held that notwithstanding this the amendment could be made under the statute (Revisal 1905, sec. 1467). *S. v. Winslow,* 95 N.C. 649; *S. v. Davis,* 111 N.C. 729; *S. v. Sharp,* 125 N.C. 634 (74 Am. St., 663); *S. v. Yoder,* 132 N.C. 1113; *S. v. Sykes,* 104 N.C. 694. As the record now stands, and accepting it as importing verity, which we are required to do in the absence of any suggestion of any error in it or a diminution of it, there

was no necessity for an amendment, and the ruling of the court, if it could possibly be considered as erroneous, was harmless.

Second. The motion to nonsuit was properly overruled, as there was evidence for the jury upon the question of the defendant's guilt; and the motion in arrest of judgment was likewise properly refused, because the affidavit and warrant charged an indictable offense, and there is nothing apearing in the record for which the judgment can be arrested. The charge is made in the precise terms of the statute, and, for an apparent reason we should not give the warrants and proceedings
(807) of magistrates a too drastic or technical construction, but even if we should do so in this case, the charge is well laid in the papers.

Third. The evidence as to reputation of the house was competent, and properly admitted, when considered in connection with the other testimony in the case. The statute itself makes such testimony competent. Pell's Revisal, sec. 3353-A. 1 Wharton's Cr. Evidence (10 Ed.), sec. 261, states the well-settled rule to be that "On indictments for keeping houses of ill fame, when such is the statutory term designating the offense, the ill fame or bad reputation of the house may be put in evidence." For that statement in the text the following cases are cited in the note: *U. S. v. Gray,* 2 Cranch C. C., 675, Fed. Cas. No. 15251; *U. S. v. Stevens,* 4 Cranch C. C., 341, Fed. Cas. No. 16391; *Caldwell v. S.,* 17 Conn., 467; *People v. Lock Wing,* 61 Cal., 380; *People v. Buchanan,* 1 Idaho, 681. See *U. S. v. Johnson,* 12 Rep., 135. See, also, *S. v. Blakesley,* 38 Conn., 523.

The annotation of this text states that care should be taken to see whether the statute makes the reputation or ill fame, an essential element of the crime, or whether the actual character of the house is the fact in issue. If the reputation is a constituent part, evidence of it is, of course, admissible, but if the actual character of the house is the question to be determined, then reputation becomes admissible like any other evidentiary fact, and is used as one of the exceptions to the hearsay rule. 1 Wharton's Cr. Evidence, sec. 261, n. 1. But the statute is sufficient authority for the admission of the evidence. It was competent for the Legislature to enact such a rule of evidence. It will be noted that the reputation of the character of the house, as being one forbidden by the law, is not given even the force of presumption or prima facie case, and is certainly not made conclusive proof of the ultimate fact sought to be established. It is only a circumstance which the jury are permitted to consider in passing upon the defendant's guilt. Some of the courts have suggested the necessity of a natural connection between the fact inferred or presumed and the fact upon which the presumption or inference is based, as a condition of the power of the Legislature to declare prima facie rules of evidence.

Thus the Court, in *S. v. Beach*, 147 Ind., 74, and 36 L.R.A. 179 (cited in *S. v. Thomas, infra)*, declared, *obiter*, that a law which provides that certain facts are conclusive proof of guilt would be unconstitutional, "as also would one which makes an act prima facie evidence of crime which had no relation to a criminal act and no tendency whatever to establish a criminal act."

So the Court, in *People v. Cannon*, 139 N.Y. 32, 36 Am. St. Rep., 668, said: "The fact upon which the presumption is to rest must have some fair relation to or natural connection with the main fact. The inference of the existence of the main fact because of the (808) existence of the fact actually proved must not be merely and purely arbitrary or wholly unreasonable, unnatural, or extraordinary." This qualification of the legislative power is denied in 2 Wigmore on Evidence, sec. 1354, p. 1672, upon the theory that if the Legislature can make a rule of evidence at all, it cannot be controlled by the judicial standard of rationality any more than its economic fallacies can be invalidated by the judicial conception of economic truth. Without, however, conceding that the rationality of the legislative rule of evidence is in no case open to judicial examination, it is probably safe to assume that the courts will be reluctant except in extraordinary cases, to declare that the legislative rule is so irrational as to be invalid. *Banks v. S.*, 52 S.E. (Ga.), 74. (Same case and note in 2 Law Reports Anno. (N.S.), p. 1007, especially the note at pp. 1008 and 1009, where the subject is discussed with a citation of some of the authorities bearing upon it.) See, also, *S. v. Thomas*, 2 L.R.A. (N.S.), p. 1011, citing *S. v. Beach*, 147 Ind., 74 (36 L.R.A. 179); *S. v. Boyd*, at this term; *Jones v. Brim*, 165 U.S. 180.

"It is within the power of the Legislature to prescribe a rule of general application based upon a state of things which is ordinarily evidence of the ultimate fact sought to be established." *Hawker v. S.*, of New York, 170 U.S. 189, 197.

The principle seems to be quite well settled that the Legislature has the power to declare that reputation, in certain instances, shall be evidence as to the character of a house in which illicit traffic is carried on *(S. v. Beach*, 36 L.R.A. 179), and it may further declare that certain facts shall be prima facie or presumptive evidence of another fact. *S. v. Barrett*, 138 N.C. 630; *S. c.*, 1 L.R.A. (N.S.) 626. If such facts were made conclusive proof of the criminal act, a different question would be presented; but they are in this case, as the statute does not go to that extent. The *Barrett* case has received the approval of this Court many times since it was decided. *S. v. Wilkerson*, 164 N.C. 432, where statutes making certain facts evidence or even prima facie

evidence of another fact involved in the issue have been upheld, and the distinction between those statutes which may be valid and those which may not be valid is fully stated. *S. v. Divine,* 98 N.C. 778, presented a different question and is easily distinguished from the cases above cited.

Fourth. The objections to the charge of the court cannot be sustained. The learned judge eliminated so much of the complaint as contained the separate charge of keeping a bawdy house and submitted all of the relevant evidence to the jury on the sole issue of vagrancy. There were circumstances in evidence which taken with the reputation of the house would warrant the jury in finding that the defendant was a va-
(809) grant within the meaning of the statute. Any extended discussion of the facts would be useless. It may be that his Honor should not have excluded the charge of keeping a bawdy house as contended by the State, but if it was error to do so, it is plain that it was one committed in favor of the defendant, and she will not be heard by the law to complain.

With reference to the remaining allegations in the complaint and the evidence to support them, the court charged almost in the very language of the statute, and at least substantially so, and the jury could not well have been misled as to the issue they were trying or as to what was necessary to constitute guilt.

No error.

Cited: S. v. Mills, 181 N.C. 534; *S. v. McNeill,* 182 N.C. 859; *S. v. Springs,* 184 N.C. 771, 775; *S. v. Hunt,* 197 N.C. 708; *S. v. Brown,* 225 N.C. 24; *S. v. Robinson,* 229 N.C. 649.

(810)

STATE v. ARVIL WOOD.

(Filed 8 May, 1918.)

1. Courts—Terms—Absence of Judge—Sheriffs—Adjournment.

The provision that the sheriff should adjourn the court from day to day until the fourth day of the term, and then for the term, in the absence of the judge who was to have held it, under the law, is subject to the provision that this shall be done "unless the sheriff shall be sooner informed that the judge, from any cause cannot hold the term," which implies the power of the judge to order an adjournment to a later day in the term. Revisal, sec. 1510.

2. Same—Appearance of Judge.

Where the sheriff has not continued a term of the Superior Court for the absence of the judge to hold the same, the judge may appear at any day within the term, and the proceedings thereafter will be valid. Revisal, sec. 1510.

3. Same—Governor.

Where the judge of the district is prevented from holding a term of court, as in case of detention by a trial in another county extending over into such term, the Governor may designate and appoint another judge to hold such term, or a part thereof, though within the same district, and by virtue of his commission he is a judge both *de facto* and *de jure*, while so acting.

4. Courts—Terms—Governor—Special Judge—Jurors—Special Terms.

Where the trial of a cause in one county has continued over the term and prevented the trial judge from holding the courts of another county in the same district commencing the following week, the mere fact that the Governor has commissioned a different judge to hold such term of court does not render that term a special one, requiring the drawing of a grand jury and advertising the term, according to the law in such instances.

5. Jurors—Grand Jury—Constitutional Law—Number of Jurors—Statutes—Courts.

Where the jurors are regularly drawn for a two weeks term of court, Revisal, sec. 1959, but it is held only for the second week and by a diferent judge commissioned thereto by the Governor, it is proper for the presiding judge to use the second week jurors for the grand jury, though but 16 in number without requiring that their names be again put in a hat and drawn therefrom by a child under 10 years of age; and it will be presumed, nothing to the contrary appearing, that the judge had satisfactorily questioned them as to their qualifications. *S. v. Brittain*, 143 N.C. 689, cited and applied. The constitutional requirements as to the requisite number of grand jurors and its history discussion by CLARK, C. J.

6. Jurors—Selection—Objection to Jurors.

Defendants in a criminal action have no right to select a jury, but only to object to jurors, which applies both to grand and petit juries.

7. Constitutional Law—Two Offices—Solicitors—Appointment by Court.

In the absence of the solicitor to prosecute a criminal action, the judge may appoint an attorney to prosecute in his stead, such temporary appointment not being to an office within the intent of our Constitution, Art. XIV, sec. 7, prohibiting the holding of two offices at the same time; and the appointment of the United States District Attorney does not disqualify him to act or affect the trial of the action.

8. Same—Acceptance of Office—Vacating Prior Office.

The appointment by the Judge of the United States District Attorney to act for the absent solicitor in the prosecution of a criminal action in the State court, if it came within the inhibition of our Constitution, Art. XIV,

sec. 7, as to holding two offices at the same time, would not affect the validity of the trial in the State courts for the acceptance of the latter position would *ipso facto* vacate the first one.

9. Criminal Law—Technicalities—Pleas—Abatement—Motion to Quash.

Where the motion in a criminal action is, in effect, to quash the indictment, it will not be deemed a waiver of the defendant's right because he has miscalled it a plea in abatement. Revisal, sec. 3239, 1870. The intent of our statutes, 3254, 3255, prohibiting reliance upon technicalities, being also for the benefit of the defendant in such instances.

ALLEN, J., dissenting.

APPEAL from *Ferguson, J.*, at December Term, 1917, of RANDOLPH, by the defendant who was convicted of a secret assault with intent to kill W. Fernando Wood, a near relative, and sentenced to 12 months imprisonment. There is no allegation of error in the trial, but the appeal rests entirely upon assignments of error for a refusal of a plea in abatement.

The regular December term of Randolph should have opened on Monday, 3 December, 1917. At that time Hon. E. B. Cline, the judge holding the courts of the district, being still engaged in the trial
(811) of Gaston B. Means for murder in Cabarrus, addressed the following letter to the sheriff of Randolph:

CONCORD, N. C. 30 November, 1917.

To the Sheriff of Randolph County, N.C.

Confirming my message to you of this date you are ordered and directed to adjourn the approaching term of the Superior Court of Randolph from Monday, 3-15 December, to begin on Monday, 10 December, 1917, which is Monday of the second week of the term, this order being made by reason of the fact I shall be compelled to continue in court here during next week and neither I nor the solicitor can be in Randolph before 10 December.

Please make this known to attorneys, jurors, and witnesses as soon as possible, certainly not later than next Monday morning at the court house door. All witnesses should be directed to return 10 December. The first week's jurors are excused, but there should be as many as 24 summoned for the second week and 36 would be better if they can legally be had.

E. B. Cline, *Judge Presiding.*

Subsequently the Governor issued a commission in regular form to Judge G. S. Ferguson, of the Twentieth Judicial District, reciting:

"Whereas, it has been made to appear to the satisfaction of His Excellency, the Governor, that the Hon. E. B. Cline, assigned by law to

hold the regular term of the Superior Court for the county of Randolph, in the Fifteenth Judicial District, is unable to do so by protracted illness or unavoidable accident:

"Now therefore, I, T. W. Bickett, Governor of the State of North Carolina, by virtue of authority vested in me by article 4, sec. 11, of our State Constitution, do hereby require and commission you to hold the regular term of the Superior Court for the county aforesaid, beginning on Monday, the 10th day of December, 1917, for one week."

The defendant entered a plea in abatement on the following grounds: "The bill of indictment was not found by a legally constituted body. The defendant is not informed whether this term of the court is a regular or a special term. The board of commissioners did not give thirty days notice of said term of court as provided by statute, and failed to draw a jury for said term of court as provided by statute, and there was not 18 jurors drawn for a grand jury by a child not 10 years of age. That the 16 jurors who were serving as grand jurors are of the jurors drawn for the second week of the term and were not drawn for grand jurors for the first week, and the men serving were all drawn for the second week; that the Governor did not notify the chairman of the board of county commissioners of the present called term of this court and give him an opportunity to draw a jury according to law in that there was not thirty days notice given in the newspaper (812) according to law, as defendant is informed and believes."

1. That if this term of the court is not a special term, but is a regular term, the same is not sitting according to statute; that the sheriff had the right to open the court from day to day till the fourth day of the term, and then the term should have continued to Monday of this week, and on Monday of this week the judge did not appear, then the court stood continued till the next term of the court.

2. That if the court was called by the Governor, as defendant is informed, he could not order an exchange of courts between Judge Cline and Judge Ferguson under the statute when Judge Cline was holding court in the district in which Randolph County is a part of the same organization of the court.

3. That W. C. Hammer is prosecuting the docket as solicitor and is holding and filling the office of the district attorney for the United States, which is an office of trust and profit within the meaning of the Constitution, and his acts as such solicitor are null and void as he could not hold two offices at the same time, and that the solicitor for the State has no right to delegate the duties of his office to another person.

4. That there was not 18 members of the grand jury at the term of court when the bill was found; that there was only 16 of said grand jurors, and that they were not drawn by a child under 10 years old, but were called into the box and charged.

The judge overruled the plea and found the following facts:

"That Judge Cline, who is assigned by law to hold the regular term of this court, is engaged in the trial of a capital case in the county of Cabarrus, and the Governor of the State called upon and requested Judge Ferguson, the present presiding judge, to hold this week of court for Judge Cline, and that Judge Ferguson was unable to reach the court on Monday and so notified the sheriff that the court would open on Tuesday. Upon the opening of the court Tuesday morning it is ascertained that the jury for the first week had been notified they need not attend the second week of court by Judge Cline; that on calling over the jury, the judge ascertained that there were only 16 jurors in attendance upon the court who were drawn by the county commissioners to serve for the second week of the term, and being of the opinion that the grand jurors should be drawn by the county commissioners from the regular jury box the 16 men were impaneled and charged as grand jurors without the form of having a child to draw their names from the box.

(813) "Hayden Clement, solicitor for the judicial district, is engaged as solicitor in the prosecution of a capital case, *S. v. Means*, in the county of Cabarrus, and that he requested W. C. Hammer, attorney of this court, to represent him at this term of court, the said Hammer being United States District attorney for the Western District of North Carolina, and the court designated and requested the said W. C. Hammer to represent the State as solicitor during the term of court and made the record that he was appointed to act as solicitor during the term."

Upon the foregoing findings of facts by the court the plea in abatement is overruled, and the defendant excepts.

After verdict of guilty was rendered, the defendant moved in arrest of judgment on the same plea in abatement, which being refused, the defendant excepted, and from the sentence imposed appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

Brittain & Brittain for defendant.

CLARK, C. J. There are no exceptions to the evidence or the charge or to the merits in any way. The defendant's exceptions are all based

upon the plea in abatement, which are, as stated in the defendant's brief, substantially as follows:

1. "That the term should have begun on 3 December, 1917, and the sheriff had power only to adjourn from day to day until the fourth day of the term, and if the judge did not appear the court should have been adjourned till the next term, and that the action of the court held the following week was therefore a nullity."

Revisal, 1510, authorized the sheriff to take the above action, but there is a provision also in that section, "Unless the sheriff shall be sooner informed that the judge from any cause cannot hold the term." This includes, by uniform custom and from the nature of the case, an instruction from the judge to adjourn to any later day in the term. This not infrequently happens by reason of the sickness of the judge or other engagements, as in this case. The judge here instructed the sheriff to adjourn the court till the following Monday, and this action was within his authority. In *McNeill v. McDuffie,* 119 N.C. 336, where the judge was detained, as in this case, by holding court in another county (Richmond), he instructed the sheriff of Cumberland to adjourn that court till the second Monday, and this Court held "The judge may appear on any day within the two weeks (if the court has not been previously adjourned), and that part of the term actually held will be as valid as if court had been opened on the day fixed by the statute," saying "It can make no difference what was the (814) cause of the judge's absence, whether illness or attending to official duties elsewhere. The material and only essential facts are that the judge designated by law to hold the court appeared within the time prescribed and held it, the court not having been previously adjourned (in consequence doubtless of directions given to the sheriff by the judge)."

If, however, the judge had given no such directions, and it was a matter of fact, as in this case, that the sheriff "had not adjourned the court till the next term and the judge afterwards in the second week actually appeared and held court, his action would be valid." *Norwood v. Thorpe,* 64 N.C. 682, which has been cited since with approval in *McNeill v. McDuffie, supra,* and other cases. If therefore, Judge Cline had appeared and held the court on the second Monday it would have been in every respect a valid term.

2. "Judge Ferguson could not hold the term of the court by exchange with Judge Cline, the regular judge of the district, who was then holding court in Cabarrus."

In this case if the judge who should have held the term was detained by illness or for any unavoidable cause, as was the case, it was

within the power of the Governor to assign Judge Ferguson to hold the second week of the term, or the whole term. *S. v. Lewis,* 107 N.C. 967, is exactly on all-fours. In that case the judge was not detained by official business, as in this case, but the judge (Shipp) had died and the Governor, instead of appointing his successor immediately, in the public interests, thought best to delay such action and assigned Judge Whitaker to hold the second week of the term.

This Court in a very full and satisfactory opinion, which has been repeatedly cited since as unquestioned authority, as follows: "Where the Governor issues a commission to one of the judges of the Superior Court, authorizing him to hold certain terms of the Superior Courts, and the judge undertakes to discharge the duties required of him, he is a *de facto* judge, even if the commission was issued without authority of law. Where the Constitution has clothed the Governor with the power to require a judge to hold a court in a district; other than that to which he is assigned by the general law, upon certain conditions as to the fulfillment of which the Governor must of necessity be the judge, and the Governor issues the commission, the Supreme Court will assume that in fact the emergency sanctioned the issuing of the commission, which will be held valid if the Governor could have for any reason lawfully issued it."

Judge Cline not being able to hold the court, there was no reason or law forbidding the Governor to assign another judge to hold the term, and there is no prohibition against two courts being held at the same time in the same district, which often happens.

(815) Judge Ferguson was a judge of the Superior Court *de facto* and *de jure* and had the same authority, by virtue of the Governor's commission to hold the term, in the same manner Judge Cline could have done. In *S. v. Watson,* 75 N.C. 136, which is quoted in *S. v. Lewis,* the Court said: "The Governor is not bound to assign any reason in the commission or to this Court. As to all the world, except the Legislature, he is the final judge of the fitness of his reasons."

In *S. v. Lewis, supra,* the Court said: "If Judge Whitaker was acting either *de jure* or *de facto* as judge of the Superior Court of Rockingham in opening and organizing that court and in presiding at the trial of the defendant until the jury returned a verdict of guilty, it was error to allow the motion of the defendant and enter the order arresting the judgment."

This case is even stronger against the defendant than that, for there Judge Skipp having died the Governor might have appointed his successor instead of assigning Judge Whitaker to hold the second week of that term. In this case the trial for homicide in *S. v. Means* not being

concluded in Cabarrus, under Revisal, 3266, that term of court was kept open, and unless the Governor could assign some other judge there would have been no term of court held for Randolph at the regular term as required by law.

Among the many cases citing *S. v. Lewis* are *S. v. Turner,* 119 N.C. 841, where it was held: "A judge of the Superior Court who presides in another district by appointment of the Governor is a *de facto* judge of the court so held, and all his acts in that capacity are valid." That case cites as authority also *Cloud v. Wilson,* 72 N.C. 155, where the Court held that the acts of Judge Wilson in holding court were valid because he was a *de facto* judge, though it was finally determined that Judge Hilliard was *de jure* judge during that time.

In *S. v. Register,* 133 N.C. 749, which cites *S. v. Lewis* and *S. v. Turner, supra,* it is held that the power of the Governor to order a judge to hold the term of the court "is not restricted in instances where there is an accumulation of business, nor when such facts is recited as a reason in the commission is the power of the judge restricted to the trial of indictments found before that term."

In *S. v. Hall,* 142 N.C. 710, *Walker, J.* sustained the validity of the action of Judge Long is holding the term of Rowan notwithstanding the extraneous evidence offered that the commission to him to hold such extra term was issued in the name of the Governor, who was absent at the time from the State.

This case is not like *S. v. Shuford,* 128 N.C. 588, where the action of the court was held invalid because the statute creating the criminal district was invalid. But even in that case it is said that the person there "attempting to perform the duties of such alleged office (816) was neither *de facto* nor a *de jure* officer, and hence his acts were null and void," adding, "In *S. v. Lewis,* 107 N.C. 967, the judge was one of the Superior Court judges of the State. The only question was as to the legality of his assignment to hold that term. It was held (p. 592) that he was a *de facto* officer and his acts could not be questioned by a motion in arrest of judgment."

3. "That the term held by Judge Ferguson could not be a regular term, but was necessarily a special term, and was invalid because there was no grand jury drawn for the special term, and no advertising made, as required by law."

This was the regular term of Randolph Superior Court. The commission to Judge Ferguson so states. It was begun and held for the second week only, and Judge Ferguson by assignment of the Governor held it in lieu of Judge Cline, who could have held it but for detention by other official duties. That the action of Judge Ferguson was valid is

fully settled in *S. v. Lewis, supra,* where Judge Whitaker held the second week of Rockingham in lieu of Judge Shipp, who had just died.

4. "That the judge erred in calling the jury for the second week in the box as grand jurors when they were summoned merely as trial jurors, and besides they were not drawn by a child less than 10 years old."

It is presumed, and is not denied, that, according to the usual custom, the judge questioned the jurors as to their qualifications, and they all answered that they were freeholders and had paid their taxes. Being only 16 in number, it would have been a vain thing, and childish indeed, to put 16 names in the hat and requre a child 10 years old to draw out the same 16 names. The jurors were regularly drawn from the box in the manner prescribed by Revisal, 1959. There is nothing in that section which prescribes that only the jurors drawn for the first week shall serve on the grand jury. It may often happen, and has happened, that the court does not begin till the second week. If Judge Cline has been able to attend the second week it would have been entirely proper for him to have taken these jurors, regularly drawn from the box, for the grand jury and to have filled out the defect of jurors for the petty jury by summoning talismen. *S. v. Manslip,* 174 N.C. 798.

5. "That the grand jury was illegal because there was only 16 serving instead of 18."

Twelve is a legal grand jury, but not less than twelve must concur in finding the bill. *S. v. Barker,* 107 N.C. 913, where the whole matter was fuly discussed with a history of the grand jury by *Shepherd, J.*

In *S. v. Perry,* 122 N.C. 1022, it is said: "An indictment is valid (817) if there are only 12 grand jurors *(S. v. Davis,* 24 N.C. 153; *S. v.* Barker, 107 N.C. 913), provided all 12 concur in finding the bill, as must be the case even when 18 grand jurors are present, and the presumption of law is that the indictment was properly found in the absence of a plea in abatement on that ground and proof *(S. v. McNeill,* 93 N.C. 552)," and there is no allegation even here that 12 grand jurors did not concur in finding the bill. There is not statute or custom that "not less (nor more) than 18 constitute a grand jury."

In *S. v. Brittain,* 143 N.C. 669, *Brown, J.,* says that "What is meant by the terms 'jury' and 'grand jury,' as used in the Constitution, is fully defined in the learned opinion of *Mr. Justice Shepherd* in *S. v. Barker,* 107 N.C. 914, but the methods by which the jurors are to be selected and summoned is nowhere prescribed by our Constitution, and we find no limitation therein upon the power of the General Assembly to regulate it."

S. v. Paramore, 146 N.C. 606, relied upon by the defendant, is not in point. That case held that while the provisions of the statute for drawing and summoning jurors are directory, the grand jury is illegally constituted when one whose name was not drawn from the boxes was summoned by mistake and served by mistake. In this case these jurors were regularly drawn from the box, were duly qualified and served. No jurors when drawn from the boxes are designated as grand jurors or petty jurors, and the judge properly took the 16 regularly drawn, who attended for the grand jury, and directed talismen to be summoned for the petty jury. *S. v. Manslip,* 174 N.C. 798.

The whole matter is fully discussed by that eminent jurist *Gaston, J.,* in *S. v. Davis,* 24 N.C. 153, in which he says: "The other ground taken for this motion is for that it appears upon the record that the grand jury who found the indictment was constituted of 15 jurors only. The argument in support of this objection is that by the express words of Revised Statutes, ch. 31, sec. 34, the grand jury must consist of 18 jurors; that under the Constitution of this State no freeman can be put to answer any criminal charge but by indictment, presentment, or impeachment; that an indictment is a written accusation found by a grand jury, and that the accusation which has been received as an indictment in this case is not an indictment because not found by a grand jury legally constituted.

"We do not doubt but that it is competent for the Legislature to declare that although a bill be found by 12 of a grand jury the accused shall not be put upon his trial, and that the bill so found shall not be deemed an indictment unless the grand jury consisted of 18 jurors. Such an act of legislation would not infringe any of the rights or liberties secured by the Constitution, but would be a regulation for the enjoyment of them under the Constitution. The question is, (818) Has the Legislature made such a declaration or any enactment tantamount to such a declaration?

"The words of the section referred to are: 'The judges of the Superior Courts and the justices of the county courts shall direct the names of all the persons returned to serve as jurors at the terms of their respective courts to be written on scrolls of paper which shall be put in a box or hat and drawn by a child under 10 years of age, and the first 18 drawn shall be a grand jury for said county, and the residue of the names in the box or hat shall be the names of those who are to serve as petit jurors for said court.' These words, it is obvious, are directory to the judges and justices of the courts in regard to the manner in which the grand and petit juries shall be formed out of the persons returned generally as jurors on the original venire. First, a suffi-

cient number, 18, shall be drawn by lot out of the whole number returned for the grand jury, and those not so drawn shall serve as petit jurors.

"It does not in terms declare that a grand jury constituted of less than 18 shall be insufficient to find a bill. It does not purport, otherwise than necessarily results from the directions so given, to add to or in any way modify the operation of the ancient rule in regard to the necessary number of a grand jury; and it cannot be believed that if any addition to or modification of the exercise of this so important rule were intended, but that it would have been distinctly and unequivocally announced. It simply gives the directions, but is silent as to the effect which may result from inattention to or nonobservance of them in any particular.

"It cannot be pretended that the rule is not yet in full force that a bill may be found on the presentment of 12 only of a grand jury. Now it would seem a singular anomaly that the concurrence of 12 out of 18 is sufficient to prefer an accusation, but that 12 out of 15 is undeserving of notice."

In *Brucker v. State,* 16 Wis., 356 (quoted in *S. v. Lewis,* 142 N.C. 643), *Dixon, C. J.* discussing the right of the Legislature to provide that 17 persons might compose the grand jury, said: "The foundation of the objection is that this was the rule at common law (that the grand jury should consist of not more than 23 or less than 12) recognized by the Constitution, against which the Legislature had no power to provide. Upon an examination of the authorities, we find no such fixed common-law principle. The only inflexible rule with respect to numbers seems to have been that there could not be less than 12 nor more than 23. The concurrence of 12 necessary to find a bill, and there could not be more than 23, in order that 12 might form a major-
(819) ity. . . . We are of the opinion, therefore, that it is competent for the Legislature, within the limits prescribed by the common law, to increase or diminish the number of grand jurors to be drawn and returned without infringing the rights of the accused granted by the Constitution."

In this State at the time the Constitution of 1868 was adopted a trial jury consisted of 12 men, neither more or less, and as to a grand jury it was required only that "not less than 12 should concur," so that a conviction was practically had by two full panels of 12 men. Long before 1868 (in 1779, ch. 157, sec. 11) the grand jury had been reduced to consist of not more than 18 nor less than 12 men, as is still the case (Revisal, 1969), and, as Judge Gaston says, the number might be reduced to a lesser number—not less than 12.

The historians of the common law say that when the grand jury was first instituted at the Assizes of Clarendon in 1166 it consisted of 36 men—20 from the Hundred and 4 each from the four nearest Vills—though in course of time the number was diminished by custom to "not more than 23 nor less than 12." And that when the first petty jury trial was instituted nearly two centuries later, in 1350, the trial jury consisted at first of the witnesses, and the number varied during a century or more, and unanimity was not at first required. But in process of time the number hardened into 12 and unanimity became necessary, which is certainly the jury intended by our Constitution, though this has been varied in other States by constitutional provisions reducing the number to 8 in one or more States and the abolition of the requirement of unanimity in several States.

The defendant relies upon *Moore v. Guano Co.*, 130 N.C. 230, but that merely holds that Revisal, sec. 1959, is mandatory, and not directory, that the names of the jurors shall be written on scrolls and drawn from the jury box. This was done as to the 16 jurors who attended court and who sat as grand jurors in this case.

As to grand jurors, as well as pretty jurors, the defendant has no right to select, but merely to object, to a juror, and on this occasion no man served as a grand juror who was not properly drawn in accordance with the requirements of law, or to whom the defendant had any legal ground of challenge.

6. The last exception was upon the ground that the court assigned W. C. Hammer, a member of the bar, to prosecute for the State in the necessary absence of Hayden Clement, the solicitor of the district, urging that he was incompetent to act because he held the office of United States District Attorney, and under our Constitution, Art. XIV, sec. 7, no person can hold two offices. Such appointment was a matter of necessity, and has been a recognized custom when the solicitor for any reason is absent (*S. v. Conly,* 130 N.C. 683), and there (820) is an express statute recognizing the custom and extending it to the lamentable case when the solicitor though present in court is not in a condition to act. Revisal, 1499. Such appointment does not make the temporary representative of the State an officer *(Borden v. Goldsboro,* 173 N.C. 661), for it did not prejudice the defendant in any way or deprive him of a due trial according to law. Moreover, even if it had made the appointee an officer, his acceptance would not have made the conviction invalid, but merely would have vacated his previous office, not the second one. *Barnhill v. Thompson,* 122 N.C. 493; *Midgett v. Gray,* 158 N.C. 445.

The Attorney-General insists that while a plea in abatement is valid (Revisal, 3239) when the exception is on the ground of improper venue, which is merely a motion to remove to the proper county *(S. v. Lewis,* 142 N.C. 632), that exceptions to the grand jury must be taken "by motion to quash the indictment, and if not so taken, the same shall be deemed to have been waived." This is indeed the requirement in Revisal, 1970.

This is a "refinement," for the intent of the defendant was to make his objection upon the grounds stated, and it is not material whether the defendant called it a motion to quash or a plea in abatement. We will treat it for what it is, and not what it was called, for while the provisions of Code, 3254 and 3255, prohibiting reliance upon such technicalities applies only against defendants, it is in accordance with the spirit of the statute that it should be invoked in their favor also.

The refusal of the motion is

Affirmed.

Cited: S. v. Simmerson, 177 N.C. 546; *S. v. Davis,* 177 N.C. 579; *S. v. Mallard,* 184 N.C. 670; *S. v. Stewart,* 189 N.C. 344; *S. v. Berry,* 190 N.C. 364; *Chemical Co. v. Turner,* 190 N.C. 473; *S. v. Montague,* 190 N.C. 843; *S. v. Graham,* 194 N.C. 466; *S. v. Barkley,* 198 N.C. 351; *Harris v. Watson,* 201 N.C. 665; *S. v. Lea,* 203 N.C. 26; *Grimes v. Holmes,* 207 N.C. 299; *S. v. Boykin,* 211 N.C. 411; *S. v. Peacock,* 220 N.C. 64; *S. v. Morgan,* 225 N.C. 550; *Edwards v. Board of Education,* 235 N.C. 351; *S. v. Gaston,* 236 N.C. 502; *S. v. Honeycutt,* 237 N.C. 598; *S. v. Brady,* 238 N.C. 410; *S. v. McGowan,* 243 N.C. 433.

(821)

STATE v. GASTON B. MEANS.

(Filed 8 May, 1918.)

1. Costs—Common Law—Statutes.

Costs of court were not recoverable under the common law, and are now allowable only in the manner and to the extent provided by statute.

2. Same—Witnesses—Subpoena.

For the attendance of a witness to be taxed as a part of the cost against the losing party to a civil action, or against the county in a criminal action, it is necessary that he should have been legally subpoenaed or lawfully recognized to attend. Revisal, secs. 1283, 1296, 1303, 1289.

3. Same—Nonresidents.

The service of subpoena on a witness beyond the borders of the State in a criminal action is not valid; and where the trial judge has allowed a necessary nonresident witness to prove his ticket against the county with mileage to the State line, there is no authority for him to allow the witness to prove for services rendered by him outside of the State when service has been attempted there. Revisal, sec. 448, providing for personal service of summons in civil action on nonresidents has no application to service of subpoenas.

4. Costs—Courts—Supervisory Powers.

The discretionary power given the trial judge in regard to the taxing of costs of an action is limited by the provisions of the statute relating thereto, and does not extend to instances where such costs are not therein allowed.

MOTION to retax costs in the above-entitled case, heard by *Cline, J.*, as of November Special Term, 1917, of CABARRUS.

The defendant was acquitted of the crime for which he was indicted.

The judge made the following order, omitting immaterial parts as to exceptions and case on appeal:

"It is hereby ordered that all of the State's witnesses called, sworn and examine in the trial of this case will be permitted to prove their attendance before the clerk (any not having done so being still granted that opportunity), and shall be paid for their attendance the regular fees of witnesses provided by the statute, and full mileage also as provided by the statute, nonresident witnesses being permitted to prove mileage from Concord to the State line by the ordinary route; provided, however, that the three witnesses, Dr. Burmeister of Chicago, Dr. Schultz of New York, and Capt. William Jones of New York, having been called as experts, having been found by the court heretofore to be experts and examined as such, and now being found to have been proper and necessary to the presentation of the State's case, each of them is hereby allowed the sum of $15 per day with their mileage to the State line.

"The verdict in this case having been taken on Sunday, and the court before adjournment on that day having mentioned the matter of the taxation of costs as to which the solicitor had already and in due time called the attention of the court for the relief of these witnesses, this order is made and filed with the clerk *nunc pro tunc* and is directed to be entered by the clerk of record.

"It is actually signed on 18 day of December, 1917.

E. B. Cline, *Judge Presiding.*

"And the solicitor for this judicial district, the Honorable Hayden Clement, desiring to appeal from this order to the Supreme Court, and

wishing to afford him every facility for doing so, and now expressing its approval of this course, the court finds the following additional facts:

(822) "That there were a number of witnesses in attendance upon this trial from distant States, such as Hon. A. B. Melville, Mr. A. Leonard Johnson and others, from Chicago; Mr. William J. Jones and others, from New York City, all of whose names, with the cities from which they came, will be found attached to their witness tickets; or if not so, and if the clerk is not familiar with all of their names, they will be indicated by the court in a special order that they were necessary and material witnesses, and that it was very proper upon the part of the solicitor to procure their attendance, if he could, that he attempted to serve them with legal process as witnesses, and while the service was made beyond the State limits, and therefore not binding upon them, still in obedience to his request and at the same time voluntarily they came to attend this trial. That the solicitor had promised them payment of their actual expenses if such could be provided by any legal order against the county of Cabarrus.

"Upon these facts, it is stated for the information of the Supreme Court that if the undersigned were vested with the discretion so to do, he would make an order allowing the actual expenses of such nonresident witnesses, the same to be paid by the county; but the motion to this effect upon the part of the solicitor is denied because the undersigned has been unable to find that as a matter of law he can or is vested with the discretion to grant the motion." (Signed by Judge Cline.)

The State, by its solicitor, excepted to this order and appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

H. S. Williams for Cabarrus County.

WALKER, J., after stating the case: We have held heretofore that at common law no costs were recoverable by the plaintiff or defendant in civil actions or criminal prosecutions. Costs are now given by statute both in England and in this country, but they are recoverable by law in those cases, State and civil, where they are allowed, and only in the manner and to the extent allowed by law. A witness who attends court without having been summoned is not entitled to prove his attendance so as to charge the losing party with the amount of his tickets. *Stern v. Herren,* 101 N.C. 518; *Thompson v. Hodges,* 10 N.C. 318; *Lewis v. Comrs.,* 74 N.C. 194; *S. v. Massey,* 104 N.C. 877; *Clerk v. Comrs.,* 121 N.C. 29; *Patterson v. Ramsey,* 136 N.C. 561.

In the *Stern* case this Court, by *Justice Davis,* said: "The attendance of a nonresident witness cannot be enforced, even though summoned; and as was said by *Daniel, J.,* in *Kinzey v. King,* 28 N.C. 76, the party desiring his evidence may have his deposition taken. To the same effect is *Meredith v. Kent,* 1 N.C. 52. It is true that (823) in *S. v. Stewart,* 4 N.C. 138, it was held that a witness who, after being summoned on the part of the State, removed to another State was entitled to mileage from the place of his residence, but the reasons given were that the 'binding a man in recognizance to attend' and give testimony did not put him under obligations not to change his place of residence; and another reason might have been given, and that is, in criminal cases the witnesses must be confronted with the accused, and they may be put under bond to attend if necessary." The question, so far as it is to be determined by the common law, is fully discussed in those cases and we need dwell upon that phase of it no longer.

The rule applied both to civil and criminal cases, and in *S. v. Massey, supra,* it was said that "the duty of one attending court in obedience to a subpoena is incident to citizenship, as in feudal times the duty of 'attending the Lord's Court' was incident to fealty. Payment of witnesses by the sovereign is neither given by common law, nor is it an inherent right." Costs are allowed and paid now, as for many years they have been, only as provided by statute, which is, so far as pertiment to this case, in the following sections of the Revisal of 1905:

"Section 1283. If there be no prosecutor in a criminal action, and the defendant shall be acquitted, . . . the county shall pay the clerks, sheriffs, constables, justices, and witnesses one-half their lawful fees only, except in capital felonies and in prosecutions for forgery, perjury, and conspiracy, when they shall recive full fees. . . . And no county shall pay any such costs unless the same shall have been approved, audited, and adjudged against the county as provided in this chapter."

"Section 1296. All witnesses summoned or recognized in behalf of the State shall be allowed the same pay for their daily attendance, ferriage, and mileage as is allowed to witnesses attending in civil suits."

"Section 1303. No person shall receive pay as a witness for the State on the trial of any criminal action unless such person shall have been summoned by the clerk under the direction of the solicitor prosecuting in the court in which the action originated, or in which it shall be tried if removed."

"Section 1289. Witnesses summoned or recognized on behalf of the State to attend on any criminal prosecution in the Superior or criminal courts where the defendant is insolvent, or by law shall not be

bound to pay the same, and the court does not order them to be paid by the county in which the prosecution was commenced. And in all cases wherein witnesses may be summoned or recognized to attend any such court to give evidence in behalf of the State, and the defendant shall be disregarded, and in cases where the defendant shall
(824) break jail and shall not afterwards be retaken, the court shall order the witnesses to be paid."

It will appear from this resume of our law upon the subject of costs that the power of the court to tax costs in favor of witnesses is confined to those who have been summoned or recognized to appear. It may be wise for the Legislature to enlarge this power so as to embrace a case of this kind and rely upon the solicitors and the general supervision of the judge to protect the interests of the State against any abuse of the same, but we are not concerned with what shall be the policy of the State, and must apply the law as it is written, the *jus dicere* being all that belongs to us, and the *jus dare* being the function and prerogative of the legislative department.

In this case, under a proper construction of the statute, the judge has allowed the nonresident witness fully as much as they were entitled to receive, if not more, but whether more we need not say. It appears that they were neither summoned nor recognized, and therefore do not come sufficiently within the designation of witnesses entitled to prove their attendance and mileage, so as to recover costs for any service rendered by them outside the State. They have been allowed costs for their attendance and for mileage from Concord to the State line by the ordinary route of travel, and the judge correctly ruled that he had no power to allow any more. These witnesses were not legally summoned. We do not know of any provision of the law which authorized service of a subpoena on a witness beyond the State. There is a statute in regard to service of a summon, notice, or other process personally, in lieu of publication, outside the State in civil cases (Revisal, sec. 448), but it has no application to the service of a subpoena in a criminal action.

There having been no legal service of subpoenas on the witnesses, the motion was properly denied, as it is said in *Thompson v. Hodges,* 10 N.C. 318, which has been followed in other cases, that "if he (the applicant for an allowance) had attended the court as a witness without having been summoned, his tickets must be expunged."

A statute of another State with identical language has received, in *Herrington v. Flanders,* 115 Ga., 823, the same judicial construction which we have placed upon ours. In the syllabus written by the Court, in that case by *Justice Fish* (now Chief Justice), the Court held as

follows: "It is unlawful, under Penal Code, sec. 1079, to charge the accused in a criminal case, upon his conviction, with 'the costs of any witness of the State unless such witness was subpoenaed, sworn, and examined on the trial.' The prohibition in that section against charging the accused, except as therein indicated, with the costs of 'more than two witnesses to the same point' relates, of course, only to witnesses who have actually been 'subpoenaed, sworn, and ex- (825) amined.' " See, also, Code of Georgia, 2 vol., sec. 5392. The discretion given to the judge in regard to the taxation of costs is subject, of course, to the other express provisions of the statute forbidding costs to be taxed.

We conclude that there was no error in overruling the motion of the State.

Cited: S. v. Scoggin, 236 N.C. 23.

STATE v. BAXTER CAIN.

(Filed 15 May, 1918.)

1. Mistrials — Murder—Homicide—Capital Felony—Juror Withdrawn—Trial.

In maintaining a fair and impartial trial, the court may withdraw a juror in the trial of a capital felony when it is necessary for exact justice to be done; and where a juror has, under a misunderstanding, told the solicitor, upon his examination, that he could convict in the first degree the prisoner upon trial for murder under circumstantial evidence, and after the jury had been impaneled stated he could not do so, and that it was his own fault that he had answered to the contrary, the court may withdraw a juror, enter a mistrial, impanel another jury, and proceed to try the prisoner. It is not required that the court should wait until the introduction of the evidence and then make a mistrial by withdrawing a juror.

2. Appeal and Error—Jurors—Mistrials—Findings.

Where the court withdraws a juror and enters a mistrial in a capital felony he should find the facts upon which his action is based for review on appeal.

3. Mistrial—Murder—Homicide—Capital Felony—Appeal and Error—Findings—Jurors Withdrawn.

Where a mistrial in a capital felony has been properly made by the court, by withdrawing a juror, and thereupon another and impartial trial has been given, objection on appeal that the prisoner has been deprived of his plea of former jeopardy is untenable.

(826)

4. Homicide—Murder—Robbery—Identified Money.

Where the prisoner is tried for the murder of the custodian of a safe which had been robbed, testimony of a witness as to a mended bill which had been deposited therein is competent for the purpose of identifying a similar bill found on the prisoner, and testimony that the bill looked like the same one is either competent in corroboration or harmless.

5. Same—Motive.

Where a safe has been robbed and its custodian killed, it is competent to show that the prisoner was in need of money which he knew was kept therein to show motive.

6. Homicide—Murder—Evidence—Circumstance.

Evidence in this case is *held* sufficient to sustain a verdict against the prisoner of murder in the first degree, and testimony that some unidentified person was seen at night near the place of the crime on a mule resembling that owned by the prisoner was, with the other evidence, a circumstance to be considered by the jury.

APPEAL by defendant from *Cline, J.*, at September Term, 1917, of ROWAN.

The prisoner was convicted at September Term, 1917, of Rowan, of murder in the first degree of one Abel Harris.

The first exception is to the order of the court withdrawing a juror and making a mistrial, and Exception 8 is to the refusal to grant a motion in arrest of judgment on the ground of the defendant's former jeopardy. On these motions his Honor found the following facts:

"This was an indictment against Baxter Cain, the defendant, charging him with murder in the first degree, No. 25 on the criminal docket of the September Term, 1917, of Rowan. The case was set down for trial and called for trial on Tuesday, 11th day of September, 1917, at which time the State announced its readiness and the prisoner his readiness. A special venire of fifty men had been summoned to appear as jurors under the statute. While the jury was being drawn, a regular juror, to wit, M. A. Goodman, whose name was drawn from the hat, appeared and was asked by the solicitor for the State whether or not he had any conscientious or religious scruples against returning a verdict where the penalty would be the death sentence upon circumstantial evidence, if such evidence warranted, and the juror answered that he had not, thereupon he was passed by the State and accepted by the defendant and was sworn as a juror, being No. 3. Other names were called and a jury of twelve was chosen, sworn, and impaneled, as is usual in capital cases. Immediately after the jury

was finally impaneled, this juror, M. A. Goodman, arose in his seat and stated to the court that he did not understand the question that was asked by the solicitor. He stated that his convictions were such that he would render a verdict of guilty of murder in the first degree in any case upon circumstantial evidence. He was further questioned, and the solicitor stated that he was relying for a verdict in this case upon circumstantial evidence, and again asked the juror if he would convict if the evidence was sufficient in such case, and he stated that he would not. He further stated in response to further questions by the court that his feelings were such that he would not bring in a verdict of murder in the first degree upon circumstantial evidence solely. He further stated to the court that he was sorry not to have made this statement sooner. The court asked him if he had not heard the same question asked of other jurors whose names were drawn from the hat, and he said that he had, and he was then asked why he did not make his feelings and convictions known (827) to the court before the cause had proceeded to this length; he replied that he was diffident about the matter and hesitated to speak out, and now felt that he was himself to blame.

"Upon these findings of fact the solicitor asked that the court direct a mistrial, and the court being of the opinion that such course was necessary and absolutely required to attain the ends of justice in order that the State and the defendant might both have a trial before a jury of competent jurors and not disqualified by their seated convictions and prejudgment, whether those convictions be conscientious or religious, and in order that the ends of justice might be attained, ordered a mistrial, and having withdrawn a juror, to wit, J. L. Holshouser, in so far as the withdrawal of a juror may be necessary, and having discharged the present jury, proceeded to make further provision for the trial of the cause as though no jury had ever been drawn, chosen, or impaneled, and to this, in due time, the defendant at the bar excepted.

"E. B. CLINE, *Judge Presiding.*"

From the verdict and sentence the prisoner appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

A. H. Price, W. C. Coughenour, and T. H. Vanderford, Jr., for prisoner.

CLARK, C. J. The exception to the actions of the court in ordering a mistrial and to the refusal of the motion in arrest of judgment on the

plea of former jeopardy present the same question, and this is the chief ground relied upon on the appeal.

When the juror Goodman was asked by the solicitor of the State "whether or not he had any conscientious or religious scruples against returning a verdict where the penalty would be the death sentence upon circumstantial evidence, if such evidence warranted, and the juror answered that he had not, he was passed by the State and being accepted by the prisoner he was sworn as a juror."

The court further finds: "Immediately after the jury finally impaneled, this juror, M. A. Goodman, arose in his seat and stated to the court that he did not understand the question that was asked by the solicitor. He stated his convictions were such that he would not render a verdict of guilty of murder in the first degree in any case upon circumstantial evidence. He was further questioned and the solicitor stated that he was relying for a verdict in this case upon circumstantial evidence, and again asked the juror if he would convict if the evidence was sufficient in such a case, and he said he would (828) not." He was then examined by the court and reiterated this statement, expressing his regret that he had not made this statement sooner, and said he had not done so "because he was diffident about the matter and hesitated to speak out, and now felt that he was himself to blame." Upon the findings of fact, which are above set out in full in the statement of the case, the solicitor asked the court to direct a mistrial, and "the court being of the opinion that such course was necessary and absolutely required to attain the ends of justice in order that the State and the defendant might both have a trial before a jury of competent jurors, and not disqualified by seated convictions and prejudgment, whether those convictions be conscientious or religious, and in order that the ends of justice might be attained," withdrew a juror and ordered a mistrial, and having discharged the jury, proceeded to draw and impanel another jury as though no jury had ever been drawn, or chosen or impaneled.

The object of a trial expressed in the oath of a juror to "Do equal and impartial justice between the State and the prisoner at the bar," it is impossible that the judge could have taken any other action. The object of a trial is to acquit the innocent and to convict the guilty. Neither can be done with any certainty when the juror states frankly under oath that he cannot find a verdict according to the law and the evidence. It was unfortunate that the juror should not have made this statement on his *voir dire,* but it is to his credit that he made it at least before there was a long trial and a miscarriage of justice by a hung jury, as would doubtless have been the result.

In England there were, till after the year 1800, 204 offenses which were punishable capitally; and until within the last twenty years there was no appeal by the prisoner in England from conviction in any criminal case. Indeed until the last 100 years (in 1836) in felonies defendants were not allowed counsel to speak for them, nor summary process to compel the attendance of witnesses in their behalf. In view of such circumstances went sometimes far to sustain technicalities as to indictments and acquittals on the ground of former jeopardy or on other grounds. It is probable that the judges exercised their discretion in such matters with some regard to the development of the facts in each case.

In this State this was not necessary, and we have long since had statutes forbiding the allowance of technical defenses as to the form of indictments and in other matters. Revisal, 3254, 3255.

As to capital offenses, the law with us has long been also well settled that "In a trial for capital felony the judge for sufficient cause may discharge the jury and hold the prisoner for another trial; in which case it is his duty to find the facts and set them out on the (829) record, and his conclusions upon matters of law arising from the facts may be reviewed by this Court." *S. v. Jefferson*, 66 N.C. 309, citing *S. v. Prince*, 63 N.C. 529; *S. v. Alman*, 64 N.C. 364, and *S. v. Baker*, 65 N.C. 332.

In *S. v. Wiseman*, 68 N.C. 203, the Court said: "It must now be considered as settled law in our State that in cases of necessity a mistrial may be ordered even in capital cases. The term necessity, as used in this connection, must be regarded rather as a technical term and includes quite distinct classes of necessity." The Court then explains that the necessity applies not only to cases of a physical nature, as illness or insanity of a juror, but "the necessity of doing justice," arising from the duty of the court to guard the administration of justice from fraudulent practices, as in the case of tampering with the jury or keeping back witnesses on the part of the prosecution by the prisoner. Among other instances of a mistrial in capital cases are *S. v. Honeycutt*, 74 N.C. 391; *S. v. McGimsey*, 80 N.C. 377; *S. v. Davis*, 80 N.C. 385.

In *S. v. Bell*, 81 N.C. 591, the Court, reiterating what is said above in *S. v. Wiseman* as to the two classes of necessity, *i.e.*, "physical necessity and the necessity of doing justice," says that the latter arises from the duty of the court to prevent the obstruction of justice by guarding its administration against all fraudulent practices, citing *S. v. Wiseman, supra*, and *S. v. Bailey*, 65 N.C. 426.

In *S. v. Washington*, 89 N.C. 535, this Court approved a mistrial where, after the jury had been impaneled, the solicitor, on the reas-

sembling of the court, moved for the withdrawal of a juror "for the alleged reason that two jurors whose names were mentioned had fraudulently procured their admission into the panel on a false oath of indifference for the purpose of securing the acquittal of the accused. The court heard testimony upon the matter, found as a fact, and declared the charges against the jurors to be true; and as a conclusion of law that the jury had been impaneled by the fraud of the prisoner, or some one on his behalf, with a view to the prisoner's acquittal, a juror was withdrawn and a mistrial ordered. The prisoner protested, avowing his disbelief of the charge and, if true, any participation in it."

This Court affirmed this action of the court below, citing *S. v. Bell, supra,* and holding that it was the clear duty of the presiding judge to see that there was a fair and impartial trial and to interpose his authority to prevent unfair dealings, and rejected the contention of counsel for the prisoner that "such power can only be exercised when the prisoner is in privity with the attempt, and that the trial must go on
(830) to verdict, however gross a fraud, in the absence of evidence of the prisoner's connection with it," and said that the necessity for the action of the court "in maintaining its dignity and integrity and assuring the firm and impartial administration of justice" is the same whether the prisoner procured the fraudulent action or would merely be its passive beneficiary.

In *S. v. Tyson,* 138 N.C. 627, a mistrial was held valid because one of the jurors had become intoxicated.

In *S. v. Guthrie,* 145 N.C. 492, the Court said: "The law is well stated in *S. v. Tyson,* 138 N.C. 628, 'It is well settled, and admits of no controversy, that in all cases, capital included, the court may discharge a jury and order a mistrial when it is necessary to attain the ends of justice. It is a matter resting in the sound discretion of the trial judge; but in capital cases he is required to find the facts fully and place them upon record, so that upon a plea of former jeopardy, as in this case, the action of the court may be reviewed."

In *S. v. Dry,* 152 N.C. 813, the prisoner absented himself for a short while from the court. The court on learning the fact asked his counsel if he intended to rely upon that fact to invalidate the trial. Counsel replying that he did, the court withdrew a juror and ordered a mistrial. This Court approved his action, calling attention to the fact that "in the Federal courts and in most of the other States a mistrial in a capital felony rests in the sound discretion of the trial judge (as it does in all other criminal cases with us), but that we have not gone further than to approve a mistrial in a capital felony in cases of necessity, physical, or in the interests of justice, the facts in such cases to be

found by the judge, subject to review as a matter of law on appeal," and approving *S. v. Guthrie,* 145 N.C. 495, where it was held that in a capital felony the judge may "order a mistrial when it is necessary to attain the ends of justice."

In a more recent case, *S. v. Upton,* 170 N.C. 770, the Court again held that in a trial for capital felony the court can order a mistrial "when necessary to attain the ends of justice," citing *S. v. Guthrie, S. v. Tyson, and S. v. Dry, supra.*

To the same purport are the rulings elsewhere in this country In *U. S. v. Perez,* 9 Wheaton, 579, it was held that the courts are invested with the discretionary authority of discharging a jury from giving any verdict in a capital case whenever in their opinion there is a manifest necessity for such an act or the ends of public justice would otherwise be defeated.

In *S. v. Allen,* 46 Conn., 531, the prisoner's counsel in the course of a trial for murder and after the witness for the State had been examined stated to the court that he had been informed and believed that one of the jurors was disqualified because before the (831) trial he had expressed an opinion that the prisoner was guilty, and asked the court to suspend the trial and hear evidence on the point, which the court did, and found the fact to be as claimed, but the prisoner's counsel then offered to waive the disqualification and proceed with the trial with the panel or to go on with the 11 jurors, which the court refused to do, and discharged the jury. It was held that this was not a bar to another trial.

The law is well summed up in the following quotation from 8 R.C.L., p. 153, "Under the strict practice which anciently prevailed, in England at least, the discharge of the jury in a criminal case for any cause after the proceedings had advanced to such a stage that jeopardy had attached, but before a verdict of acquittal or conviction, was held to sustain a plea of former jeopardy, and therefore to operate practically as a discharge of the prisoner. In deference, however, to the necessities of justice, this strict rule has been greatly relaxed and the general modern rule is that the court may discharge a jury without working an acquittal of the defendant in any case where the ends of justice, under the circumstances, would otherwise be defeated."

Prisoner's counsel in their brief contend that the juror Goodman's statement that he would not bring in a verdict of murder in the first degree upon circumstantial evidence only should not have been taken, but that the court should have waited until the evidence was produced so that the court might decide whether it was in fact circumstantial. Such course would have been a useless consumption of the public time,

and needlessly expensive, for the solicitor for the State publicly announced that he was relying upon circumstantial evidence for conviction, and the court besides can see from the record that this was the case.

In the appellant's brief he states: "If this honorable Court should be of the opinion that the plea of former jeopardy could not avail the appellant, it certainly was at least error on the part of his Honor to discharge the juror and order a mistrial, which entitled the appellant to a new trial, and we, of course, say this with the understanding that if the court should so hold we will be precluded from again entering a plea of jeopardy upon a new trial."

If, however, the prisoner is correct in his contention of former jeopardy, this Court would be powerless to order a new trial, but would have to discharge the prisoner. There is no exception as to the manner of obtaining the second jury and nothing on the record suggests any irregularity. The prisoner has already had a new trial before an impartial jury and is not now entitled to another.

(832) Exception 2 is to the admission of testimony describing the condition of a dollar bill which the witness identified as having deposited in the safe which was robbed at the time of the murder of the custodian of the property, the bill having been torn in two and pasted together with brown paper. This was competent for the purpose of identifying a similar bill which was found in the possession of the prisoner immediately following the homicide and robbery.

Exception 3 is to the same witnesse's testimony that he had prior to the trial seen this bill and had stated that "it looked pretty much like the same bill." This was merely corroboration of his own testimony and was competent and harmless.

Exception 4 is to evidence that the prisoner on prior occasions had recently attempted to borrow sums of money. This was competent as a motive for the crime to show that he was in need of money, and that he availed himself of the opportunity to rob the safe and secure the funds which the prisoner knew were placed each night in the safe (which was robbed) by the conductors of the street railway. The deceased was the night watchman in charge of the property.

Exception 5 is to the testimony of the witness that about 2 o'clock on the night of the homicide he had seen a man riding a mouse-colored mule, attempting to cross the railroad track near the cotton mill. He said it was dark and he was not able to identify the prisoner as the man, but the mule was about the size of the prisoner's mule. This was offered simply as a circumstance, together with the other evidence, to identify the prisoner with the crime. Whether it had any weight or

not was for the jury. In view of the other testimony, it was not so remote that it should have been excluded, nor was it a matter of sufficient materiality to be prejudicial error justifying a new trial.

Exceptions 6 and 7 are to the refusal to grant a motion of judgment as of nonsuit. There was ample evidence not only to submit the case to the jury, but to justify this conviction, if it satisfied the jury beyond a reasonable doubt, of the prisoner's guilt.

The prisoner has been defended with marked ability by his learned counsel, and everything has been presented to the judge and jury below and to this Court that in any way could militate in the prisoner's favor. We find no error in the conduct of the trial by the able and impartial judge who presided.

If the statutory time as to the several steps in settling cases on appeal had been observed as they should have been, this case would have stood for argument at the end of the docket at last term.

No error.

Cited: S. v. Beal, 199 N.C. 295; *S. v. Ellis,* 200 N.C. 80; *S. v. Cain,* 223 N.C. 700; *S. v. Ham,* 224 N.C. 130; *S. v. Crocker,* 239 N.C. 450.

STATE v. R. H. TAYLOR.

(Filed 28 May, 1918.)

Husband and Wife—Abandonment—Instructions—Willful—Criminal Law —Statutes.

Where the husband is indicted for abandonment under the provisions of Revisal, sec. 3355, there is no reversible error in the charge of the court for omitting the word "willful" in one part thereof when he has elsewhere repeatedly instructed the jury that in order to convict the abandonment must have been willful, which must be proved beyond a reasonable doubt.

INDICTMENT for abandoning his wife without providing adequate support (Revisal, sec. 3355), tried before *Lane, J.,* at July (833) Term, 1917, of BUNCOMBE.

The defendant was convicted and appealed.

Attorney-General Manning and Assistant Attorney-General Sykes for the State.

R. M. Wells for defendant.

BROWN, J. The only assignment of error relates to the charge of the court. It is contended that the court failed to instruct the jury that in order to convict they must find beyond a reasonable doubt that the abandonment was willful, as held to be essential in *S. v. Smith*, 164 N.C. 477. We do not think the charge of the judge is justly amendable to such criticism.

In one part of the charge, in referring to the constituent elements of the crime of abandonment he omitted to use the word "willful." In other parts of the charge the judge was careful to explain that the abandonment to be criminal must be willful—that is, unnecessary and without just cause or legal excuse. Near the conclusion of the charge he instructed the jury in these words:

"But if you find that he *willfully* abandoned her and failed to provide adequate support for her, he would be guilty; but you must find these things beyond a reasonable doubt. If a reasonable doubt remains in your mind, you will return a verdict of not guilty; but you must find these things beyond a reasonable doubt. If a reasonable doubt remains in your mind, you will return a verdict of not guilty."

Taking the charge as a whole, it is manifest that the jury must have understood that before they could convict they must find that the abandonment was willful as well as without providing adequate support.

No error.

Cited: S. v. Falkner, 182 N.C. 795, 798; *S. v. Faulkner*, 185 N.C. 636; *S. v. Cook* 207 N.C. 262; *S. v. Hinson*, 209 N.C. 191; *S. v. Coal Co.*, 210 N.C. 754.

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 Alimony, 4, 5; Instructions, 20; Contracts, 28; Husband and Wife, 3.

ABATEMENT. See Criminal Law, 15.

ACCEPTANCE. See Landlord and Tenant, 1; Contracts, 12, 17, 18; Instructions, 8.

ACCIDENT. See Master and Servant, 3.

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ACT OF GOD. See Negligence, 4; Railroads, 12.

ACTIONS. See Attorney and Client, 4; Judgments, 4; Corporations, 7; Evidence, 31; Trusts, 7; War, 1.

1. *Former Actions—Pleas in Bar—Actions—Executors and Administrators—Fraud.*—Pendency of proceedings brought before the clerk wherein the executors of a deceased person are sought to be disallowed a credit for the amount of a certain note alleged to have arisen out of transaction with a bank, involving fraud on the deceased, and transferred to the civil issue docket, to which the bank was not a party, cannot successfully be pleaded in bar to another action wherein the heirs at law are parties, joining the executors for conformity, brought against the bank to recover moneys it had wrongfully received on account of the alleged fraud. *Bradshaw v. Bank*, 21.

2. *Actions—Parties—Fires—Railroads.*—The husband, the owner of the homestead in lands, and who had equipped a gin-house thereon with his own money, and the wife holding the title in remainder, may join in an action against a railroad company for negligently setting out fire from its passing locomotive to the damage of the land and injury of the property. *Boney v. R. R.*, 354.

3. *Actions—Misjoinder—Demurrer—Answer—Waiver.*—Objection to misjoinder of plaintiffs in an action must be taken by demurrer, and is waived by an answer in general denial. *Ibid.*

4. *Actions—Severance—Conspiracy—Court's Discretion—Criminal Law.*—Upon the trial of two defendants, one for assault and the other for conspiracy therein, the question of severing the actions upon defendant's motion is one addressed to the discretion of the trial judge, and his refusal is not appealable in the absence of abuse of his discretion. *S. v. Griffin*, 770.

ADEMPTION. See Wills, 18.

ADJOURNMENT. See Courts, 7.

ADMISSIONS. See State Lands, 1; Injunction, 1; Evidence, 11, 17, 26; Drainage Districts, 3; Pleadings, 3; Conversion, 1; Criminal Law, 4.

ADMISSIONS ON TRIALS. See Costs, 2.

ADVERSE POSSESSION. See Boundaries, 1, 2; Deeds and Conveyances, 1; Appeal and Error, 1; Instructions, 1; Ejectment, 3; Trusts, 4; Limitation of Actions, 4, 5, 6.

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AGREEMENT. See Reference, 3; Vendor and Purchaser, 2.

ALIENS. See War, 1.

ALIMONY. See Divorce, 1.

1. *Alimony—Statutes—Divorce—Marriage.*—The granting of alimony without divorce is now regulated by statute, Revisal, sec. 1567, independent of the equity jurisdiction under which such proceedings were formerly cognizable. *Crews v. Crews*, 168.

2. *Same—Issues—Trial by Jury—Constitutional Law.*—When in proceedings for alimony without divorce the pleadings raise the issues of the validity of marriage between the parties, or whether the husband had separated himself from the wife and failed to provide her suitable or reasonable sustenance, or the husband is a drunkard or spendthrift (Revisal, sec. 1567), the right of trial by jury arises to the defendant, and the case should be transferred by the judge to the civil issue docket for the purpose. Revisal, secs. 529, 717; Const., Art. I, sec. 19. *Ibid.*

3. *Same—Courts—Questions of Law.*—Where in proceedings for alimony without divorce (Revisal, sec. 1567) the issues are found for plaintiff by the jury, or are not raised by the pleadings, or are admitted by the parties or waived in the methods specified and prescribed by law, *i.e.*, by failing to appear at trial, by written consent filed with the clerk or by oral consent entered on the minutes of the court, the amount of the alimony and how the same is to be secured, etc., are questions of fact to be determined by the judge, having regard to the condition and circumstances of the parties, including also the separate estate of the wife, if she have any. *Easeley v. Easeley*, 173 N.C. 530.

4. *Alimony—Divorce—Independent Support — Statutes — Abandonment—Pleadings.*—Where the pleadings in proceedings for alimony without divorce (Revisal, sec. 1567) raise the issue as to whether the wife has wrongfully left the home the husband had provided, etc., it should be submitted to the jury for determination, the husband not being required to provide her with an independent support. *Ibid.*

5. *Alimony—Courts—Evidence—Abandonment—Statutes.*—The trial judge may not pass upon the issuable facts in proceedings for alimony

ALIMONY—*Continued.*

without divorce (Revisal, sec. 1567) upon evidence introduced before him theretofore upon a trial of the husband for abandonment, etc., of which he was acquitted when the witnesses are present and ready to testify. *Cooper v. R. R.*, 170 N.C. 490, cited and distinguished. *Ibid.*

6. *Alimony—Judgments—Divorce—Motions—Modification—Termination—Statutes.*—A judgment awarding alimony in suits for divorce *a mensa et thoro* or as an independent right under the statute (Revisal, sec. 1567) is not final, and may thereafter be modified on motion and sufficient evidence, and it terminates on the death of either of the parties or on their reconciliation. *Ibid.*

7. *Alimony—Judgments—"Estates"—Earnings.*—The award to the wife of alimony from the husband's "estate" includes, within the statutory meaning of the word, the husband's income, whether arising from permanent property and investments or his earnings from legitimate labor, etc. *Skittletharpe v. Skittletharpe*, 130 N.C. 72, cited, and on that point overruled. *Ibid.*

ALLOWANCE. See Divorce, 3.

ALLEGATIONS. See Contracts, 3; Removal of Causes, 3, 4.

ALLEYWAYS. See Appeal and Error, 34.

AMBIGUITY. See Wills, 16.

AMENDMENTS. See Municipalities, 1; Municipal Corporations, 2, 3; Attorney and Client, 6; Constitutional Law, 2; Pleadings, 1, 4, 5; Criminal Law, 11.

ANIMALS.

1. *Animals—Defense—Killing—Burden of Proof—Appeal and Error—Instructions—Trials.*—One may not unnecessarily injure dogs of another, though they are trespassing on his lands; and in an action against him for damages, wherein it is shown that he shot and killed the plaintiff's dog, and he alleges that it was necessary for the protection of his turkeys, the burden is on the defendant to show matters in excuse, and it is reversible error for the court to instruct the jury to the contrary. *Scott v. Cates*, 336.

2. *Animals—Protection—Dogs—Damages — Rule of Prudent Man.* — The owner of a dog may recover damages for its unlawful killing by another, except when such appears to be necessary, under the rule of the prudent man, to protect his domestic animals. *S. v. Smith*, 156 N.C. 628, cited and applied. *Ibid.*

ANSWER. See Removal of Cause, 1; Actions, 3; Judgments, 5; Appeal and Error, 18.

ANTECEDENT DEBT. See Corporations, 7.

ANTE LITEM MOTAM. See Boundaries, 2; Evidence, 20.

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1. *Appeal and Error—Instructions—Adverse Possession—Burden of Proof.* Where the defendant in ejectment admits the plaintiff's paper title, but claims a part of the lands by adverse possession under "color," a charge by the court to the jury that the burden of proof was on the plaintiff is reversible error, though he may properly have placed the burden in another part of his charge, but without having corrected the error; and under such circumstances the trial judge may set aside the verdict as a matter of law. *Vanderbilt v. Chapman*, 11.

2. *Appeal and Error—Contracts, Written—Evidence—Legal Construction.* The admission of parol evidence to explain a written contract of employment for the sale of merchandise upon a commission basis of compensation is not reversible error when it tends to sustain the interpretation correctly placed on the written instrument in the Superior Court as matter of law. *Caffey v. Furniture Co.*, 387.

3. *Appeal and Error—Motions—Docket and Dismiss—Appellee's Laches.* Where the appellant has failed to docket his appeal as required by Rule 5 of the Supreme Court, the right of the appellee to dismiss under Rule 17 must be exercised before the appellant has complied with the rule, and if appellee's motion is made thereafter his right to dismiss at that term is barred by his own laches. *McLean v. McDonald*, 418.

4. *Same—Printing Record—Briefs.*—Where the appellee has lost his right to docket and dismiss the appellant's case at the first term of the Supreme Court next ensuing that of the trial, and the appeal goes over to the next term of the court, a motion by appellee at this term to dismiss for failure to print the record or file printed briefs is premature. *Ibid.*

5. *Appeal and Error—Motions—Docket and Dismiss—Appellee's Laches—Assignment of Error.*—Where an appeal goes over to the next term of the Supreme Court for failure of appellee to docket and move to dismiss it in time, a motion to dismiss for appellant's failure to comply with Rule 19 (2) in not properly grouping and numbering his assignments of error is premature. *Ibid.*

6. *Appeal and Error—Trust Funds—Misappropriation—Verdict.*—As to whether it is material for a member of the firm o have knowledge of a wrongful conversion by the other of property held in trust by the firm, *Quaere?* But the question does not arise on appeal when its has been established on the trial that the defendant did willfully and knowingly misappropriate the trust property, etc. *Guano Co. v. Southerland*, 228.

7. *Appeal and Error—Evidence—Harmless Error.—The exclusion of im*material evidence upon the trial which could not have changed the result is not reversible error on appeal. *Weathersbee v. Goodwin*, 234.

APPEAL AND ERROR—*Continued.*

8. *Appeal and Error—Superior Courts—Judgments—Motions—Procedure.* Where the Supreme Court has reversed a judgment of the Superior Court, refusing to set aside a former judgment of the latter court upon the ground that the court was without jurisdiction to set aside a judgment theretofore rendered, apparently by consent of a party when such consent had not in fact been given, a subsequent hearing of this motion in accordance with the course and practice of the court is a compliance with the decision of the Supreme Court, and a denial of the motion does not deprive the movant of the benefit of the decision, or ignore the fact that the prior Superior Court judgment had been reversed on appeal. *Cox v. Boyden*, 368.

9. *Appeal and Error—Judgments Motions—Evidence—Findings—Duress.* The findings of the Superior Court upon the evidence on motion to set aside a judgment are conclusive on appeal; and where a movant has appeared in court with her attorney and upon affidavit withdraws her motion to set aside the judgment and requests that it be enforced as rendered, which is accordingly granted without exception or appeal, and thereafter she again moves to set aside the judgment upon the ground of duress or coercion, the denial of the motion by the trial judge, upon findings that she had been fairly and impartially treated, without duress or coercion, will not be disturbed on appeal. *Ibid.*

10. *Appeal and Error—Record—Exceptions.*—The defendant in an action to recover land may not take advantage of the position that a conveyance of the land had been made according to a parol division, etc., when the fact has been found against him by the jury, and there is no exception of record to present the question. *Blanton v. Boney*, 211.

11. *Appeal and Error—Evidence—Harmless Error.*—Upon a motion to nonsuit, the erroneous admission of evidence will not constitute reversible error when there is other evidence in the case that would render it immaterial or harmless. *Moore v. Lumber Co.*, 205.

12. *Appeal and Error—Examination of Party—Premature Appeal—Supreme Court's Discretion.*—While ordinarily an appeal from an order of the clerk of the court for examination of a party under oath is premature, the Supreme Court, in this case, in its discretion, considered the appeal on its merits. *Ward v. Martin*, 287.

13. *Appeal and Error—Evidence—Transactions with Deceased—Statutes—Verdict—Harmless Error.*—The erroneous admission of evidence of transactions with deceased persons, prohibited by Revisal, sec. 1631, becomes immaterial when from the answers by the jury to the issues it appears that this evidence was disregarded by them. *Ray v. Ray*, 290.

14. *Appeal and Error—Parent and Child—Habeas Corpus—Review of Evidence.—Semble*, on appeal in *habeas corpus* proceedings as to care and custody of children, the Supreme Court may not regard as final the findings of the Superior Court, but may consider and pass upon the whole record, including the testimony. *Atkinson v. Downing*, 244.

15. *Appeal and Error—Objections and Exceptions—Judgments—Estates—Betterments—Estoppel.*—Where a preliminary judgment in proceed-

APPEAL AND ERROR—*Continued.*

ings to sell lands with contingent interests (Revisal, sec. 1590) provides for the payment of betterments to the life tenant, and in this respect the judgment is not excepted to or appealed from, it is conclusive upon the parties as an estoppel. As to whether under the facts of this case such betterments are allowable. *Quaere? Pendleton v. Williams*, 248.

16. *Appeal and Error—Evidence—Harmless Error.*—The exclusion of evidence on the trial will not be considered reversible error on appeal where it appears that the witness had substantially given such evidence elsewhere in his testimony, and that it conformed with the contention of the appellee. *Pritchard v. Williams*, 320.

17. *Appeal and Error—Favorable Error.*—Appellant cannot complain of errors, if any, made by the trial judge in his favor in the charge to the jury. *Belk v. Belk*, 69.

18. *Appeal and Error—Issues—Answers—Harmless Error.*—Where the answers by the jury to other issues renders immaterial the submission of one of them, its submission will be considered on appeal as harmless, if erroneous. *Ibid.*

19. *Appeal and Error—Issues—Instructions—Assumptions of Risks.*—In an action to recover damages for a personal injury, where the judge has correctly charged the jury on the evidence as to negligence and contributory negligence, including that as to the plaintiff's assumption of risks, the failure to submit an issue or give a request for instruction as to assumption of risks is not reversible error. *Patterson v. Lumber Co.*, 90.

20. *Appeal and Error—Issues and Answers.*—Issues answered in appellant's favor are necessarily excluded from consideration on his appeal. *Cobb v. R. R.*, 130.

21. *Appeal and Error—Briefs, Time of Filing—Rules of Court.*—Upon motion of appellant aptly made at the call of the district to which the case belongs, the appellee's brief will be dismissed if not filed on the preceding Saturday by noon and disposed of without argument by appellee, unless for good cause shown the time should be extended Rule 36. *Phillips v. Junior Order*, 133.

22. *Appeal and Error—Record—Instructions—Presumptions.*—The charge of the trial judge neither set out in the record nor excepted to is presumed to be correct on appeal. *Burns v. Burns*, 147.

23. *Appeal and Error—Instructions—Presumptions.*—Where the record does not set out the judge's charge, and there are no exceptions thereto, it will be presumed on appeal that it was a correct one. *Muse v. Motor Co.*, 466.

24. *Appeal and Error—Opinions—Harmless Error.*—The plaintiff's testimony in his action to recover damages for a personal injury alleged to have been negligently inflicted, as to the result of the injury in producing hernia, is harmless when he has testified that immediately thereafter he felt a severe pain and the other evidence tends to show it was so caused, and that hernia immediately followed. *Ibid.*

APPEAL AND ERROR—*Continued.*

25. *Appeal and Error—Instructions—Contentions—Objections and Exceptions.*—The judge should be given an opportunity to correct his statement of the contention of the parties by objection taken at the time, or error in that respect will not be considered on appeal. *Ibid.*

26. *Appeal and Error—Letters—Evidence—Reversible Error.*—Where an employee sued his employer to recover damages arising from malpractice of a physician alleged to have been employed by the company to attend him, which employment the defendant denied by its pleading and evidence, the erroneous admission of a letter claimed to have been written by the defendant's president, which tends to contradict the defendant's evidence, is not harmless, but reversible error. *Woody v. Spruce Co.*, 546.

27. *Appeal and Error—Objections and Exceptions—Briefs.*—Exceptions in the record not set out in appellee's brief, or in support of which no reason or argument is stated or authorities cited, will be taken as abandoned by him on appeal to the Supreme Coourt. Rule 34. *Cole v. Boyd*, 555.

28. *Appeal and Error—Evidence—Unanswered Questions.*—Where in answer to a question calling for the knowledge of the witness as to relevant facts at issue, the witness states he can only give the declarations of others, without further answering, the competency of such declarations are not before the Court on appeal. *Jordan v. Simmons*, 537.

29. *Appeal and Error—Instructions—Railroads—Fires—Negligence.—When* an action to recover damages against a railroad company for negligently setting out fire to the damage of plaintiff's lands, both from the pleadings and evidence centers solely on the question of whether the fire started on the defendant's foul right of way or otherwise from an independent source, and the issue has been answered in defendant's favor, a charge of the court which fails to give the plaintiff the benefit of the presumption of the origin of the fire (*Currie v. R. R.*, 156 N.C. 423) is unobjectionable. *Bond v. R. R.*, 606.

30. *Appeal and Error—Instructions—Evidence—Harmless Error.*—Where a phase of negligence is submitted under the judge's charge to the jury prejudicial to the appellee only and unsupported by allegation and evidence, it will not be considered as reversible error to the appellant on appeal. *Ibid.*

31. *Appeal and Error—Verdict—Harmless Error.*—Where damages are sought to be recovered from the defendant, alleging several causes of action on contract and one arising from its negligent acts, and as to the last the jury has not answered the issue, and no recovery has been had thereon, no error has been committed to the defendant's prejudice therein. *Watts v. Spruce Co.*, 661.

32. *Appeal and Error—Objections and Exceptions—Instructions—Special Requests.*—Exception that instructions given by the court to the jury were not sufficiently full and explicit must be to the refusal of appellant's request, aptly and properly made, to have them made so. *Power Co. v. Power Co.*, 669.

APPEAL AND ERROR—*Continued.*

33. *Appeal and Error—Frivolous Appeals—Motions.*—Appeals from the Superior Court as a matter of right must be taken bona fide for the purpose of reviewing alleged error, and when no serious assignment of error is made and it appears that the appeal is frivolous and for the purpose of delay, it will be dismissed on appellee's motion. *Blount v. Jones*, 708.

34. *Appeal and Error—Divided Court—Alleyways—Obstruction—Judgments.*—On this appeal by both parties to an action between abutting owners on an alley seeking to restrain defendants from obstructing it with a cross-action to prevent plaintiff from maintaining a fence across it, the court is equally divided, one member not sitting or taking part therein, and the judgment of the Superior Court restraining the plaintiffs from maintaining the gate and defendants from obstructing the alley, is affirmed. *Alexander v. Auten's Auto Hire*, 720.

35. *Appeal and Error—Objections and Exceptions—instructions.*—Exception taken to a part of the charge to the jury which contains both correct and incorrect instructions will not be considered on appeal. *Quelch v. Futch*, 694.

36. *Appeal and Error—Evidence—Harmless Error.*—The admission of evidence which is harmless will not be held for reversible error. *Ibid.*

37. *Appeal and Error—Substantial Error—Burden of Proof.*—The burden is upon appellant to show substantial error on appeal. *Ibid.*

38. *Appeal and Error—Case—Requisites.*—The appellant is required, in stating his case on appeal, to make a concise statement of the entire case necessary to present the assignments of error relied upon, and set out the necessary and pertinent evidence in narrative form, together with the charge of the court necessary to be considered; and when this is not done the appellee may move before the trial judge to dismiss the appeal. *Thompson v. Williams*, 696.

39. *Appeal and Error—Case—Evidence—Narrative Form—Exceptions.* Upon exception, when the appellant has set out the evidence in narrative form, it is the duty of the trial judge to supervise and correct it, where correction is required. *Ibid.*

40. *Appeal and Error—Case—Certificate of Judge—Motions to Dismiss.* Where the trial judge has certified that the parties have been unable to agree upon the case on appeal, and that the foregoing is the case, it is binding upon the Supreme Court and it will not be dismissed (Rules 17-21) on the ground that no case on appeal had been stated and settled. Revisal, sec., 591. *Ibid.*

41. *Appeal and Error—Reference—Findings—Evidence.*—The findings of fact by a referee, upon competent evidence, and concurred in by the judge, are conclusive on appeal. *Keener v. Lumber Co.*, 701.

42. *Appeal and Error—Homicide—Prejudice—Harmless Error.*—An unanswered question ruled out upon the trial will not be held as reversible error, especially when from the nature of the evidence adduced and the admissions respecting the answer no prejudice to the appellant was likely to have resulted. *S. v. Davis*, 724.

APPEAL AND ERROR.—*Continued.*

43. *Appeal and Error—Instructions—Contentions—Objections and Exceptions.*—Objection to an erroneous statement of a party's contention should be called to the attention of the trial judge at the time so that he may have an opportunity to make the proper correction, and an exception thereto otherwise taken will not be considered on appeal. *Ibid.*

44. *Appeal and Error—Technical Error—New Trials.*—A new trial will not be granted on appeal for a technical error of the trial court when it clearly appears that it was not substantial and could not have affected the result. *Ibid.*

45. *Appeal and Error.*—Exception taken to three and a half pages of the record of the judge's charge is a "broadside attack" and will not be considered on appeal. *S. v. Herron*, 754.

46. *Appeal and Error—Trials—Improper Remarks—Harmless Error.*—It is improper for the prosecuting attorney to argue to the jury that the defendant, upon indictment, did not go upon the stand, but such error was cured in this case by the attorney's withdrawing his remarks and the court's instruction that the jury must not consider them. *S. v. McIver*, 762.

47. *Appeal and Error—Certiorari—Correcting Case.*—A *certiorari* will not issue for correcting the record of a criminal case sent up on appeal agreed to by the solicitor, when the statement of the trial judge is only that the evidence was incorrectly stated therein, with indication that he would not be able to either recollect the evidence or correct it, and in the absence of allegation of misconduct on the part of the solicitor, especially when it appears that the defendant was a man of good character and the judge has stated he was not to blame for the offense charged. *S. v. Faulkner*, 787.

48. *Appeal and Error—Jurors—Mistrials—Findings.*—Where the court withdraws a juror and enters a mistrial in a capital felony he should find the facts upon which his action is based for review on appeal. *S. v. Cain*, 825.

APPEARANCE. See Judgments, 8.

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ARREST AND BAIL.

Arrest and Bail—Trusts.—Arrest and bail will lie for a wrongful conversion of trust funds. *Guano Co. v. Southerland*, 228.

ARREST OF JUDGMENT. See Criminal Law, 12.

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ASSETS. See Corporations, 10, 11.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. *Assignments for Benefit of Creditors—"Property"—Contracts—Statutes.* Our statutes requiring the trustee in a general assignment for creditors to recover property "conveyed or transferred by the grantor or assignor" in preference within the four months period, includes within their meaning both real and personal property, and the general methods by which the title is passed or interest therein created, and extends to an executed contract of sale. Revisal, sec. 967 *et seq.;* 1 Greg. Supp., pp. 109-110. *Teague v. Grocery Co.*, 195.

2. *Same—Preference.*—Our statutes regulating general assignments for creditors prohibits and avoids, as a wrongful preference, any and every disposition of real or personal property, absolute or conditional, by which a creditor in consideration of an existent or antecedent debt, within four months of a general assignment by his debtor, acquires title to such debtor's property, or any interest therein or lien thereon, when he knew or had reasonable grounds to believe that his grantor or assignor was insolvent at the time the transfer or conveyance was made. Revisal, sec. 967 *et seq*; 1 Greg. Supp., pp. 109-110. *Ibid.*

3. *Same—Possession Retained—Contracts—Title.*—It is not required that possession of specific personal property be given the purchaser in order to make an executed contract of sale, for the title passes according to the intent of the parties as expressed in the contract between them; and in the absence of specific agreement, the presumption is that the title passed at the time of the purchase without such delivery. *Ibid.*

4. *Same—Instructions—Appeal and Error.*—Where the trustee in a general assignment for creditors brings his action to set aside as a fraudulent and void preferance a transfer of the assignor's property for an antecedent debt, made within the four months period, wherein the assignor retained possession until a later time, and the evidence is conflicting as to whether it was then agreed between the parties that the title should presently pass, it is reversible error for the trial judge to instruct the jury that the transaction was void within the meaning of the statute, if the creditor had knowledge of the insolvency of his debtor at the time the goods were delivered to him. Revisal, sec. 967 *et seq.*; 1 Greg. Supp., pp. 109-110. *Ibid.*

ASSIGNMENT OF ERROR. See Appeal and Error, 5.

ASSIGNOR OF TRUSTS. See Trusts and Trustees, 3.

ASSUMPTION OF RISKS. See Master and Servant, 2, 4; Appeal and Error, 19; Commerce, 2.

ATTACHMENT. See Mortgages, 17, 20.

Attachment—Judgments—Courts—Nonresidents—Garnishments.—A judgment of the Federal court is not liable to garnishment in the State court; and where it is alleged that a nonresident has property in this State by virtue of such judgment, and process by advertisement has been attempted and proceedings in attachment instituted, the attachment will be dissolved on motion by special appearance made in the cause in the State court, and as the demand or debt merges in the

ATTACHMENT—*Continued.*

judgment no distinction between the two may be drawn. *LeRoy v. Jacobosky*, 136 N.C. 458, cited and distinguished. *Mfg. Co. v. Freeman*, 212.

ATTENDANT. See Carriers of Passengers, 1.

ATTORNEY AND CLIENT. See Evidence, 15; Judgments, 8.

1. *Attorney and Client—Judgment—Consent.*—Where an action upon contract and also in tort for embezzlement is alleged, it is within the scope of the employment of the attorney for the defendant to consent to a judgment upon the contract alone, excluding that upon the tort. *Chemical Co. v. Bass*, 426.

2. *Same—Partnership.*—Where a member of defendant partnership consents that judgment be entered against the firm in open court, through their attorneys, the consent is that of a partner, rather than that of the attorney, and is binding upon the defendant firm. *Ibid.*

3. *Same—Burden of Proof.*—Where consent judgment has been entered against a defendant partnership in open court, in the presence of a member of the firm representing it, the burden of proof is on the other partner, absent at the time, to show the lack of authority of the attorneys to consent thereto, on his motion to set it aside upon that ground, the law presuming that such authority existed. *Ibid.*

4. *Attorney and Client—Fees—Prior Assignment—Notice—Action—Prima Facie Case.*—Where an attorney has collected by suit moneys for his client upon the latter's building contract, and has retained a part thereof as compensation for his services, in an action by the assignee of the contract, the plaintiff makes out a *prima facie case* against the attorney by showing the assignment of the contract to himself, the amount of the indebtedness, and that the attorney acted with notice of his claim. *Bank v. O'Brien*, 338.

5. *Same—Burden of Proof—Quantum Meruit.*—Where an attorney has collected in part upon his client's contract and has retained a part thereof as his fee, the burden is on him to show, in an action by the assignee of the contract, upon his making a *prima facie* case, in the absence of a special contract between them, that he is entitled to his compensation upon a *quantum meruit*, and that he has properly distributed the funds in his hands. *Ibid.*

6. *Same—Pleadings—Amendments—Courts.*—Where the plaintiff sues his debtor's attorney for the entire sum collected by the attorney upon a contract assigned to him for security of a loan, the position taken by the trial judge that he could not recover without an amendment setting up a *quantum meruit* is incompatible with the principal cause of action, and a nonsuit upon his failure to so amend when he has made out a *prima facie* case is reversible error. *Ibid.*

AUCTIONEER. See Mortgages, 11.

AUTOMOBILES.

1. *Automobiles—Negligence—Principal and Agent—Evidence—nonsuit—Trials.*—Where the plaintiff sues the owner of an automobile for in-

AUTOMOBILES—*Continued.*

juries received while his son was driving it, evidence that the son was driving his mother at the time, and that after the injury the defendant ordered his son to take the plaintiff home, is sufficient to take the case to the jury upon a motion to nonsuit, upon the question of whether the son was acting in the service of the defendant when the injury was inflicted. *Clark v. Sweaney*, 281.

2. *Automobiles—Negligence—Evidence—Ownership—Principal and Agent—Chauffeur—Minor Son.*—Where the mother is the owner of an automobile which ran into a buggy at night and injured the plaintiff, the guest thereon of another, through the negligence of her 19-year-old son, driving the machine at the time, and the son, with his father, were engaged in the business of the mother, the latter is liable whether she was then in the automobile or not; and evidence of her ownership and that the machine was being driven by her minor son in pursuance of her business is sufficient to take the case to the jury, subject to be rebutted. *Linville v. Nissen*, 162 N.C. 101, cited and applied. *Wilson v. Polk*, 490.

3. *Criminal Law—Manslaughter—Automobile—Speed Limits—Trials—Questions for Jury—Negligence.*—The driver of an automobile truck while greatly exceeding the speed ordinance of a town and of the general statute, and without signal or warning, ran into a boy on his bicycle at a cross street, and death resulted to the boy, upon trial for manslaughter: *Held*, the ordinance and statute are intended to protect the life and limb of the citizen, and the defendant should reasonably have anticipated meeting some one at the crossing, and the evidence of his reckless violation of the ordinance and statute, under the circumstances, were sufficient to carry the case to the jury. *S. v. McIver*, 761.

4. *Same—Negligence—Contributory Negligence.*—Where one recklessly drives an automobile without signal or warning, in excess of the speed limit fixed by ordinance and the general statute, and thereby injures or kills another at a street intersection of the town, his violating the law in this manner makes him criminally liable for the injury without regard to the exercise of his judgment at the time in endeavoring to avoid the injury or contributory negligence on the part of the one injured or killed. *Ibid.*

5. *Criminal Law—Automobiles—Evidence—Mistake of Judgment—Appeal and Error.*—Where one is run upon and killed by the reckless and unlawful driving of an automobile, beyond the speed limit fixed by law, it is not error for the court to reject testimony of a witness that it was a mistake of judgment of the defendant in turning in a certain direction, being merely the inference of the witness, and also immaterial, as such mistake would not excuse him. *Ibid.*

BAILMENT.

Bailment—Control and Possession—Railroad Cars—Dwelling.—A railroad company is not liable as bailee for the household goods of an employee it permits to use its box car at a siding for a dwelling, possession and control being essential elements in the law of bailment. *R. R.*, 35.

BALLOTS. See Municipalities, 1; Municipal Corporations, 3.

BANKS. See Telegraphs, 3.

BANKS AND BANKING. See Bills and Notes, 2.

BAWDY HOUSES. See Criminal Laws, 7, 11, 12, 13, 14.

BENEFICIARY. See Insurance, 1.

BETTERMENTS. See Appeal and Error, 15.

Betterments—Estates—Tenant for life.—A devise of lands for life with limitation over does not entitle the life tenant to compensation for betterments he has placed on the land during his tenancy, under the equitable principles allowing it or our statute relating thereto. Revisal, sec. 652, *et seq. Northcott v. Northcott*, 148.

BIGAMY.

1. *Bigamy—Criminal Law—Defense—Divorce—Judgments—Constitutional Law—Residence—Fraud.*—Where a marriage has been contracted in this State and a party thereto has again married in another State and resides and cohabits here and thereafter, and is indicted under ch. 26, Laws of 1913, amending Revisal, sec. 3361, and offers in defense a divorce granted in the other jurisdiction, it is not in contravention of the "full faith and credit" clause of the Federal Constitution, and may be shown in the courts of our State that the residence required by the laws of such other State was not acquired in good faith, but in fraud, and that the decree therein was therefore void. *S. v. Herron*, 754.

2. *Bigamy—Criminal Law—Defense—Divorce—Evidence—Trials — Questions for Jury.*—The introduction in evidence of a divorce granted in another State, upon a trial for bigamy, in our own courts is only evidence which should be submitted to the jury under proper instructions, *Ibid.*

3. *Bigamy—Criminal Law—Defense—Divorce—Residence—Instructions—Burden of Proof.*—Where a decree of divorce in another State is solely relied on as a defense on a trial for bigamy which is attacked by the State for insufficient residence in such other State, with supporting evidence, the defendant must satisfy the jury of the bona fide of his residence for the required time, but not beyond a reasonable doubt. *Ibid.*

BILLS OF LADING. See Carriers of Goods, 1, 2, 5; Pleadings, 10.

BILLS AND NOTES. See Contracts, 14, 15; Corporations, 6; Principal and Surety, 1; Judgments, 10.

1. *Bills and Notes—Negotiable Instruments—Blank Amount—Principal and Agent.*—A note signed by the maker with blank left for amount, and intrusted by him to another for use, gives implied authority to the one to whom it is delivered to fill in the amount, and in the hands of an innocent purchaser constitutes the one to whom it was delivered the agent of the maker, and is valid and binding upon him. *Phillips v. Hensley*, 23.

BILLS AND NOTES—*Continued.*

2. *Same—Banks and Banking—Executors and Administrators—Accounting.*—A bank is responsible for the conduct of its cashier in having a note signed by a third person as maker, in blank amount, and in wrongfully filling in the blank for a larger sum than intended and misappropriating the surplus to his own use, and where the maker has since died and the transaction is an item of the account with his administrator, the full amount thereof will not be allowed as a credit. *Ibid.*

3. *Bills and Notes—Negotiable Instruments—Endorser—Notice—Dishonor.* The liability of an endorser on a promissory note in conditional, entitling him to notice of dishonor; and payment may not be enforced against him unless such notice has properly been given. *Horton v. Wilson*, 533.

4. *Same—Anticipated Dishonor.*—Notice given to an endorser on promissory note prior to maturity in anticipation of dishonor by the maker is not sufficient to hold him to liability thereon, such notice to be valid must be properly given after the note is dishonored. *Ibid.*

5. *Bills and Notes—Negotiable Instruments—Limitation of Actions—Payment—Endorsers.*—A payment on promissory note to repel the bar of the statute of limitations must be made by one of the same class of liability thereon, and a payment by the maker does not continue the right of action against the endorser thereof. *Ibid.*

6. *Same—Mortgages.*—Where the endorsers of a promissory note thereafter take a mortgage on the maker's lands to secure them as such, without further liability for the payment of the debt, they do not thereby change their relationship an endorsers only, and a payment made on the note by the maker does not affect the running of the statute of limitations in the endorser's favor. *Ibid.*

7. *Bills and Notes—Negotiable Instruments—Endorsers—Dishonor—Notice—Statutes.*—An endorser of a negotiable instrument is entitled to notice of dishonor under our statute, and upon failure to do so his liability thereon is discharged. Revisal, sec. 2239. *Hicks v. Wooten*, 602.

BILL OF PARTICULARS. See Pleadings, 9.

BILL OF SALE. See Mortgages, 16.

BIRTH OF CHILD. See Evidence, 8, 9, 10.

BODILY HEIRS. See Wills, 22.

BONDS. See Statutes, 1; Removal of Causes, 5; School Districts, 1; Municipal Corporations, 5.

BOND ISSUES. See Constitutional Law, 4, 7, 9; Municipal Corporations, 4.

BOUNDARIES. See State Lands, 2; Deeds and Conveyances, 10; Evidence, 22; Limitation of Actions, 5.

1. *Adverse Possession—Color—Admission of Title—Boundaries—Burden of Proof—Ejectment—Statutes.*—Where defendant in ejectment admits plaintiff's paper title to a 465-acre tract of land, but claims title

BOUNDARIES—*Continued.*

to 169 acres thereof under color and adverse possession of a few acres, with constructive possession to the outer boundaries of his deed under which he claims as "color," the law presumes the possession to be under the true title, and the burden of proof is on the defendant to show the contrary. *Vanderbilt v. Chapman*, 11.

2. *Boundaries—Evidence—Declarations—Interest—Ante Litem Motam.* Parol evidence of declarations as to the placing of the corner of private lands of which the title is in dispute is allowed when made *ante litem motam* by a declarant who was disinterested at the time and dead at the time of trial; and in such case the lapse of time is not always controlling. *Bank v. Whilden*, 52.

3. *Same—Remote Period—Definite Corners.*—Parol evidence of common reputation as to the placing of a corner, on the question of private boundary, is admissible when shown to have existed for a remote period and direct evidence of its origin is not likely to be procurable; such reputation must always be shown to have existed *ante litem motam*, and should attach itself to some muniment of title or natural object, or be fortified by testimony of occupation and acquiescence tending to give the land some definite and fixed location. *Ibid.*

4. *Same—State Grants—State Lands.*—Where both parties to the action claim lands by mesne conveyances under separate grants from the State, and the controversy is made to depend upon the location of the lands under the defendant's grant, with description, "Beginning at a locust near the gap of the trail between Johnson's and McManus', and runs," etc., and defendant insists the locust was at "J," while the plaintiff that it was at "O": *Held*, general reputation as to the location of an indefinite tract of land not shown to have been at a remote period or *ante litem motam*, etc., is properly excluded, and general reputation as to the location of the Johnson and McManus tracts and the trail between tending to show the corner locust at "O" is competent, it appearing that the declarant was dead, disinterested, and his declarations made *ante litem motam*, the lapse of time not considered controlling. *Ibid.*

5. *Boundaries—Corners—Parol Evidence—Trials—Questions for Jury.* Where in an action to recover lands the controversy depends upon the location of the beginning corner given in a deed as "at a planted stone on" a designated street "about six feet southeast of a large red oak," with conflicting evidence as to its location with reference to that of the red oak, plaintiff contending and offering evidence that it was eleven feet from the street and defendant that it was on the street, the exclusion of defendant's evidence tending to show his use and occupation of the *locus in quo*, building, fencing, and cutting trees thereon in plaintiff's view without objection, that plaintiff's contention would run the disputed line through buildings, etc., is reversible *Taylor v. Meadows*, 373.

6. *Same—Questions of Law.*—Where parol evidence as to the location of a certain controlling corner given in a deed does not contradict the written instrument, and its admission is otherwise competent, the question as to what is the corner is one of law and as to where it is located is one of fact for the determination of the jury under con-

BOUNDARIES—*Continued.*

flicting evidence and proper instructions in an action to recover the land. *Ibid.*

7. *Boundaries—Deeds and Conveyances—Intent—Interpretation—Ejectment.*—The intent of the parties in a deed to land as to its boundaries, as expressed in the entire instrument, should be given effect, and in ascertaining such intent that which is definite and specific shall prevail over that which is uncertain, and in case of conflicting descriptions that cannot be reconciled the courts will adopt that construction which best comports with the manifest intention of the parties and the surrounding circumstances of the case at the time the instrument was executed. *Millard v. Smathers*, 56.

8. *Same—Calls—Straight Lines.*—None of the calls in a deed to lands shall be disregarded when they can be fulfilled by any reasonable way of running the lines, and this requirement will be defeated only when it is necessary to give effect to the intention of the parties as expressed in the instrument, justifying, in proper instances, a departure from a straight line called for between two established calls and requiring at times the running of two or more lines instead of one. *Ibid.*

9. *Same—Fixed Corners—Line Deflected.*—When the call in a deed to lands is along a recognized line to a known or established corner, and the line does not go to such corner, the usual rule of location is to run the line of the description as far as it will go, or to the nearest point to the corner called for and thence a direct line to the corner. *Ibid.*

10. *Boundaries—Surveys—Evidence.*—Evidence that the parties had for many years before the action recognized a line between their adjoining lands, made by a surveyor, as the true line thereof is competent as to the location of the true line in dispute, and its exclusion is reversible error. *Wiggins v. Rogers*, 67.

11. *Boundaries—Evidence—Declarations.* — Declarations as to definite markings of the corners of lands in controversy, made by one without interest, since deceased and before the controversy arose and sufficiently remote, are competent evidence. *Canter v. Chilton*, 406.

BREACH. See Vendor and Purchaser, 3, 4; Contracts, 24, 25, 26, 27.

BRIDGES. See Constitutional Law, 3.

BRIEFS. See Appeal and Error, 4, 21, 27.

BROKER. See Criminal Law, 6.

BUILDINGS. See Deeds and Conveyances, 10.

BURDEN OF PROOF. See Boundaries, 1; Appeal and Error, 1, 37; Wills, 4; Attorney and Client, 3, 5; Trusts, 1; Ejectment, 2, 3; Animals, 1; Evidence, 19, 26; Deeds and Conveyances, 11; Negligence, 10; Mortgages, 13; Railroads, 10; Instructions, 23; Intoxicating Liquors, 1; Bigamy, 3; Criminal Law, 9.

BURGLARY.

1. *Burglary—Rape—Intent—Evidence—Criminal Law.*—Upon trial for burglary in the first degree evidence is sufficient to show the prison-

BURGLARY—*Continued.*

er's intent to commit rape at the time of breaking into the dwelling, which tends to show that the prisoner entered the room in which the daughter of the owner was sleeping, placed his hand upon her person, and secreted himself beneath her bed when the alarm was given.—*S. v. Bowden*, 794.

2. *Same—Instructions—Appeal and Error—Reversible Error.*—A charge on a trial for burglarly in the first degree, which reiterates and emphasizes that the entry into the dwelling by the prisoner must have been with the intent to commit rape, will not constitute reversible error because from an expression in one part it may be inferred that the prisoner would be guilty of the offense charged if such intent had been formed afterwards. *Ibid.*

3. *Burglary — Instructions — Rape — Intent—Acquiescence.* — Where the judge has charged the jury that the prisoner, on trial for burglary in the first degree, must have had the intent to have carnal intercourse with the female forcibly and against her will, and that the act must have been conceived with a felonious intent, is not objectionable upon the ground that this included a purpose of having intercourse with her consent, under the evidence in this case.—*Ibid.*

CALLS. See Boundaries, 8; School Districts, 1.

CAPITAL FELONY. See Mistrials, 1, 2.

CARRIERS OF GOODS. See Pleadings, 10.

1. *Carriers of Goods—Principal and Agent—Bills of Lading—Purchasers for Value—Receipt of Goods—Defenses—Vendor and Purchaser.*—A common carrier is not bound by a bill of lading issued by its agent unless the goods be actually received for shipment, and the principal is not estopped thereby from showing by parol that no goods were in fact received, although the bill has been transferred to a *bona fide* holder for value. *Bank v. R. R.*, 415.

2. *Carriers of Goods—Bills of Lading—Negotiable Instruments—Statutes.* A bill of lading issued by the agent of the carrier is in the nature of a receipt, susceptible of explanation or contradiction, and is not negotiable in the ordinary application of the word to commercial paper; as to the effect on its negotiability by chapter 415, Laws of 1916, 39 W. S. Stat. at Large, part 1, p. 138, *Quaere? Ibid.*

3. *Carriers of Goods—Live Stock—Negligence—Evidence—Questions for Jury—Trials.*—In an action against the carrier for damages for the destruction of a shipment of live stock by fire, a *prima facie* case is made out when the plaintiff shows the receipt of the cattle for transportation and their nondelivery. *Osborne v. R. R.*, 594.

4. *Carriers of Goods—Negligence—Sparks—Origin—Circumstantial Evidence.*—It may be shown by circumstantial evidence that a spark which caused the plaintiff's cattle to be destroyed by fire while being transported by the defendant carrier originated from the defendant's locomotive. *Ibid.*

5. *Carriers of Goods—Negligence—Bills of Lading—Contract—Live Stock.* Under the provisions of the "Cummins" Amendment, a common car-

CARRIERS OF GOODS—*Continued.*

rier may not stipulate in its bill of lading for exemptions from liability for damages to a live stock shipment caused by its own negligence. *Ibid.*

CARRIERS OF PASSENGERS.

Carriers of Passengers—Live Stock—Attendant—Negligence—Evidence—Questions for Jury—Trials.—A carrier transporting live stock is not held to the same absolute liability to the attendant in the car, as passenger, as it is to the owner of the cattle for damages arising from destruction of the car by fire; but it is *Held* the evidence in this case was sufficient to be submitted to the jury on defendant's liability to the attendant in his action. *Osborne v. R. R.*, 594.

CARTWAY. See Criminal Law, 5.

CASE. See Appeal and Error, 38, 39, 40.

CERTIFICATES. See Corporations, 4.

CERTIORARI. See Habeas Corpus, 1, 3; Contempt, 6; Appeal and Error, 47.

CHANGES. See Drainage Districts, 4.

CHARACTER. See Homicide, 6; Evidence, 35, 36, 37.

CHARGE AS A WHOLE. See Instructions, 4.

CHARTER. See Municipalities, 1; Municipal Corporations, 2, 3; Corporations, 3, 13, 14, 15; Public Officers, 7; Instructions, 20; Constitutional Law, 11.

CHATTEL. See Mortgages, 7.

CHAUFFEUR. See Automobiles, 2.

CHILDREN. See Deeds and Conveyances, 4; Negligence, 6; Estates, 8, 9, 10; Wills, 26.

CHILDREN THEN LIVING. See Wills, 3.

CITIES AND TOWNS. See Municipalities, 1; Municipal Corporations, 1, 2, 3, 4, 5, 7, 9, 10, 11; Street Railways, 1, 3.

CITIZENS. See War, 1, 2.

CLAUSE. See Insurance, 5.

CLERKS OF COURT. See Depositions, 1; Judgments, 9; Homestead, 1; Deeds and Conveyances, 15.

1. *Clerks of Court—Appeal and Error—Judgments—Executions—Appellant's Duty.*—While it is the clerks' duty to act primarily and send up an appeal from his judgment refusing plaintiff's motion for leave to issue execution under a dormant judgment, Revisal, sec. 620, it is the duty of the appellant to take the necessary and proper legal measures to put the case before the judge if the clerk fails to act. *Hicks v. Wooten*, 597.

CLERKS OF COURT—*Continued.*

2. *Same—Laches—Excusable Neglect.*—Where a plaintiff's motion for leave to issue execution on a dormant judgment has been denied by the clerk, Revisal, sec. 620, and he appeals therefrom in open court and defendant waives notice, and he remains inactive for two months thereafter, and then finding that his appeal has not been sent up to the judge owing to the failure of the clerk to do so, he has it sent up, the fact that the settlement by the judge thereof has not been returned to the clerk within the statutory time puts him upon notice that there has been an unreasonable delay, and the appeal should be dismissed on the ground of his inexcusable laches. Revisal, secs. 610, 611, 612, 613. *Ibid.*

CLOUD ON TITLE. See State's Lands, 1; Injunction, 2.

COLLATERAL ATTACK. See Constitutional Law, 10; Habeas Corpus, 2.

COLOR. See Boundaries, 1; Deeds and Conveyances, 1; Limitation of Actions, 4, 5, 6.

COLORED PERSONS. See Instructions, 7.

COMMERCE.

1. *Commerce—Railroads—Statutes—Federal Decisions.*—Where it appears from plaintiff's evidence, in his action to recover damages from a railroad company for a wrongful injury, that he was engaged in interstate commerce at the time, the Federal statute excludes and supersedes the State law in regard to the doctrine of assumption of risks, and the decisions of the Supreme Court of the United States will control. *Gaddy v. R. R.*, 515.

2. *Same—Master and Servant—Assumption of Risks—Employer and Employee.*—While under the decisions of the Federal Court the doctrine is recognized that the master should furnish the servant reasonably safe tools and appliances and place to work, and to keep and maintain them in such condition, they also enforce the doctrine of assumption of ordinary risks by the employee incident to his employment, including his continuing to work without objection when he has knowledge of a defect and an apprehension of the danger which it entails. *Ibid.*

3. *Same—Evidence—Nonsuit—Trials.*—Where an experienced switchman of a railroad company is injured while acting for the company in the course of his employment, in interstate commerce, and it appears from his own evidence that he was at the time engaged with a crew in switching cars upon several diverging tracks, with full knowledge of the conditions; that after leaving a car that had been "kicked" upon one of the tracks he, with knowledge of the approach of other cars, "kicked" upon another track, was injured by his foot catching between the guard and stock rails and run over by the cars moving towards him and to which he was walking to continue his duties as brakeman; that at the time he saw that the cars had no brakeman on them to stop them, and had seen them "kicked" upon the track: *Held*, under the Federal decisions, the employee assumed the risks, and a motion to nonsuit thereunder should have been allowed in his action to recover damages against the railroad company. *Ibid.*

COMMERCE—*Continued.*

4. *Commerce—Railroads—Through Trains—Master and Servant—Employee.*—A railroad switchman engaged in making up a through train passing into, through, and beyond the State is engaged in interstate commerce. *Ibid.*

COMMISSION. See Contracts, 4; Evidence, 32.

COMMON LAW. See Divorce, 2; Costs, 7.

COMPARATIVE NEGLIGENCE. See Railroads, 14.

COMPENSATION. See Municipal Corporations, 9.

CONDEMNATION. See Statutes, 6.

CONDITION PRECEDENT. See Municipal Corporations, 5.

CONDITIONAL SALES. See Corporations, 2; Deeds and Conveyances, 2.

CONFESSIONS. See Criminal Law, 10.

CONFIRMATION. See Costs, 5; Contracts, 20.

CONSENT. See Attorney and Client, 1; Judgment, 1; Partnership, 1; Register of Deeds, 2; Spirituous Liquors, 2.

CONSIDERATION. See Vendor and Purchaser, 2; Contracts, 13, 16; Statute of Frauds, 1; Contracts, 17; Corporations, 6.

CONSIGNMENT. See Vendor and Purchaser, 5; Limitations of Actions, 12.

CONSPIRACY. See Evidence, 32; Actions, 4; Criminal Law, 4; Homicide, 7.

CONSTITUTION.

Art.

I, sec. 17. Endorsement by county of township bonds is a pledge of the county's credit. *Comrs. v. Boring*, 105.

II, sec. 2. A ratified legislative charter for a private corporation may not be collaterally impeached as to the thirty-day advertisement. *Power Co. v. Power Co.*, 668.

II, sec. 29. Includes erecting bridges over nonnavigable streams, but does not deprive Legislature from authorizing bond issues or current local taxation when necessary. *Mills v. Comrs.*, 215.

IV, sec. 1. The laws of the State or origin of a fraternal insurance assessment order, without profit, are controlling. *Hollingsworth v. Supreme Council*, 615.

VII, sec. 7. Endorsement by county of township bonds is a pledge of county's credit. *Comrs. v. Boring*, 105.

XIV, sec. 5. Officers holding over until successors qualify, etc. (Revisal, 2368) are officers *de jure*. *Markham v. Simpson*, 135.

CONSTITUTIONAL LAW. See Alimony, 2; Public Officers, 1; Counties, 1; Statutes, 3; Schools, 1; Fraternal Orders, 2; Bigamy, 1; Courts, 5; Criminal Law, 13; Jurors 1; Schools, 2.

CONSTITUTIONAL LAW—*Continued.*

1. *Constitutional Law — Municipal Corporations — Eminent Domain — Schools—Taxation.*—The question as to the constitutionality of such parts of chapter 136, Public Laws 1917, as confer upon municipalities the right to pass ordinances conferring the power of eminent domain, does not invalidate an ordinance or arise in its construction, referring to the voters the question of amending its charter by creating a board of education and authorizing the raising of a minimum tax levy for the maintenance of its schools, or affect it. *Taylor v. Greensboro*, 423.

2. *Constitutional Law—Amendments—Time Effective—Statutes.*—The recent constitutional amendments, though prior ratified by the people of the State, became effective on 10 January 1917, chiefly on the ground that the act of the Legislature providing for the election so specified and the vote of the people thereunder approving the same thereby determined the time. *Mills v. Comrs.*

3. *Same—Counties—Bridges.*—A legislative enactment relating to the building of bridges by a county over a nonnavigable stream or river, comes within the purview and control of the recent amendment to our Constitution, Art. 2, sec. 29. *Ibid.*

4. *Same—Bond Issues—Taxation.*—The recent amendments to our Constitution prohibiting "local" legislation in certain respects as to counties, etc., does not deprive the Legislature of its power to authorize county commissioners to raise money by the issue of bonds or by current taxation to carry out the necessary measures for the orderly and proper government of their counties, and an enactment to authorize a county to issue bonds for the necessary purpose of building bridges in connection with an adjoining county over a nonnavigable stream dividing them is not prohibited by the recent amendment to our Constitution, Art. II, sec. 29. *Brown v. Comrs.*, 173 N.C. 598, cited and applied. *Ibid.*

5. *Same—"Local" Laws—Interpretation—Limit of Taxation.*—The term "local" as used in the recent amendments to our Constitution is of comparatively recent use and importance, and has received no fixed or generally recognized meaning; and is sufficiently ambiguous to admit of interpretation by reference to the context, the purpose appearing in the terms of the law and the attendant relevant circumstances; and when so construed in relation to Article 2, sec. 29, the local legislation refers to the building, maintenance, and control of specified and designated highways, bridges, etc., and does not prevent legislation authorizing the raising of proper funds by the sale of bonds of a county or by taxation therein, required for the public good, where the limit of taxation allowable to the county by the Constitution for ordinary State and county purposes may have been reached by the county in question. *Ibid.*

6. *Same — Municipal Corporations — Clerical Errors — Transportation of Sections.*—Constitution, Art. 8, secs. 1 and 4, the latter section being a recent amendment, have no relation to the question of the constitutionality of a legislative enactment authorizing a county to issue bonds, etc., for the building of bridges over nonnavigable rivers or streams, section 4, being in terms restricted to cities, towns, and incorporated villages. *Semble*, section 4, was inadvertently misplaced

CONSTITUTIONAL LAW—*Continued.*

and properly belongs under Article 7, entitled "Municipal Corporations," instead of under Article 8, entitled "Corporations Other than Municipal." *Ibid.*

7. *Constitutional Law—Counties — Townships — Bond Issues — Endorsement—"Faith and Credit"*—Where townships upon petition to the county commissioners are permitted by statute to call an election for the purpose of voting upon the question of the issuance of township bonds for the roads of the township, the proceeds to be turned over to the sole management and control of the township commissioners, with further provision that the county endorse the bonds upon being satisfied of the validity of the issuance under the statutory authority conferred, the endorsement by the county of the township bonds is a loan of the credit of the county, without benefit to the other townships however remote the liability and contrary to the Constitution, Art. I, sec. 17; Art. VII, sec. 7. *Commissioners v. State Treasurer*, 174 N.C. 141, cited and applied. *Comrs. v. Boring*, 105.

8. *Same Statute—Intent—Part Constitutional.*—Where a provision of a statute authorizing the issuance of bonds is valid and complete in itself and evidences the intent of the Legislature that township bonds for road purposes may be voted upon and issued as bonds of the township, and there is an unconstitutional provision of the same act authorizing the endorsement of the bonds by the county tending to increase the market value of the bonds: *Held*, the unconstitutional feature of the statute does not affect the validity of the constitutional part, and the bonds may be sold without the endorsement of the county. *Ibid.*

9. *Constitutional Law—"Faith and Credit"—Statutes—Counties—Townships—Bond Issues—Principal and Agent.*—Where the townships of a county are authorized by statute to separately act upon and issue township bonds for road purposes, with an unconstitutional provision that the county endorse the bonds of such townships have voted for the issuance of the bonds under the valid provisions of the act does not affect the unconstitutional provision thereof as to the endorsement of the bonds by the county. *Ibid.*

10. *Constitutional Law—Statutes—Private Acts—Notice—Collateral Attack.*—Where an act granting a charter to a private corporation has been duly ratified, it may not be collaterally impeached in an action between it and another corporation or private person on the ground that the thirty days notice preceding the application therefor had not been made as required by our Constitution, Art. II, sec. 12. *Power Co. v. Power Co.*, 669.

11. *Constitutional Law—Eminent Domain—Special Privileges—Corporations—Charters—Statutes.*—A corporation chartered for the purpose of furnishing electricity for power and light to the people of a certain territory is a public-service corporation, and a legislative charter granting this power impliedly requires it to render such service when in operation, and its charter falls within the exceptions to our Constitution, Art. I, sec. 7, declaring that "no man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services," and the objection is

CONSTITUTIONAL LAW—*Continued.*

untenable that the right of eminent domain may not be granted to one of such corporations in the State without granting it to all of them, or in one county unless granted in all. *Ibid.*

12. *Constitutional Law—Criminal Law—Evidence—Identification.*—Testimony that defendant was placed for identification in the same relative position to a witness as the perpetrator was seen by her just before committing a criminal offense is not objectionable as forcing the defendant to give evidence against himself in denial of his constitutional rights; and the fact that the witness was not so certain of the identity on the day the crime was committed goes only to her credibility, which is for the determination of the jury. *S. v. Neville,* 731.

13. *Constitutional Law—Two Offices—Solicitors—Appointment by Courts.* In the absence of the solicitor to prosecute a criminal action, the judge may appoint an attorney to prosecute in his stead, such temporary appointment not being to an office within the intent of our Constitution, Art. IV, sec. 7, prohibiting the holding of two offices at the same time; and the appointment of the United States district attorney does not disqualify him to act or affect the trial of the action. *S. v. Wood,* 809.

14. *Same—Acceptance of Office—Vacating Prior Office.*—The appointment by the judge of the United States District Attorney to act for the absent solicitor in the prosecution of a criminal action in the State court, if it comes within the inhibition of our Constitution, Art. XIV, sec. 7, as to holding two offices at the same time, does not affect the validity of the trial in the State courts for the acceptance of the latter position would *ipso facto* vacate the first one. *Ibid.*

CONTEMPT. See Evidence, 25.

1. *Contempt—Courts—Powers.*—Revisal, secs. 939 et seq., regulating proceedings "for contempt and as for contempt," confer on courts all the inherent powers to attach for contempt that were recognized by the common law as essential to the due and orderly exercise of their jurisdiction and functions. *S. v. Little,* 743.

2. *Same—Definition.*—The power conferred by Revisal, secs. 939 *et seq.,* on courts to punish for contempt, etc., includes all cases of disorderly conduct, breaches of the peace, noise and other disturbance near enough and designed and reasonably calculated to interrupt the proceedings of the court then engaged in the administration of the State's justice and the dispatch of business presently before it. *Ibid.*

3. *Same—Witnesses.*—The power of a court to attach for contempt, etc., includes its protection to all officers of the court, jurors, attorneys, and others who in the line of their official duty are assisting the court in the present dispatch of its business, and to all witnesses who are in attendance under supoena to give evidence in causes pending before it. *Ibid.*

4. *Same—Assault on Witness—Summary Punishment.*—Where the defendant in a criminal action has assaulted the State's principal witness during the term and before trial, for the purpose of hindering

CONTEMPT—*Continued.*

or delaying the administration of justice by the court, he is in direct contempt thereof, without right of appeal, trial by or to demand that his hearing be removed to another judge for determination. The distinction between proceedings "as for contempt" pointed out. *Ibid.*

5. *Contempt—Findings—Evidence—Appeal and Error.*—Where the judge has found sufficient facts to attach the defendant for direct contempt of court, upon imposing punishment therefor, will not be disturbed on appeal. *Ibid.*

6. *Same—Courts—Jurisdiction—Habeas Corpus—Appeal and Error—Certiorari.*—Where a defendant punished for direct contempt contends that a legal right has been denied him, and it is made to appear that the court was without jurisdiction of the cause or power to impose the sentence, his remedy is by *habeas corpus* proceedings, taken to the Supreme Court, if necessary, by writ of *certiorari. Ibid.*

CONTENTIONS. See Instructions, 5, 6, 22; Appeal and Error, 25, 43.

CONTINGENCIES. See Estates, 6, 9.

CONTINGENT INTERESTS. See Estates, 1, 2, 3, 4, 5; Judgments, 6; Wills, 24.

CONTINGENT LIMITATIONS. See Wills, 25; Estates, 10.

CONTINGENT REMAINDERS. See Wills, 2, 13, 17.

CONTRACTS. See Vendor and Purchaser, 1, 2; Appeal and Error, 2; Landlord and Tenant, 1; Fertilizer, 1; Insurance, 1, 3, 4, 8; Infants, 1; Assignments for Benefit of Creditors, 1, 3; Municipal Corporations, 5; Evidence, 26, 30; Mortgages, 11; Telegraphs, 4; Principal and Surety, 4; Carriers of Goods, 5; Instructions, 8, 19; Fraternal Orders, 3; Contracts, 23.

1. *Contracts, Illegal—Courts.*—Our courts will not enforce the obligations of an executory contract which is illegal or contrary to public policy or against good morals, or lend their aid to the acquisition or enjoyment of rights or claims which grow out of or are necessarily dependent upon such contracts. *Marshall v. Dicks*, 38.

2. *Same—Fraud—In Pari Delicto.*—A conveyance of lands to defraud or avoid creditors is illegal; and where such is made the ground for recovery by an heir at law, contending that it was so made by his mother to the defendant for her benefit during her life and then in trust for her heirs at law, he and the defendant are *in pari delicto*, and the law will leave them *in statu quo. Ibid.*

3. *Contracts, Written—Compensation—Commission—Traveling Salesman—Territory—Mail Orders—Subagents—Principal and Agent.*—Defendant contracted in writing with the plaintiff that the latter closely cover a defined territory of the sale of products manufactured by the former; send in a list of the "customers" visited as well as sold, for which he was to receive a certain per cent commission on "all orders received, accepted, and shipped by us": *Held*, the writing contemplated the payment of the specified commission on all orders "received, accepted, and shipped" by the plaintiff within the territory

CONTRACTS—*Continued.*

during the life of the contract, and did not confine them to the orders that the plaintiff had taken in person. *Caffey v. Furniture Co.*, 387.

5. *Contract—Vendor and Purchaser—Express Warranty—Implied Warranty.*—Subject to a few recognized exceptions, an express warranty in an executed contract of sale will exclude one that is ordinarily implied where the two are of the same general nature or refer to the same or closely related subjects or qualities in the thing sold. *Fertilizer Works v. Aiken*, 398.

6. *Contracts—Breach—Negligence.*—Negligence as a constituent part of an actionable wrong is the failure to exercise proper care in the performance of some legal duty which defendant owes the plaintiff growing out of the circumstances in which they are placed, proper care being that degree of care which a prudent man should use under like circumstances and charged with a like duty. *Ramsbottom v. R. R.*, 138 N.C. 38, cited approved. *Avery v. Palmer*, 378.

7. *Same—Legal Duty—Implied Liability.*—While it is not usual that the legal duty referred to is involved in the ordinary adjustments for breaches of contract, a contract may and not infrequently does create the circumstances from which the added duty will arise, and at times the duty is superimposed by the law on the contract relation, as in the case of contracts on the part of public service corporations made in the ordinary exercise and performance of their chartered obligations. *Cashwelll v. Bottling Works*, 174 N.C. 324; *Dail v. Taylor*, 157 N.C. 284; *Peanut Co. v. R. R.*, 155 N.C. 148, cited and applied. *Ibid.*

8. *Contracts — Negligence — Legal Duty — Damages — Evidence — Trials.* The plaintiff's intestate, a farmer, owned a roughly constructed two-wheel cart, without body, the pieces on each side continuing to form the shafts with rounds across, forming a framework for the load, and applying to the defendant to haul a tombstone to be erected five miles in the country, was informed by him that his cart was insufficient and that he get another. Whereupon the intestate insisted that it was and asked the defendant "What do you think the stone weighs?" to which the defendant replied, from the information that he had, 1,650 pounds. There was evidence tending to show that it weighed approximately 2,350 pounds. The agreement was made and the stone accordingly loaded on the cart under the intestate's sole direction, without chain or other device to hold the stone in place over the axle. In going over the end of a bridge across the road, when there was a drop about two or three inches, the stone fell forward on the intestate, breaking the shafts of the cart and killing him. *Held*, not sufficient evidence of a breach of a legal duty owed by the defendant to the intestate to be submitted to the jury on the question of actionable negligence, in an action brought by his executor to recover damages for his wrongful death. *Ibid.*

9. *Same—Principal and Agent.*—Where a dealer in tombstones has shipped one of them to his agent for delivery, properly crated in pursuance to his contract, and the latter has contracted with the plaintiff's intestate to haul it to its destination some five miles in he country, and while thus being hauled, the stone falls forward and

CONTRACTS—*Continued.*

kills the intestate without default or breach of legal duty on the part of agent, falling within the course and scope of his agency, no breach of a legal duty has been sufficiently shown as to the principal to take the case to the jury upon the issue of his actionable negligence for the death of the intestate. *Brown v. Foundry Co.*, 170 N.C. 38; *Dail v. Taylor*, 151 N.C. 284; *Cashwell v. Bottling Works*, 174 N.C. 324; *Peanut Co. v. R. R.*, 153 N.C. 148, cited and distinguished. *Ibid.*

10. *Contracts—Negligence—Evidence—False Statements—Fraud.*—Where the defendant has agreed with the plaintiff's intestate to haul a tombstone some five miles in the country to its destination, and the intestate was killed by the tombstone falling upon him en route, evidence that the defendant had told the intestate that the latter's cart was insecure for the purpose but had yielded to the intestate's insistence that it was and had given the weight of the stone as 1,650 pounds, from the best information he had, when it weighed approximately 2,350, and each one had the same knowledge and opportunity to estimate the weight: *Held* insufficient evidence that the defendant induced the intestate to undertake the hauling by false and fraudulent statements. *Ibid.*

11. *Contracts—Writing—Letters—Statute of Frauds.*—The owner of farming lands made an offer by letter that if the addressee would take charge of his farm and stock, at the death of the owner and his wife he should have a certain portion thereof in fee simple, and wrote later reiterating the terms of the offer, evidencing the receipt of the letter of acceptance, agreeing upon a later time when the addressee should move there, which was accordingly done. *Held*, the contract is valid within the meaning of the Statute of Frauds. *Mfg. Co., v. Hendricks*, 106 N.C. 492, cited and applied. *Stockard v. Warren*, 283.

12. *Contracts— Lands— Descriptions— Evidence— Identification— Deeds and Conveyances.*—A proposition, upon consideration by letter and acceptance, to give 200 acres of land on the home place of a larger tract of land, is not too vague as to description to admit of parol evidence of identification and evidence that theretofore the owner had caused the tract to be cut up in several tracts, leaving a well-defined 200-acre tract attached to the home place. *Ibid.*

13. *Contracts—Lands—Acceptance—Consideration—Trusts and Trustees—Courts—Equity—Decrees.*—Where the owner of lands, by letter, makes a proposition, upon lawful consideration, to give a certain part thereof after his own death and that of his wife, which has been accepted in writing and complied with, the court will decree, at the death of the owner and his wife, a trust in favor of the acceptor and enforce it. *Ibid.*

14. *Contracts—Statute of Frauds—Parol Agreement—Contemporaneous—Bills and Notes.*—A parol contemporaneous agreement that a promissory note was not to be paid at its stated due date is contradictory of the written instrument and is incompetent evidence. *Mfg. Co. v. McCormick*, 277.

15. *Contracts—Statute of Frauds—Parol Agreement, Subsequent—Bills and Notes—Maturity—Notice.*—The rule excluding parol evidence contra-

CONTRACTS—*Continued.*

dictory of a written instrument does not apply to an agreement thereafter made upon a sufficient consideration, and evidence thereof is admissible as between the original parties to a promissory note, or its endorsee taking after maturity. *Ibid.*

16. *Contracts—Statute of Frauds—Parol Agreement—New Promise—Consideration—Insurance, Life.*—An agreement subsequently made by the maker of a promissory note and the payee that the latter take out at his own expense insurance on the maker's life requires the consent of the maker, and is a sufficient consideration for the new promise, being an act which he was not required to do and conferring a substantial benefit on the payee. ***Ibid.***

17. *Contracts—Options—Consideration—Withdrawal of Offer—Acceptance.* An offer to sell upon commission certain lands to a proposed purchaser, so much in exchange and the balance in cash or on certain conditions of payment, is not a valid contract to convey the lands, but a mere option, or unilateral contract without consideration, which the owner could withdraw before acceptance. *Real Estate Co. v. Moser*, 255.

18. *Contracts— Options— Acceptance— Evidence— Questions for Jury— Trials.*—Where the seller of lands upon commission under an option or unilateral contract containing certain conditions, and without consideration, telegraphs the proposed purchaser, who was absent, asking him when he could come and close the deal, and a date is set in reply, the telegraphic communication is not an acceptance of the proposal to sell or to make it enforcible as a completed contract. *Ibid.*

19. *Contracts—Telegrams—Offer and Acceptance—Request for Formal Contract.*—A subcontractor for constructing a sewer telegraphed an offer to another, offering him a certain price per running foot to do the work, who unconditionally accepted by telegram, adding. "Send contract signed at once": *Held*, the telegrams constituted a definite and binding contract, unaffected by the fact that the request for a more formal contract had not been complied with. *Billings v. Wilby*, 571.

20. *Same—Confirmation—Inquiry—Instructions—Trials.*—Where a definite and binding contract for constructing a sewer has been made by offer and acceptance by telegraph, evidence that the contractor again telegraphed his acceptance with the further words, "Wire at once if you accept" my proposition, does not indicate his purpose to abandon any of his rights under his contract or to reopen the question; and where his evidence denies the sending of the later telegram, it is proper, under any view of the evidence, as in this case, for the court to instruct the jury to answer the issue in the affirmative if they "believe the evidence and find the facts to be as testified by the witnesses and disclosed by the documents produced in evidence." *Ibid.*

21. *Contracts—Fraud—Misrepresentations—Insurance—Assessments—Fraternal Orders.*—A misrepresentation to avoid a contract must have been made fraudulently, and where one has accepted a life insurance policy in a mutual fraternal order upon representation by its agent that the assessments could not be increased from that therein set out, and both under the application and policy, the company would

CONTRACTS—*Continued.*

have such right under certain conditions set out in its charter and by-laws, and the insured was a man of intelligence who could have properly informed himself, and had the means of information at hand, but kept the insurance in force, with knowledge of the facts, until it had become necessary to raise the assessment for fraudulently induced to take the policy by the misrepresentation of the agent, and refusing to pay the increase recover the amount he may therefore have paid. *Hollingsworth v. Supreme Council*, 615.

22. *Contracts—Statute of Frauds—Standing Trees—Title.*—A contract made with the owner of lands to cut and peel hemlock trees on his lands at a certain sum per thousand feet does not involve the title to or any interest in the standing trees, and is not one required by the statute to be in writing. *Sumner v. Lumber Co.*, 657.

23. *Same—Separate Contracts—Parol Evidence.*—The defendant orally contracted with the plaintiff to cut and peel hemlock trees growing upon two separate tracts of its land, the one easily accessible and the other difficult of access. The defendant orally agreed that if the plaintiff signed a written contract as to the latter tract, he should cut the former one at the same price per thousand feet. Upon this agreement, the plaintiff signed the written contract tendered him, and it is *Held*, that evidence of the parol contract was admissible, as it was not intended to be a part of the written one, but a separate and distinct contract which the statute did not require to be in writing. The principle discussed by WALKER, J., where a contract, not required by the statute to be in writing, is partly in writing and partly in parol. *Ibid.*

24. *Contracts—Breach—Evidence—Trials—Questions for Jury.*—Defendant, operating an independent steam logging road, contracted with the plaintiff for the former to cut and deliver a quantity of cordwood with cars that the plaintiff would have delivered by a railroad company to the defendant for the purpose. There was evidence tending to show that but for the use by the defendant of these cars for other purposes the plaintiff would have delivered the wood before the occurrence of a fire which destroyed it, causing the damage complained of: *Held*, sufficient to take the case to the jury upon the issue of defendant's breach of contract. *Walls v. Spruce Co.*, 662.

25. *Contracts—Breach—Damages—Proximate Result—Profits — Remote Cause.*—The plaintiff sued the defendant for damages by fire arising from breach of contract in defendant's failing to deliver to it gondola cars on which to deliver a quantity of cordwood, which it was required to do. By reason of this breach the plaintiff, without default, was unable to deliver the wood before it was destroyed by a fire: *Held*, the plaintiff was entitled to recover, as damages, the loss of his profits under the contract, but not for the loss of his other wood, as such did not naturally and proximately result from defendant's Breach of contract or duty. *Extinguisher Co. v. R. R.*, 137 N.C. 278, cited and applied. *Ibid.*

26. *Contracts—Breach—Evidence.*—The plaintiff sued the defendant for breach of contract in its failure to deliver cars for the transportation of cordwood before it was destroyed by fire: *Held*, plaintiff's

CONTRACTS—*Continued.*

testimony that he stopped work because the wood was burned was, in effect, that he could not continue unless he could get the proceeds for the wood, and under the evidence in this case was properly admitted. *Ibid.*

27. *Contracts—Breach—Damages—Remote Cause—Speculative Damages.*—Where plaintiff is permitted to recover damages for defendant's breach of contract to deliver cars for the transportation of cordwood burned by reason of the consequent delay, the admission of evidence that the plaintiff sold his camp outfit and tools at a great sacrifice in order to pay his debts is error prejudicial to the defendant and constitutes reversible error. *Ibid.*

28. *Contracts—Abandonment—Damages—Roads and Highways—Counties.* Where a contract for the building of a county highway within a certain time has been abandoned by the contractor, and he thereafter obtains an extension of time for its completion with the consent of the surety for performance on his bond, without waiver by the county of any of its rights for the breach of the contract; and the contractor again abandons his contract, both he and his bondsmen are liable to the county for the amount required to make good the pecuniary value of the contract to the county. *Keener v. Lumber Co.*, 701.

29. *Contracts—Monthly Payments—Estimate—Contract Price—Charges—Damages.*—Where a contract has been entered into with a county to construct a certain length of its highway within a given time at a fixed sum, after the contractor had carefully gone over the line and had made his bid, and monthly payments are provided for as the work progressed of 90 per cent of the work performed upon the basis of 23 cents per cubic yard for each excavation, 45 cents per cubic yard for loose rock excavations, and 70 cents per cubic yard for solid rock excavations: *Held*, sufficient to sustain findings of a referee that the clause as to monthly payments would not have the effect of enlarging the contract price for the whole or allow the contractor any additional sum for any change in the proportion of earth and loose and solid rock excavations. *Ibid.*

30. *Contracts—Breach—Extension of Time—Resumption of Work—Waiver—Damages.*—Where a contractor has abandoned his contract for the building of a county road at a fixed sum within a certain time, with provision for monthly payments of a certain per cent of the value of the work as it progressed, upon estimates to be made by the county, and upon abandonment of the contract, the contractor is given an extension of time at his request, without releasing him from liability: *Held*, the contractor, by obtaining the privilege and resuming work under the contract, waived any right he may have had to abandon it and to any damages for minor departures therefrom as to the time and amount of monthly payments, etc. *Ibid.*

CONTRACTORS. See Principal and Agent, 2.

CONTRIBUTORY NEGLIGENCE. See Negligence, 1; Master and Servant, 2, 4, 5.

CONTROL. See Bailment, 1.

CONVERSION.

Conversion—Evidence—Admissions—Accounting.—In an action to recover for the conversion of a quantity of cordwood, the defendant's evidence showed that it had received the proceeds of sale of at least a part thereof, and that a certain amount was due the plaintiff and unpaid on another lot of the wood: *Held*, the defendant must at least account to the plaintiff for the amount of the conversion admitted, the issue as to defendant's counterclaim having been answered in the negative. *Walls v. Spruce Co.*, 662.

COPIES. See Evidence, 22.

CORNERS. See State's Lands, 2; Boundaries, 3, 5, 9; Deeds and Conveyances, 10.

CORPORATIONS. See Vendor and Purchaser, 2; Estoppel, 2; Fraud, 1; Telegraphs, 2; Removal of Causes, 8; Instructions, 20; Injunction, 2; Statutes, 6; Constitutional Law, 11.

1. *Corporations—Receivers—Title—Creditors—Statutes.*—Upon the insolvency of a corporation and the appointment of a receiver under the provisions of Revisal, sec. 1224, the corporate property vests in the receiver from his appointment, and the receiver represents the creditors as well as the owner, excluding the general creditor from taking any separate or effective step on his own account in furtherance of his claim; and the proceedings for the receivership is in the nature of judicial process by which the rights of the general creditors are "fastened upon the property." *Observer Co. v. Little*, 42.

2. *Same—Conditional Sales.*—Where the bargainor under a conditional sale to a corporation has not recorded the instrument as required by Revisal, secs. 982, 983, and a receiver has been appointed under the provisions of Revisal, sec. 1224, his right to a preferential lien has been lost by his failure to register the instrument, the receiver representing the rights of the other creditors, and he is only entitled as any other general distributee of the funds. *Ibid.*

3. *Corporations—Shares of Stock—Right of Purchase—Charters.*—An offer to sell to a corporation shares of its stock does not fall within the provisions of its charter requiring its shareholder to notify the company of any *bona fide offer* made therefor and giving it the privilege of buying at the same price within a specified time. *Ins. Co. v. Moize*, 344.

4. *Corporations—Certificates of Stock—Pledge—Defects—Good Faith—Notice.*—Where a corporation has made out its certificate of stock in proper form and properly signed to a certain named person, and permits him to use it in the open market as collateral security for a loan, the corporation is bound by the acts of such person as its agent, and the holder who has taken the stock in good faith from him, without notice of any defect in the title of the pledgor and for value, acquires a good title as against the corporation. *Bank v. Deic*, 79.

5. *Same—Trials—Questions for Jury.*—Where a certificate of stock of a corporation appears upon it face to have been regularly issued to a certain named person, and is pledged by him to a bank as collateral security for a loan, the question of whether the pledge received the

CORPORATIONS—*Continued.*

shares with actual notice of any equity claimed by the corporation is one for the jury under the evidence and not one of law for the court. *Ibid.*

6. *Corporations—Shares of Stock—Pledge—Bills and Notes—Extension of Payment—Consideration.*—Where a bank renews a note of its customer upon consideration of the additional pledge of certificates of stock of a corporation, the extension of time accordingly granted is a sufficient consideration to make the bank a purchaser for value and protect it, as against the corporation, as an innocent holder of the certificate in due course if it had no notice of any infirmity in the title of its pledgor. *Ibid.*

7. *Same—Antecedent Debt.*—Promised forbearance to enforce an antecedent debt and extend the time of payment in consideration of the debtor's pledging additional collateral security, which was given, is sufficient to constitute the pledgee a holder for value. As to whether the pledgee's actual promise of forbearance is necessary or whether his implied promise is sufficient, *quaere?* Ibid.

8. *Corporations—Liquidation—Actions—Parties.*—A national bank in the course of liquidation may maintain an action to collect debts due it in order to wind up its affairs. *Ibid.*

9. *Corporations—Insolvency—Officers—Trusts and Trustees—Preference—Distribution of Assets—Creditors.*—Directors of corporations, especially when they are officers and in active charge of the business, are considered to a certain extent as trustees in respect to their corporate management and business dealings with the corporate property, and in case of insolvency they will not be allowed to take advantage of their position to retain a preference for themselves at the expense of creditors or other shareholders, either in acquisition of rights or in relief from liabilities which they may have incurred either as principal or sureties. *Steel Co. v. Hardware Co.*, 450.

10. *Same—Accounting—Fraud.*—Directors and officers of an insolvent corporation who are active in the management of its business, and some of whom have become personally liable for the payment of some of its debts, may not take advantage of this relationship with its business to acquire a preference over the other creditors without committing a legal wrong; and those participating therein and at times in negligent default may be held to an accounting to the extent that such misconduct has caused pecuniary damages to the other creditors, whether the came amounts to fraud or the breach of a fiduciary relationship. *Ibid.*

11. *Same—Sale of Assets—Vendor and Purchaser.*—The president of an insolvent mercantile corporation was an endorser on one of its notes to a bank and also on another given to a different bank of which he was president and shareholder. He and the secretary of the insolvent corporation, both directors and large owners of its shares, under authority conferred, sold its merchandise in bulk to another corporation and were given active charge of the disbursements of its assets among creditors: *Held*, it was a breach of the legal duty of both the president and secretary to pay the debts on which the former was liable in

CORPORATIONS—*Continued.*

a greater proportion than the other debts of the concern, and to that extent they were both participants in the wrong and personally liable to an accounting. The fact that the insolvent corporation was a going concern at the time of the transactions in the sense that it was still doing business does not affect the application of the principle. *Ibid.*

12. *Same—Assumption of Debt—Substitution—Payment.*—Where a corporation purchases the merchandise in bulk of another and insolvent corporation and assumes the payment of an amount due by the latter to the bank with the consent of the bank as part payment of the purchase price and secures the debt thus due with a mortgage on its stock of goods: *Held*, the effect of the transaction was to substitute the purchasing corporation as debtor to the bank in the place of the selling one with the additional security of the deed in trust, and as to the latter amounted to a payment. The officers of an insolvent corporation who have unlawfully obtained a larger per cent over the other creditors in the distribution of its assets, and those officers thereof participating in such wrongful act, are not relieved of an accounting to the other creditors of the corporation by reason of their having sold its merchandise in bulk to another corporation which was paid partly in cash and partly by assuming an indebtedness to a bank, secured by a mortgage on its merchandise, it appearing that such officers have become shareholders and connected with the purchasing corporation, and the bank has consented to its assuming the debt, for if such officers or the creditor bank permitted the assets to be wasted or misapplied by their own neglect or default, it should not be visited on the selling corporation or its creditors. *Ibid.*

13. *Corporations—Public Utilities—Electricity—Water-powers—Statutes—Charter—Rights—Vested Interests—Lands.*—Where two public utilities corporations are given under their legislative charters the right to acquire by purchase or condemnation lands for the development of water-power to supply electricity to the public for power and lighting purposes, etc., the prior right belongs to that company which first defined and marked its route according to the statutory provisions and adopted the same for its permanent course or location by proper and authoritative corporate action, and which is proceeding in good faith with reasonable diligence to acquire the title to the lands located in a regular and orderly way; and the competitive company can acquire no superior right by starting a distance ahead to obtain the title to the lands intervening between the beginning and objective points. *Power Co. v. Power Co.*, 668.

14. *Corporations—Public Utilities—Eminent Domain—Statutes—Charters—Private Enterprises.*—The validity of a charter granting the right of eminent domain to a *quasi*-public corporation is not affected by the authority conferred therein allowing it, also to engage in private enterprises which do not require the exercise of the right of eminent domain; nor can the question of the validity of the act be raised before the corporation has attempted to acquire property by condemnation, thereby threatens the constitutional rights of the defendant. *Ibid.*

15. *Corporations—Charters—Statutes—Rights — Parties.* — Where the defendant to the action has acquired no vested rights in the lands, he

CORPORATIONS—*Continued.*

may not attack the rights of the plaintiff corporation to condemn them under authority given it by its charter. *Ibid.*

CORROBORATION. See Evidence, 6, 24; Criminal Law, 1.

COSTS. See Divorce, 3.

1. *Costs—Lands—Title—Disclaimer.*—A defendant in an action concerning land should enter a disclaimer if he does not claim the land in controversy, or does not intend to litigate with the plaintiff, in order to escape the payment of costs. *Swain v. Clemmons*, 240.

2. *Costs—Lands—Title—Part Recovery—Admissions on Trial.*—Where the pleadings raise the issue of title or right of possession of the parties, and the plaintiff recovers a part of the land, he is entitled to his cost of the defendant; and this applies to the adjunction of the question of title alone (Revisal, sec. 1264); and where the plaintiff has been required to introduce evidence of his title to the whole of the *locus in quo*, and then defendant consents that the court charge the jury to find for the plaintiff if they beleive the evidence as to a certain part. and the issue if found for the defendant as to the remaining land, the costs of the action are properly awarded against the defendant. *Ibid.*

3. *Costs—Mortgages—Statutes—Foreclosure.*—The clerk of the Superior Court may foreclose a mortgage on land given by plaintiff to secure costs of his action when the costs are awarded against him, or the clerk may report the matter to the court for a decree of sale by himself, the latter being the better practice to insure a safer title and prevent a needless sacrifice. Revisal, sec. 266. *Clark v. Fairly*, 342.

4. *Same—Court's Supervision—Payment of Costs.*—Where a mortgage on land has been given by the plaintiff to secure the costs in his action, which are awarded against him, and the Superior Court, in term, acting through the presiding judge, has duly acquired jurisdiction to decree foreclosure, it is his duty to supervise the sale and see that the land brings a fair price: and when such sale has not been made accordingly he may set aside the sale and permit the plaintiff to pay the costs properly chargeable against him. Revisal, sec. 266. *Ibid.*

5. *Costs—Mortgages—Foreclosure — Confirmation—Statutes.*—Where the Superior Court has assumed jurisdiction to decree foreclosure of a mortgage given by the plaintiff to secure the costs of his action, it is proper for the court to confirm the sale, and possibly it is necessary for him to do so. Revisal, sec. 206. Ibid.

6. *Costs—Mortgages—Foreclosure—Decree Set Aside—Powers of Court.* A decree of confirmation of the sale of lands to pay the costs of an action under a mortgage given to secure them (Revisal, sec. 266) may be set aside by the judge during the term of the Superior Court at which it was entered. *Ibid.*

7. *Costs—Common Law—Statutes.*—Costs of court were not recoverable under the common law, and are now allowable only in the manner and to the extent provided by statute. *S. v. Means*, 820.

8. *Same—Witnesses—Subpoena.*—For the attendance of a witness to be taxed as a part of the cost against the losing party to a civil action,

COSTS—*Continued.*

or against the county in a criminal action, it is necessary that he should have been legally subpoenaed or lawfully recognized to attend. Revisal, secs. 1283, 1296, 1303, 1289. *Ibid.*

9. *Same—Nonresidents*—The service of a subpoena on a witness beyond the borders of the State in a criminal action is not valid; and where the trial judge has allowed a necessary nonresident witness to prove his ticket against the county with mileage to the State line, there is no authority for him to allow the witness to prove for services rendered by him outside of the State when service has been attempted there. Revisal, sec. 448, providing for personal service of summons in civil actions on nonresidents has no application to service of subpoenas. *Ibid.*

10. *Costs—Courts—Supervisory Powers.*—The discretionary power given the trial judge in regard to the taxing of costs of an action is limited by the provisions of the statute relating thereto, and does not extend to instances where such costs are not therein allowed. *Ibid.*

COTTONSEED MEAL. See Criminal Law, 6.

COUNTER-CLAIMS. See Evidence, 26.

COUNTIES. See Constitutional Law 3, 7, 9; Schools, 1; Roads and Highways, 1, 3, 4; Contracts, 28.

Counties—Townships—Principal and Agent—Constitutional Law.—Held, under the facts of this case, that a county may act as the agent of a township in the issuance of the bonds of the township for road purposes. *Comrs. v. Boring*, 105.

COURTS. See Attorney and Client, 6; Costs, 6, 10; Attachment, 1; Contracts, 13; Reference 2, 3; Alimony, 3, 5; Trusts and Trustees, 5; Drainage Districts, 4; Removal of Causes, 5; Evidence 25; War, 1; Deeds and Conveyances, 13; Pleadings, 7; Divorce, 3; Roads and Highways, 4; Contempt, 1, 6; Actions 4; Instructions 25; Criminal Law, 11; Jurors, 1; Constitutional Law, 13; Mistrials, 1.

1. *Courts—Jurisdiction—Municipal Courts—Superior Courts — Pleadings —Demurrer.*—A counterclaim, strictly as such, and not by way of defense, may not be set up in excess of the jurisdictional amount of a municipal court in which the action is properly brought; and a demurrer in the Superior Court on appeal which has only derivative jurisdiction is good. *Fertilizer Works v. Aiken*, 399.

2. *Courts—Intimation of Opinion—Instructions—Statutes—"Strong Evidence."*—In an action to recover the purchase price of fertilizer, evidenced by notes, the defendant set up a counterclaim for damages for breach of warranty, upon which there was uncontradicted evidence that the defendant in giving the notes told the plaintiff that his crops were as good as ever, and solicited the agency for the coming year; *Held*, an instruction from the court, after placing the burden of proof on plaintiff, that the jury may consider, if they so found the facts, this as strong evidence that defendant's counterclaim was not well founded, is not an expression of opinion forbidden by the statute. *Hubbard v. Goodwin*, 174.

COURTS—*Continued.*

3. *Courts—Evidence—Findings—Trials—Verdicts.*—The findings of fact by the trial judge where a trial by jury has been waived by the parties is as conclusive upon them as a verdict upon the evidence. *Hicks v. Wooten*, 602.

4. *Courts—Discretion—Excluding Witnesses — Witness Remaining.*—*It is* within the discretion of the trial judge to permit a witness who had remained in court when the others had been excluded from the courtroom to testify. *Lee v. Thornton*, 174 N.C. 288, cited and applied. *S. v. Davis*, 724.

5. *Courts—Constitutional Law — Statutes — Jurisdiction — Appeal and Error.*—The creation of county courts by statute is not inhibited by our Constitution, and such statutes are valid. The legislative authority to create such courts with jurisdiction in matters of contract, and tort also with concurrent civil jurisdiction with a justice of the peace, is not presented on appeal from judgment in a criminal action. *S. v. Boyd*, 791.

6. *Courts—Trials—Prejudice—Instructions—Appeal and Error.*—Upon this trial for larceny, the child of defendant went into the courtroom while the defendant was a witness, when the solicitor remarked that it was for the purpose of influencing the jury: *Held*, the instruction of the judge relieved the situation of prejudice to the defendant, if any existed, and his requiring the child to be carried into another room was a matter within his discretion. *S. v. Ford*, 798.

7. *Courts—Terms—Absence of Judge—Sheriffs—Adjournment.*—The provision that the sheriff should adjourn the court from day to day until the fourth day of the term, and then for the term, in the absence of the judge who was to have held it, under the law, is subject to the provision that this shall be done "unless the sheriff shall be sooner informed that the judge from any cause cannot hold the term," which implies the power of the judge to order an adjournment to a latter day in the term. Revisal, sec. 1510. *S. v. Wood*, 809.

8. *Same—Appearance of Judge.*—Where the sheriff has not continued a term of the Superior Court for the absence of the judge to hold the same, the judge may appear at any day within the term, and the proceedings thereafter will be valid. Revisal, sec. 1510. *Ibid.*

9. *Same—Governor.*—Where the judge of the district is prevented from holding a term of court, as in case of detention by a trial in another county extending over into such term, the Governor may designate and appoint another judge to hold such term, or a part thereof, though within the same district, and by virtue of his commission he is a judge both *de facto* and *de jure* while so acting. *Ibid.*

10. *Courts—Terms—Governor—Special Judge—Jurors—Special Terms.* Where the trial of a cause in one county has continued over the term and prevented the trial judge from holding the courts of another county in the same district commencing the following week, the mere fact that the Governor has commissioned a different judge to hold such term of court does not render that term a special one, requiring the drawing of a grand jury and advertising the term, according to the law in such instances. *Ibid.*

COURT'S DISCRETION. See Appeal and Error, 12; Estates, 5; Pleadings, 5; Habeas Corpus, 1.

COVENANT NOT TO SUE. See Torts, 1, 3.

CREDITORS. See Corporations, 1; Partnership, 1, 9.

CREDITOR'S BILL. See Evidence, 1, 4.

CREDITS. See Torts, 3.

CRIME AGAINST NATURE. See Criminal Law, 2.

CRIMINAL LAW. See Constitutional Law, 12; Bigamy, 1, 2, 3; Automobiles, 3, 5; Actions, 4; Homicide 8, 11; Husband and Wife 1, 3; Larceny, 1; Burglary, 1; Instructions, 26.

1. *Criminal Law—Evidence—Corroboration—Appeal and Error—Harmless Error.*—Testimony of the husband of the prosecutrix in a criminal action that he told the officer "I believe you got the right man": *Held*, competent as corrobrative in this case and harmless in any view of it. *S. v. Neville*, 731.

2. *Criminal Law—"Crime Against Nature"—Statutes.* — The unnatural gratification of the passion by one of mature years with the mouth is punishable within the meaning of "a crime against nature" under the provision of Revisal, sec. 3349, though the pathic be a youth of 9 years before reaching the age of puberity. *S. v. Griffin*, 767.

3. *Same—Instructions—Requests—Trials—Questions for Jury.*—Upon trial of defendant for the "crime against nature" of matured years and married and with children, a special request which assumes as a fact that such unnatural intercourse would more likely occur when the defendant was developing into manhood is properly refused, this being for the determination of the jury. *Ibid.*

4. *Criminal Law—Conspiracy—Evidence—Admissions—Instructions.* — Upon trial for an assault and conspiracy, admissions of each of the defendants are competent against the one making them, though not made in the presence of the others, it being required that the trial judge by proper instructions and admonitions to the jury protect the rights of each defendant by confining the declarations to the proper parties. *S. v. Griffin*, 770.

5. *Criminal Law—Obstructing Cartway—Dedication—Adverse User—Evidence.*—Where the indictment for willfully and unlawfully obstructing a cartway charges that it had been "duly dedicated for public use and enjoyment," and it appears upon the trial that the defendant obstructed it upon his own land, and there is no evidence of such dedication or of continuous use by the prosecuting witness for the period required by law to give him an easement, the prosecutor will fail. *S. v. Lance*, 773.

6. *Criminal Law—Cottonseed Meal—"Sale"—Broker—Statutes.*—One who sells cottonseed meal for the manufacturer upon commission, who neither handles nor sees the seed, but has it shipped direct to the purchaser, is not a seller thereof within the intent and meaning of Revisal, sec. 3814, making it a misdemeanor to sell such seed contrary to the requirements of section 3958, that it shall have not less than 7½

CRIMINAL LAW—*Continued.*

per cent of ammonia; and when it is shown upon the trial that he received the order and sent it to the manufacturer, stating that it should have not less than the required amount of ammonia and the proper N. C. tags, he is not guilty when in no default himself the manufacturer ships the seed in violation of the statutes. *Johnson v. Carson*, 161 N.C. 373, construing section 3960, cited and applied. *S. v. Faulkner*, 787.

7. *Criminal Law—Bawdy Houses—Leases—Knowledge—Misdemeanors—Particeps Criminis.*—One who leases a house to be kept as a bawdy house, with knowledge of the continued use to which it was put, is *particeps criminis* in the commission of the misdemeanor, and is punishable as a principal therein. *S. v. Boyd*, 791.

8. *Same—Evidence.*—The fact that one who leased a house used as a bawdy house knew of and acquiesced in the use to which it was put may be shown by its continued use as such, and the reputation it bore in the community. *Ibid.*

9. *Same—Instructions—Verdict Directing—Trials—Questions for Jury—Burden of Proof—Appeal and Error.*—Where the evidence is conflicting as to whether the lessor knew that the house leased was used as a bawdy house, from the circumstances existing, the question raised is one of fact for the jury, with the burden on the State to show the guilty knowledge beyond a reasonable doubt; and it is reversible error for the court to direct a verdict of guilty upon the evidence as a matter of form. *Ibid.*

10. *Criminal Law—Confessions—Evidence—Custody.*—Confessions made by the prisoner charged with a criminal offense, voluntarily and free from coercive influences, are properly admitted as evidence against him upon the testimony of a witness; and the fact that they were made while in the custody of an officer does not alone render them incompetent. *S. Bowden*, 794.

11. *Criminal Law—Amendments—Courts—Statutes—Bawdy Houses—Vagrancy.*—The court has the power to allow a complaint and warrant for the violation of the vagrancy law (ch. 391, Acts of 1905; ch. 1, Acts of 1915; ch. 1012, Acts of 1917) to be amended in proper instances by the insertion of the words "bawdy houses and assignation houses" and adding the words "thereby becoming a vagrant in violation of the statutes." *S. v. Poythress*, 174 N.C. 809, cited and applied. *S. v. Price*, 804.

12. *Criminal Law—Bawdy Houses—Vagrancy—Evidence—Nonsuit—Arrest of Judgment.*—Where the affidavit and warrant for a violation of the vagrancy laws follow the language of the statute (ch. 391, Acts of 1915, etc.), and there is evidence upon the trial to support the charges therein made motions to nonsuit and in arrest of judgment are properly denied. *Ibid.*

13. *Criminal Law—Bawdy Houses—Evidence—Reputation—Statutes—Constitutional Law.*—By express statutory provision, the reputation that a house is kept as a bawdy house may be received in evidence on the trial of a person for keeping one, under an indictment for vagrancy,

CRIMINAL LAW—*Continued.*

etc., and the statute is constitutional and valid. Pell's Revisal, sec. 3342a. *Ibid.*

14. *Criminal Law—Instructions—Bawdy Houses—Issues—Appeal and Error—Harmless Error.*—Where the defendant is charged under the provisions of the statute with vagrancy and the keeping of a bawdy house, of which there is evidence upon the trial, and the court submits the case under the issue as to vagrancy alone, the charge of the court embracing the elements of keeping a bawdy house is not to the defendant's prejudice when it was so explained to the jury that they could not have been misled thereby, and when the court so confined the inquiry to vagrancy as to exclude all evidence not relating thereto. *Ibid.*

15. *Criminal Law—Technicalities—Pleas—Abatement—Motion to Quash.* Where the motion in a criminal action is, in effect, to quash the indictment, it will not be deemed a waiver of the defendant's right because he has miscalled it a plea in abatement. Revisal, see 3239, 1870. The intent of our statutes, 3254, 3255, prohibiting reliance upon technicalities, being also for the benefit of the defendant in such instances. *S. v. Wood*, 809.

CROPS. See Fertilizers, 1; Railroads, 8.

CROSS-BILL. See Divorce, 1.

CROSSINGS. See Railroads, 5.

CUSTODY. See Criminal Law, 1.

CUSTODY OF CHILD. See Parent and Child, 1.

DAMAGES. See Injunction, 1; Negligence, 31; Vendor and Purchaser, 1, 4; Fertilizers, 1; Contracts, 8, 28, 29, 30; Railroads, 1, 6, 14; Animals, 2; Insurance, 5; Master and Servant, 6, 7; Schools, 3; Telegraphs, 5; municipal Corporations, 7, 8, 9, 11, 12; Roads and Highways, 2; Contracts, 25, 27.

1. *Damages—Personal Injury—Earning Capacity.*—As an element of damages to be awarded in a personal injury case, the jury may estimate the amount of the plaintiff's diminished earning capacity as of the present time. *Fry v. R. R.*, 159 N.C. 357, cited and applied. *Brown v. Mfg. Co.*, 201.

2. *Damages—Punitive Damages—Trials—Discretion of Jury.*—It is within the discretion of the jury to award punitive damages for a willful and wanton trespass. *Cobb v. R. R.*, 130.

3. *Damages—Mental Anguish—Negligence—Personal Injury.*—Where there is evidence, either direct or circumstantial, tending to show that mental anguish was suffered in connection with a physical injury negligently inflicted, it may be considered by the jury as an element of actual or compensatory damages in passing upon that issue. *Wallace v. R. R.*, 104 N.C. 442, 452, cited and applied. *Muse v. Motor Co.*, 467.

DEADLY WEAPON. See Homicide, 3, 7.

DEBT. See Corporations, 12.

DEBT OF ANOTHER. See Statute of Frauds, 1.

DECEASED PERSONS. See Evidence, 1, 2, 3, 33; Wills, 6, 10.

DECREES. See Contracts, 13.

DECLARATIONS. See evidence, 6, 8, 10, 18, 19; Boundaries, 2, 11.

DEDICATION. See Municipal Corporations, 8; Criminal Law, 5.

DEED OF TRUSTEE. See Trusts, 5.

DEEDS AND CONVEYANCES. See evidence, 1, 3, 31; Instructions, 1, 5; Infants, 1; Tenants in Common, 1; Contracts, 12; Tax Deeds, 1; Trusts, 3; Pleadings, 3; Boundaries, 7; Issues, 1; Limitation of Actions, 5, 11; Estates, 12.

1. *Deeds and Conveyances—Adverse Possession—Intent—Title—Color—Ejectment.*—Adverse possession to ripen title to lands in the claimant under "color" must be under a claim of right with intent to claim against the true owner, and if it was by mistake, or equivocal in character, or without such intent, it is not adverse within the meaning of the law. *Vanderbilt v. Chapman*, 11.

2. *Deeds and Conveyances—Conditional Sales—Statutes—Registration.*—By Revisal, sec. 983, conditional sales reserving title in the bargainor are required to be in writing and registered in the same manner, and have the same legal effect as provided for chattel mortgages by Revisal, sec. 982, and by the latter section "No deed in trust nor mortgage for real and personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor," etc. "but from the registration of the same"; therefore such conditional sales are regarded as chattel mortgages and void as to creditors and purchasers, except from registration. *Observer Co. v. Little*, 42.

3. *Deeds and Conveyances—Intent—Formal Clauses.*—A conveyance of land should be construed to effectuate the intent of the donor as gathered from the wording of the entire instrument, and the intent thus ascertained will control the meaning of a formal clause of the deed. *Lynch v. Dewey Bros.*, 152.

4. *Same—Estates—Limitations—Children—Second Marriage.*—The granting clause of a deed to J. "for the term of his natural life, and after his death in remainder to his wife, if she survive him, for her natural life then to the children of said J."; and in the habendum, "to him and his wife their lives, and to their children," are *Held*, when construed together, to continue the ulterior limitation, after the falling in of the life estates, to the children of J. and his wife living at the time of the execution of the deed, to the exclusion of any interest of his second and later wife and the children of that marriage. *Ibid.*

5. *Deeds and Conveyances—Registration—Indexing—Duty by Grantee.* Where the general index in the office of the register of deeds correctly refers to the book and page where a chattel mortgage, or agricultural lien, combined with a real estate mortgage of the same land for the same purpose is to be found, it is sufficient for all purposes; and the fact that the instrument was only recorded in a book set apart for

DEEDS AND CONVEYANCES—*Continued.*

chattel mortgages and crop liens will not affect the rights of the mortgagee to the prior security of his lien on the land as against that of a junior mortgage. The duty of a grantee to see to the proper registration and indexing of his deed, and as to whether the indexing is a part of registration discussed by HOKE, J. *Ely v. Norman*, 294.

6. *Deeds and Conveyances—Registration—Indexing.*—*Held*, by BROWN, J., WALKER and ALLEN, JJ., concurring, that the indexing of deeds is an essential part of their registration, overruling *Davis v. Whitaker*, 114 N.C. 279. *Ibid.*

7. *Deeds and Conveyances—Grantees Not in Esse—Statutes.*—A deed executed and delivered in 1881, or prior to the Acts of 1893, ch. 498 (now Revisal, sec. 1045), conveying lands, etc., to persons not then *in esse* may not be revoked by the grantor. *Coe v. Journegan*, 261.

8. *Deeds and Conveyances—Delivery—Presumptions—Evidence.*—The registration of a deed presumes delivery and places the burden of proof on the one who controverts its delivery. *Ibid.*

9. *Deeds and Conveyances—Tenants in Common—Plats—Interpretation—Intent.*—Where lands are divided by tenants in common, according to a survey, by executing deeds for the separate parcels, referring to each other and also to a common plat accordingly made for a more particular description of the property, such deeds should be construed together and with the plat referred to in ascertaining the intent and meaning of the parties. *Millard v. Smathers*, 56.

10. *Same—Boundaries—Fixed Corners—Buildings—Deflected Lines—Ejectment.*—Where the location of the true divisional line between adjoining city lots is in dispute between parties who formerly held the lands in common and it appears that they have interchanged deeds to their respective lots according to a plat made by a surveyor for this purpose, and have referred to this plat in the deeds for boundaries, etc., and that on the plaintiff's lot was a brick building mentioned in his deed which ran back from the street 100 feet of the given distance of 110 feet, and admitted corner being the corner of this building on the street, and there is nothing on the face of the deeds which gives or purports to give the width of the plaintiff's lot in the rear, or definite direction of the line, but the plat referred to places the further point as 16 feet from an alley which would cut off 3 feet from the corner of the building in the rear: *Held*, the building is considered as a part of the land conveyed, and the line in question should be run from the recognized corner at the street, taking the line of the building to the nearest point opposite the rear corner, according to the plat, 16 feet from the alley, and thence directly to the rear corner. *Ibid.*

11. *Deeds and Conveyances—Registration—Evidence—Presumptions—Burden of Proof—Statutes.*—The registration of a deed to lands, regular as to probate, is only presumptive evidence of its due execution; and where its validity as to execution is contested with supporting evidence, and the *locus in quo* claimed under a subsequently registered deed from the same grantor, the registration of the prior deed is only such evidence of its due execution as will take the case to the jury, with the burden of proof on the plaintiff alleging its invalidity and the presumption of its due execution in his favor. *Belk v. Belk*, 69.

DEEDS AND CONVEYANCES—*Continued.*

12. *Deeds and Conveyances—Fraud—Execution—Evidence—Tax Lists—Impecunious Grantee.*—Evidence of the impecunious condition of the grantee in a deed to lands, and that therefore he had no money to pay the recited consideration is properly admitted with other evidence as competent to show fraud in its execution, as also the tax lists tending to show that the grantee did not own the lands. *Ibid.*

13. *Deeds and Conveyances—Mental Incapacity—Evidence—Court's Discretion—Appeal and Error.*—Mental incapacity of a grantor to avoid his deed must exist at the time of its execution and may be shown by evidence thereof before and after that time, the question of remoteness of the time ordinarily being addressed to the discretion of the trial judge, which will not be disturbed on appeal when not abused. *Burns v. Burns*, 447.

14. *Same—Mental Disease—Senile Dementia.*—Evidence of the mental incapacity of a grantor to make a deed, that such existed before and after its execution, is especially admissible when there is evidence that it existed as a result of disease or the gradual decay of the mental facilities attending old age. *Ibid.*

15. *Deeds and Conveyances—Registration—Judgments—Execution—Homestead—Clerks of Court.*—A deed to lands in trust for the benefit of creditors, reserving the homestead rights of the grantor, and duly recorded, is not affected by the lien of judgment of one of the creditor's subsequently obtained; and where the homestead has been allotted under execution of the judgment, and not set aside under reservation of the deed, the judgment creditor is not entitled to have another execution issued to revive his judgment, by his motion under Revisal, sec. 620, either as against the land embraced in the deed or included in the homestead set aside to the judgment debtor. Revisal, sec. 685. *Hicks v. Wooten*, 597.

16. *Deeds and Conveyances—Registration—Filing.*—Where the filing of a paper in the office of the register of deeds is necessary to the title to lands, the time thereof will be considered as at that which the paper was delivered to and received by the proper officer; and while the file mark of the officer is evidence as to the time, it is not essential under our statutes. *Power Co. v. Power Co.*, 668.

17. *Deeds and Conveyances—Interpretation—Intent—Reference for Description.*—As to the construtcion of a deed referring to a former deed for description, giving effect to its intent, transposing its parts if necessary, etc., see *Quelch v. Futch*, 172 N.C. 316. *Quelch v. Futch*, 694.

DEFAULT. See Mortgages, 2; Judgments, 8, 9.

DEFENSE. See Animals, 1; Carriers of Goods, 1.

DELIBERATION. See Homicide, 9.

DELIVERY. See Deeds and Conveyances, 8.

DEMURRER. See Fertilizers, 2; Courts, 1; Action, 3; Evidence, 11; Judgments, 7; Pleadings, 10, 12; Schools, 3.

Demurrer—Pleadings—Parties—Misjoinder—Fires—Railroads. — Where the owner of the equitable title to lands in possession thereof sues to

DEMURRER—*Continued.*

recover damages thereto for the negligent burning thereof by the defendant railroad company, and alleges in the complaint ownership and possession, an amendment setting out his equitable ownership and making the holder of the legal title a party defendant is not objectionable for misjoinder of parties and causes of action; and where no answer is filed by the new party and the trust is not denied, the defendant cannot be heard to complain. *Mull v. R. R.*, 593.

DEMURRER ORE TENUS. See Master and Servant, 1; Insurance, 7.

DEPOSITIONS. See Evidence, 5.

Depositions—Return to Clerk—Evidence—Clerks of Court.—While it is better to send depositions taken in an action to the clerk at once, who upon proper application may compel the commissioner to return them after unreasonable delay, there is no requirement of law that they be returned to the next or any particular term of court. *Askew v. Matthews*, 187.

DESCENT and DISTRIBUTION. See Wills, 7.

DESCRIPTION. See Wills, 77; Contracts, 12; Deeds and Conveyances, 17.

DEVISE. See Wills, 7, 18, 21, 25, 26.

DISCLAIMER. See Costs, 1.

DISCRETION. See Pleadings, 7; Courts, 4.

DISCRETION OF JURY. See Damages, 2.

DISCRETIONARY POWERS. See Municipal Corporations, 4.

DISHONOR. See Bills and Notes, 3.

DISTRIBUTION. See Mortgages, 8.

DITCHES. See Railroads, 7.

DIVERSITY OF CITIZENSHIP. See Removal of Causes, 1.

DIVIDED COURT. See Appeal and Error, 34.

DIVISION. See Wills, 23; Mortgages, 9.

DIVORCE. See Alimony, 1, 4, 6; Bigamy, 1, 2, 3; Marriage 1.

1. *Divorce—Alimony—Judgment—Cross-bill—Estoppel—Statutes.*—A denial of alimony in an independent action brought by the wife under section 1567 of the Revisal, on the ground that her husband maliciously turned her out of doors, will conclude her upon her cross-bill setting up the same matter in an action thereafter brought by her husband against her for divorce *a vinculo*. *Medlin v. Medlin*, 529.

2. *Same.*—The ground for divorce *a mensa* given the wife (Revisal, sec. 1652, subsec. 2) because of being maliciously turned out of doors by her husband is but an instance of wrongful abandonment provided by subsection 1 thereof and the basic facts of these two suits being the same, an authoritative decision on the right of alimony will conclude

DIVORCE—*CONTINUED.*

the parties as to such right and as to the relevant facts existent at the time and involved in the inquiry. *Ibid.*

3. *Divorce—Statutes—Common Law—Expense Money—Allowance to Wife—Costs—Courts—Remedies.*—Our statute allowing, in given instances, alimony to the wife is remedial in its nature, affirmative in its terms, and cumulative in its effect, and does not conflict with or abrogate the common law existent on the subject or withdraw from the court any powers already possessed by them in administering its principles: and hence the court in its sound discretion may allow a reasonable amount to the wife to enable her to properly present her defense to an action brought against her by her husband for divorce *a vinculo*, though she may be concluded by judgment against her in her former and independent action for divorce *a mensa* under the provisions of the statute, Revisal, sec. 1567. The history of this principle discussed by Hoke, J. *Wilson v. Wilson*, 19 N.C. 377; *Reeves v. Reeves*, 82 N.C. 348, cited and overruled on this point. *Ibid.*

DOCKET AND DISMISS. See Appeal and Error, 3, 5.

DOGS. See Animals, 2.

DOWER. See Trusts and Trustees, 7.

DRAINS. See Municipal Corporation, 10.

DRAINAGE DISTRICTS.

1. *Drainage Districts—Assessments—Petition—Judgment.*—The State Board of Education, then the owners of certain lake bottom lands, joined in the petition with certain owners of outlying lands to form Mattamuskeet Drainage District, with provision in the petition that such outlying lands should not be taxed exceeding 15 cents per acre for benefits. The Board of Education afterwards conveyed these lands to a corporation with provision that the outlying lands should only be taxed one-fourth of the necessary assessments for maintenance, etc. The judgment creating the district decreed the establishment of the district under the Laws of 1909, ch. 442, and 1909, ch. 509, which contain no restriction upon assessments, except such as necessary to maintain the district. There was no exception taken to the judgment: *Held*, the failure to except was a waiver of the right of the outlying landowners to claim the limit of the assessment as set out in the petition, which, under the judgment, is controlled by the statute and the restriction in the deed of the Board of Education. *Gibbs v. Drainage Comrs.*, 5.

2. *Drainage Districts—Necessary Expenses—Judgments—Mandamus—Assessments.*—A judgment against a drainage district for necessary service rendered by the drainage engineers in its formation, and given after the completion of its organization, is enforcible by mandamus to compel the levy of an assessment upon the lands in the district for that purpose, irrespective of whether the commissioners have directed an issuance of bonds for the expenses of the districts. *Allen v. Drainage Comrs.*, 190.

DRAINAGE DISTRICTS—*Continued.*

3. *Drainage Districts—Summons—Pleadings—Admissions—Judgments—Estoppel.*—Summons issued against the individual commissioners of a drainage district and "the board of drainage commissioners," with allegation that it is "a corporation duly created, organized, and existing under and by virtue of the drainage laws of the State of North Carolina," is an action against the district; and where this allegation is admitted and judgment rendered against it, the corporation is estopped, in proceedings for mandamus to enforce the judgment, to set up any defense which might have been raised in the former action. *Ibid.*

4. *Drainage Districts—Judgments—Modifications—Changes—Courts.*—The judgment rendered upon the organization of a drainage district does not conclude the filing of supplementary petitions, for such proceedings are subject to modification from time to time by the landowners in the district or by the supervisory orders of the court, with the restriction that no radical change will be made or any change that would throw additional costs upon the landowners therein without benefit to them. *In re Lyon Swamp Drainage District*, 270.

5. *Same—Supplementary Petition—Procedure.*—Where it is made to appear that the stopping of a main canal within a drainage district short of the distance originally planned is a detriment, and causes damage to the health of those living therein, and is also insufficient, it is proper, upon the petition of some of the landowners in the district to extend the canal at their own cost, for the court to appoint "viewers" with direction to report their action, subject to the approval of the court. *Ibid.*

DURESS. See Appeal and Error, 9.

DUTY OF MASTER. See Master and Servant, 3; Negligence, 5.

EARNINGS. See Alimony, 7.

EARNING CAPACITY. See Damages, 1.

EASEMENTS. See Roads and Highways, 2.

EDUCATION. See Municipal Corporations, 2.

EFFECT. See Pleadings, 13.

EJECTMENT. See Justices of the Peace, 1; Boundaries, 7; Deeds and Conveyances, 10; Divorce, 1.

1. *Ejectment—Landlord and Tenant—Justice of the Peace—Jurisdiction—Proof.*—While a justice of the peace has no jurisdiction in ejectment, though the techincal relation of landlord and tenant exists, if it appears that the defendant, tenant in possession, has acquired or holds an interest in the property itself, either under an executory contract of sale or otherwise under circumstances giving him a right to call for an accounting and an adjustment of the equities between the parties upon which the title may depend, the bare averment of the pleadings

EJECTMENT—*Continued.*

that such conditions exist is not sufficient to deprive the justice's court of its jurisdiction, but such must be made to appear from the evidence or admissions of the parties. *Jerome v. Setzer*, 391.

2. *Ejectment—Mortgages—Title—Burden of Proof.*—Where the plaintiff claims title to land by deed and mesne conveyances from the original owner, and the defendants in possession claim under a prior mortgage made by him and mesne conveyances, the burden is on the plaintiffs, in this action of ejectment, to show they had in some way acquired the title and the right of possession, as the mortgagees had taken possession after default in payment of the mortgage debt. As to whether the bar of the statute, Revisal, sec. 390, applies, the action not being one to redeem. *Quaere? Weathersbee v. Goodwin*, 234.

3. *Same—Limitation of Actions—Adverse Possession—Burden of Proof—Trials—Instructions.*—Where those claiming the right to possession of lands under a deed and mesne conveyances from the original owner rely upon adverse possession under color of title, as against those claiming possession under his prior mortgage and mesne conveyances, after default, a charge that the plaintiff would be entitled to recover should the jury find he had been in adverse possession of the land for seven years from the date of the deed, is not to his prejudice under the evidence in this case. The possession of the mortgagor is not adverse to the mortgage. *Parker v. Banks*, 79 N.C. 480, reviewed. *Ibid.*

4. *Ejectment—Mortgages—Title—Constructive Possession.*—Where the *locus in quo* is not in the actual possession of any one, it is in the constructive possession of one having the legal title to the lands, and this is sufficient in ejectment for a recovery against one who has no superior title. *Ibid.*

ELECTIONS. See Municipalities, 1; Municipal Corporations, 1, 3; Insurance, 2.; Trusts, 8; School Districts, 1.

Elections—Injunctions.—While the courts are slow to restrain the holding of an election, it will nevertheless do so if the election contemplated would be held contrary to law, and therefore be ineffective and void. *Hood v. Sutton*, 98.

ELECTRIC LIGHTS. See Municipal Corporations, 4; Homicide, 1, 2, 4, 5, 6, 7, 10, 12, 14; Criminal Law, 1, 4, 5, 8, 10, 12, 13; Contempt, 5; Bigamy, 2; Husband and Wife, 1; Larceny, 4; Burglary, 1.

ELECTRICITY. See Corporations, 13.

EMINENT DOMAIN. See Constitutional Law, 11; Corporations, 14.

EMPLOYER AND EMPLOYEE. See Master and Servant, 1, 3, 4, 8, 9; Commerce, 2, 4; Railroads, 11.

ENDORSEMENT. See Constitutional Law, 7.

ENDORSERS. See Bills and Notes, 5.

ENEMY. See War, 1.

EQUITY. See Justices of the Peace, 1; Contracts, 13; Trusts and Trustees, 5; Trusts, 7; Injunction, 2.

ESTATES. See Wills, 1, 13, 16, 22, 25; Betterments, 1; Judgments, 2, 6, 15; Deeds and Conveyances, 4; Alimony, 7.

1. *Estates— Contingent Interests— Judicial Sales— Statutes— Constitutional Law.*—Pell's Revisal, sec. 1590, authorizing the sale of land affected with contingent interests does not interfere with the essential rights of ownership but operating in addition to those already possessed, is constitutional and valid. *Pendleton v. Williams*, 248.

2. *Estates—Contingent Interests—Judicial Sales—Statutes.*—An estate to G. and K. in the event either die without issue then to the other, etc., and should both die without issue, then to R.: *Held*, G. and K. took vested interest in the lands under the provisions of our statute, Pell's Revisal, sec. 1590, and it is subject to judicial sale under the terms and provisions of the statute. *Smith v. Witter*, 174 N.C. 616, and other like cases, cited and approved. *Ibid.*

3. *Estates—Contingent Interest—Qualified Fee—Vested Rights.* — The owner of a base or qualified fee, determinable on a contingency, has a vested interest in the property while it endures, with a fixed right of present use and control, and may exercise over it all the acts or privileges of the owner in fee simple absolute, except that he cannot alien the property freed from the contingency by which it is determined. *Ibid.*

4. *Estates—Contingent Interests—Vendor and Purchaser—Fee Simple Title—Application of Funds.*—A purchaser at a sale of land with contingent interests allowed under the provisions of Revisal (Pell's) 1590, acquires a fee simple title upon payment of purchase price to the court or person authorized to receive it, without being required to see to the application of the funds, and on such payment made is quit of all obligations concerning it. *Ibid.*

5. *Estates—Contingent Interests—Judicial Sales—Funds—Court's Discretion—Life Tenant—Interest.*—The preservation of the proceeds of the sale of lands affected with contingent interests, under Pell's Revisal, sec. 1590, is referred to the sound discretion of the trial judge, and in this case no error is found to the order requiring the funds to be paid into the office of the clerk of the Superior Court, to be loaned out by him or otherwise invested as required by law until the happening of the contingency, except that it should be so modified as to require that interest on these loans be allowed the owners of the particular estate, whether the estate, under correct interpretation of the deed, be one for life to be enlarged into a fee, or a fee simple, determinable on their death without issue, it appearing that they were given the usufruct of the land. *Ibid.*

6. *Estates—Limitations—Contingencies—Statutes.*—Our statute with regard to contingent limitations by will or deed depending "upon the dying of any person without heirs or issue," etc., was enacted for the primary purpose of making such limitations good by fixing a definite time when the death of the first taker shall become absolute, and also to establish a rule of interpretation by which the estate of the first taker shall be affected with the contingency till the time of his death,

ESTATES—*Continued.*

unless a contrary intent appears upon the fact of the instrument. Revisal, sec. 1581. *Bell v. Keesler*, 525.

7. *Same—Intent—Vesting of Estates—First Taker—Direct Descendant—Descents and Distributions.*—In ascertaining whether the intent of a donor or testator is to fix an earlier period for the estate to become absolute than at the death of the first taker without heirs or issue (Revisal, sec. 1581) the instrument should be construed in reference to the principles that the law favors the early vesting of estates; that the first taker is ordinarily to be regarded as the primary object of the testator's bounty, especially when he is his child or lineal descendant. *Ibid.*

8. *Same—Wills—Wife—Children—Nephews.*—A devise of lands to testator's wife for life, "at her death to such child or children as may survive her," etc., "upon their coming of age or marriage, share and share alike," etc., and a following item, with limitation over to a nephew upon contingency that no child "live to become of age or marry or die without heirs": *Held*, upon the death of the wife and one child surviving having become of age, such child took a fee simple absolute estate, the contingency thereof being the estate of the first taker becomes absolute upon his becoming of age or marrying, or dying without heirs or the issue of children or offspring, and in either or any one of these events. *Ibid.*

9. *Estates—Limitations—Contingency—Children—Words and Phrases—"Or."*—When a gift over, in case of death without issue, is accompanied by a gift over in case of death before arriving at a certain age, the dying without issue will generally be restricted to a dying without issue before arrival at the age specified, to aid which the word "or" may be construed as "and." *Ibid.*

10. *Estates—Contingent Limitations—Heirs—Children—Statutes — Interpretation—Death of First Taker.*—The statute of 1827, now Revisal, sec. 1581, providing that every contingent limitation by deed or will, made to depend upon the dying of any person without heir or heirs of the body, etc., shall be held and interpreted a limitation to take effect when such person shall die, not having such heir, etc., changed the law as it was interpreted prior to 1829, as to perpetuities, and the statute is not only a law validating limitations of this character, by referring the "death without heir or issue" to a fixed and definite time, but is also regarded as a rule of interpretation by which the estate of the first taker is to be affected with the contingency until his death, unless it clearly appears upon the face of the deed or will that an earlier period was intended by the testator for the first estate to become absolute. *Kirkman v. Smith*, 579.

11. *Same—Intent—Vesting of Estates.*—On devise of an estate to M. for life, then to G. and K., and if they should die without bodily heirs, then over, the creation and existence of the life estate, without more, does not of itself affect the statutory rule of construction as to estates in remainder, and the contingency affecting such estates will continue

ESTATES—*Continued.*

to affect the same till the death of the first takers in remainder. Revisal, sec. 1581. *Ibid.*

12. *Same—Defeasible Fee—Deeds and Conveyances.*—A devise to M. "to be hers her lifetime" and then to G. and K., and if they should die without any bodily heirs, "then said land shall go back to the Flow heirs," after the death of M. and K., it is *Held* that G., who is alive, married and having living children, has a fee-simple title to the land, defeasible upon his dying without children, and he cannot convey a perfect title thereto. *Ibid.*

ESTOPPEL. See Judgments, 2, 3, 6, 7; Drainage Districts, 3; Trusts and Trustees, 5; Appeal and Error, 15.

1. *Estoppel—Judgment—Nonsuit.*—A voluntary nonsuit does not operate as an estoppel by judgment of the matters alleged in the pleadings. *Slade v. Sherrod*, 346.

2. *Estoppel—Corporations—Shares of Stock—Pledgee—Irregularity of Issue—Notice.*—Where certificates of stock of a corporation appear to be regularly issued to a certain person, and they are by him pledged to another as collateral security for a loan for value, without notice of any irregularity in their issuance, the corporation is estopped, *in pais*, as against the innocent pledgee, from setting up that such shares had not been transferred on the books of the corporation. *Bank v. Dew*, 79.

EVIDENCE. See State Lands, 2; Boundaries, 2, 5, 10, 11; Appeal and Error, 2, 7, 9, 11, 14, 16, 26, 28, 30, 36, 39, 41; Wills, 5, 6, 8, 9, 10, 11, 12; Reference, 1; Nonsuit, 1; Contracts, 8, 10, 12, 18, 23, 24, 26; Trusts, 1; Railroads, 3, 4, 5, 9, 11, 12, 13, 14; Instructions, 3, 8, 9, 10, 12, 18, 19, 24; Trials, 1, 2, 3; Master and Servant, 2, 3, 8; Courts, 2, 3; Depositions, 1; Automobiles, 1, 2, 5; Landlord and Tenant, 3; Trusts and Trustees, 6; Deeds and Conveyances, 8, 11, 12, 13; Pleadings, 3, 4, 14; Insurance, 6; Negligence, 6, 12, 13; Street Railways, 2; Commerce, 3; Register of Deeds, 1; Limitation of Actions, 11; Principal and Surety, 3; Carriers of Goods, 3, 4; Carriers of Passengers, 1; Mortgages, 18; Conversion, 1; Spirituous Liquors, 1; Vendor and Purchaser, 5; Physicians, 1; Constitutional Law, 12.

1. *Evidence — Deceased Persons — Transactions and Communications — Deeds and Conveyances—Creditor's Bill.*—Where a conveyance of land is sought to be set aside as fraudulent against creditors, and there is evidence tending to show that the debtor had conveyed the lands to a third person without consideration, who indirectly conveyed the same to the debtor's sister, the latter claiming that the conveyance was for a loan and the deed was in the nature of a mortgage therefor, the debtor having since died, it is *Held* that it was incompetent for his sister to testify as to any transactions relating to the subject of the action in favor of his estate. Revisal, sec. 1631. *Sutton v. Wells*, 1.

2. *Evidence—Deceased Persons—Transactions and Communications—Independent Knowledge.*—A party in interest may testify to a substantive fact independent of any transaction or communication with a deceased person and existing by independent knowledge, such not being within the intent and meaning of Revisal, sec. 1631. *Ibid.*

EVIDENCE—*Continued.*

3. *Evidence—Deceased Persons—Interest—Deeds and Conveyances—Favor of Title.*—A party to a transaction with a deceased person is incompetent to testify thereto when it involves the question of one of several alleged fraudulent conveyances of lands as against the creditors of the deceased person and in favor of the title which he himself had conveyed. Revisal, sec. 1631. *Ibid.*

4. *Same—Executors and Administrators—Creditor's Bill.*—A defendant administrator of a deceased debtor in a creditor's bill to set aside a series of conveyances alleged to be in fraud of his creditors has antagonistic interests to a defendant grantor in one of the deeds involved in the controversy and where the administrator has not testified to a transaction the testimony as to such by the grantor in the deed is incompetent. Revisal, sec. 1631. *Ibid.*

5. *Evidence—Depositions—Relevancy—Former Trial.*—While depositions properly and regularly taken and introduced on a former action between the same parties or those in privity therewith may properly be introduced on the later trial under certain circumstances, their rejection will not be held for error unless it is made to appear that the proposed evidence was relevant and reasonably calculated to have appreciable effect in the verdict. *Bank v. Whilden*, 52.

6. *Evidence—Declarations—Corroboration—Appeal and Error.*—Declarations not admissible as substantive evidence under the rule are properly rejected as corroborative of evidence excluded on the trial. *Ibid.*

7. *Evidence—Nonsuit—Trials.*—Upon a motion to nonsuit, the evidence in support of plaintiff's claim must be accepted as true and construed in the ilght most favorable to him. *Boney v. R. R.*, 354.

8. *Evidence—Family History—Birth of Child—Declarations—Physicians—Repute—Tenant by the Curtesy.*—Where the controversy depends upon whether the father is tenant by the curtesy in his wife's land by the birth of a child alive of the marriage, and those who were present are all dead, including the family physician, it is competent for the father to testify to the fact, and of declarations made to him by the physicians at the time, at least in corroboration of his testimony; also a brother-in-law not interested in the action is competent as to family repute, and testimony by a thrid person, at least in corroboration of such general reputation in the community. *Turner v. Battle*, 219.

9. *Evidence—Birth of Child—Presumptions—Instructions—Appeal and Error.*—Where the controversy depends upon whether the father was tenant by the curtesy in his wife's lands by the birth of a child of the marriage alive, the proof that the child was born raises the presumption that it was born alive, and a peremptory instruction to the contrary by the court is reversible error. *Ibid.*

10. *Evidence—Family History—Birth of Child—Declarations—Repute—Statutes—Registration of Births.*—Declarations of family physicians and general family repute as to whether a child was born of a marriage alive, making the father a tenant by the curtesy in his wife's lands, are received from necessity as the best evidence, but they are more restricted, as such, since the enactment of our statute requiring registration of births and deaths. *Ibid.*

EVIDENCE—*Continued.*

11. *Evidence—Admissions—Pleadings—Demurrer—Trials.*—In an action to recover damages alleged to have been caused by the negligence of the defendant's driver of his team, and there is sufficient evidence of the negligence, a demurrer on the ground that there was no evidence that the driver was employed by the defendant at the time will not be sustained where the plaintiff has alleged it and it is admitted in the answer and the trial has proceeded upon that theory throughout without defendant's objection. *Cohoon v. Davis*, 145.

12. *Evidence—Examination of Party—Incrimination—Refusal to Answer—* Statutes.—Where no statutory immunity is given, a party to an action cannot be compelled to testify to matters that manifestly tend to convict him of a crime, whether the examination takes place at or before the trial. *Ward v. Martin*, 287.

13. *Evidence—Examination of Party—Statutes—Affidavits.*—Upon application to examine a defendant before the clerk of the Superior Court prior to trial (Revisal, secs. 865, 866), and to aid in preparing the complaint, such facts as will entitle the movant to the order must be made to appear by affidavit; but after filing a verified complaint setting out a cause of action, the plaintiff has a right to the order for examination, and the leave of the court is unnecessary. *Ibid.*

14. *Same—Incrimination—Refusal to Answer.*—An order to examine a defendant under Revisal, secs. 805, 806, will not be denied on the ground that the answers of the defendant will tend to incriminate him, in an action wherein the complaint has been filed alleging that the defendant had misappropriated the plaintiff's money while acting as his bookkeeper and accountant, the answers of the defendant not necessarily having to show a criminal intent, etc., and the time for his refusal to answer being when such incriminating questions are asked on the examination. *Ibid.*

15. *Evidence—Incrimination—Oath of Party—Attorney and Client.*—The privilege to refuse to answer questions tending to incriminate a party must be claimed by the party under oath, and not by his attorney, and an order to examine the party to an action under Revisal, secs. 806, 866, may not be revoked on motion made on written notice of his attorney, stating that the answers sought to be elicited will tend to incriminate him. *Ibid.*

16. *Evidence—Declarations—Against Interest.*—Where the grantor conveys land by gift to his son and later to another person under a registered deed, the declarations of the son made shortly prior to the later deed, that his father had offered to give him the place, but he would not accept it, do not of themselves show that the declarations were against the son's interest, and they are incompetent evidence in favor of the son's title to the lands. *Roe. v. Journegan*, 261.

17. *Evidence—Admissions—Lands—Title*—Admissions as to title must be made by the adverse party or one under whom he claims to be admissible against him in an action to recover lands. *Ibid.*

18. *Evidence—Title—Lands—Declarations — Interest — Remainderman.* Declarations of a deceased person affecting title to lands should be most closely scrutinized and admitted as evidence with great caution;

EVIDENCE—*Continued.*

and when they are admitted, it is upon the ground that, being against declaration's interest, they are as efficacious of the truth of the matter as the oath and cross-examination; and when admissible, the declarations of a life tenant may be competent against the remainderman. The distinction between admissions and declarations discussed by ALLEN, J. *Ibid.*

19. *Evidence—Title—Lands—Declarations—Burden of Proof.*—One relying on declarations of a deceased person as affecting his title and made against his interest must show that the defendant was aware of their effect at the time; and when the facts and circumstances tend to disprove this, and only the mere fact of the declaration is testified to, such declarations are inadmissible. *Ibid.*

20. *Evidence—Lands—Title—Ante Litem Motam.*—The doctrine of *ante litem motam*, in its relation to the admissibility of declarations affecting title to lands, applies to the beginning of the controversy and not the action. *Ibid.*

21. *Evidence—Principal Agent—Good faith—Fraud.*— Evidence that an agent to sell land on commission was trying to get the best terms he could for a proposed purchaser is not alone, under the evidence in this case sufficient of his bad faith or fraudulent purpose to obtain a greater price with the intention of appropriating the excess. *Real Estate Co. v. Moser*, 256.

22. *Evidence—Boundaries—Public Records—Copies—Notations — State Lands—Official Surveys.*—A duly certified copy made by the Secretary of State of records and maps of an official survey of lands formerly owned by the State, is competent evidence in an action involving the dividing line of adjoining lands, when relevant, but it must be confined to the contents of the records and maps themselves, as they therein appear; and notations thereon based on the returns of the surveyor, as to the date of a survey, does fall within the meaning of the law, and should be excluded. *Wiggins v. Rogers*, 67.

23. *Evidence—Impeachment.*—Questions asked for the purpose of impeaching a witness or showing his bias are more broadly admitted than substantive evidence, but when irrelevant and harmful they should be excluded. *Belk v. Belk*, 69.

24. *Evidence—Consistent Statements—Corroboration.* — Consistent previous statements of a witness are competent in corroboration of his testimony on the stand. *Ibid.*

25. *Evidence—Trespass. Willful—Contempt Findings of Court.*—Upon an issue as to whether a tresspass was committed willfully and wantonly in disregard of plaintiff's rights, the facts theretofore found by the trial judge upon adjudicating the defendant in contempt may not properly be introduced in evidence; but the evidence upon which the adjudication had been made is competent. *Cobb v. R. R.*, 130.

26. *Evidence—Wagering Contracts—Futures—Statutes — Pleadings — Counterclaims—Admissions—Burden of Proof—Trials—Contracts.*— The burden of proof is on the defendant to establish his counterclaim set up in an action against him upon his note; and where he has admitted his ability on his note, and the reply alleges that his counter-

EVIDENCE—*Continued.*

claim, if it existed, was based upon an illegal or wagering contract in futures. Revisal, sec. 1691, he must establish his counterclaim by his evidence upon the trial, and show that it was a lawful one; and where he fails to introduce evidence to that effect, it is proper for the court to disregard the counterclaim and direct a judgment upon the note.—*Heath v. Heath*, 457.

27. *Evidence: Corroborative; Contradictory—Instructions—Requests—Restrictions—Appeal and Error.*—Where evidence is admissible only for corroboration or contradiction, the failure of the trial judge to thus restrict it is not reversible error in the absence of a special request to do so. *Muse v. Motor Co.*, 466.

28. *Evidence—Illustrations—Spikes.*—Where there is evidence tending to show defendant's actionable negligence in permitting a hole in a concrete floor with spikes in it to remain where the defendant, his employee was required to work, it is competent for the witness to explain his testimony to the jury by using another spike like in size and form. *Ibid.*

29. *Evidence—Letters.*—For a letter to be competent evidence in an action, there must be testimony as to the genuineness of the signature thereto, and the authority of the writer for sending it, so that it may be shown that it was not the act of the stranger; and where the evidence is only that a letter had been received, but was destroyed with the name of the president of the defendant corporation appearing as the writer, but of this the witness was not quite sure, and there being no proof of the genuineness of the signature, it is insufficient to admit testimony of its contents bearing adversely to the contentions of the defendant. *Woody v. Spruce Co.*, 545.

30. *Evidence—Contracts—Principal and Surety—Judgments.*—The plaintiff's attorney having obtained three judgments for goods sold and delivered, had execution issued on all of them, whereupon the defendant gave a written offer of guarantee of payment if the executions were withdrawn upon certain terms, which were accepted by the attorney in writing, mentioning specifically all three of the judgments with amount of each. The defendant testified that she was aware at the time that there was three judgments and executions, and her testimony on the trial that she did not understand that she guaranteed one of them, was improperly admitted. *Pants Co. v. West*, 565.

31. *Evidence—Deeds and Conveyance—Commencement of Actions—Puis Dorreign Continuance.*—Where a plaintiff corporation has shown its right to acquire lands for a public utility which is claimed by a rival company, deeds to the land made to the defendant since the commencement of the action are not evidence of the latter's right. The admission of matters in defense since the last discontinuance discussed by WALKER, J. *Power Co. v. Power Co.*, 669.

32. *Evidence—Conspiracy — Commissions—Principal and Agent—Vendor and Purchaser.*—Evidence in this case held sufficient to sustain a verdict and judgment in plaintiff's favor that he was entitled to his agreed commissions on sale of land of which he had been deprived by a conspiracy between the vendor and his purchaser. *Crowell v. Parker*, 717.

EVIDENCE—*Continued.*

33. *Evidence—Deceased Persons—Interest*—Testimony of a party interested of transactions or communications with a deceased person is properly excluded under Revisal, sec. 1631. *Quelch v. Futch*, 694.

34. *Evidence—Impressions.*—Where relevant testimony has been introduced by the State that the prisoner's hat and cap had been found in witness' kitchen, which would require the unlatching and opening of the door, it is incompetent for the prisoner to ask the witness, not an expert, if she thought she would have heard any one there, as such would be only the impression of the witness and not the statement of a fact. *S. v. Neville*, 731.

35. *Evidence—Character—Witnesses.*—Where a character witness for a witness for prisoner has stated that he had not heard any one say anything about the character of the witness, the exclusion of a question as to whether he had heard his character discussed is not erroneous or to prisoner's prejudice, the witness afterwards testifying as to good character. *Ibid.*

36. *Evidence—Character—Witnesses—Specific Statements—Cross Examination.*—Proof of character of a witness must be elicited by general questions, and not by specific statements of the witness as to what another person has said respecting it; and a party may not ordinarily cross-examine his own witness upon the subject. *Ibid.*

37. *Evidence—Character—Voluntary Qualifications.*—A character witness may voluntarily qualify his evidence as to the character of a party, as in this case, "Yes, it is bad for selling liquor," the offense for which he was being tried. *S. v. McKinney*, 784.

EXAMINATION. See Evidence, 12 13; Appeal and Error, 12.

EXCEPTIONS. See Reference, 1; Appeal and Error, 10, 39, 45; Removal of Causes, 2.

EXCUSABLE NEGLECT. Clerks of Court, 2.

EXECUTION. See Wills, 4; Mortgages, 5; Deeds and Conveyances, 12, 15; Statutes 5; Clerks of Court, 1; Homestead, 1.

EXECUTORS AND ADMINISTRATORS. See Evidence, 4; Actions, 1; Bills and Notes, 2; Usury, 1.

EXEMPTIONS. See Partnership, 1; Statutes, 5; Sheriffs, 1.

EXONERATION. See Partnership, 1.

EXPLOSIVES. See Negligence, 6.

EXTENSION OF PAYMENT. See Corporations, 6.

EXTENSION OF TIME. See Removal of Causes, 1; Contracts, 30.

FACTS. See Larceny, 2.

FAITH AND CREDIT. See Constitutional Law, 7, 9.

FALSE PRETENSE. See Fraud, 1.

FAMILY HISTORY. See Evidence, 8, 10.

FEDERAL COURTS. See Removal of Causes, 1.

FEDERAL EMPLOYEES' LIABILITY ACT. See Master and Servant, 6, 7, 8, 9.

FEES. See Attorney and Client, 4; Sheriffs, 1.

FERTILIZER. See Vendor and Purchaser, 4.

1. *Fertilizers—Vendor and Purchaser—Contracts—Express Warranty—Analysis—Crops—Damages.*—An express warranty in the written contract of sale of commercial fertilizers guaranteeing a specified analysis, but not as to the result on the crops in which it is to be used, will protect the manufacturer or seller from the warranty ordinarily implied that the fertilizer is fitted for the contemplated purpose. *Fertilizer Works v. Aiken*, 398.

2. *Same—Pleadings—Demurrer.*—Where the maker of notes given for commercial fertilizer therein waives all claims, damages and penalties in case of deficiency, except claim for the actual commercial value of defiiciency when ascertained and determined by the State Chemist from samples taken in the presence of the seller or his authorized representative, the stipulation as to the waiver is a reasonable and valid one and excludes any and all evidence as to the effect of the fertilizer upon the crops upon the question of damages; and where there is no allegation in the pleading that the specified method has been employed a demurrer is good. *Ibid.*

3. *Same—Statutes—Waiver.*—Chapter 143, Laws of 1917, repealing sections 3945-3956 of the Revisal, provides adequate and sufficient means and facilities for the analysis of fertilizers by the State Chemist, under conditions safeguarding both the seller and buyer thereof, and provides that no suit shall be brought for damages resulting in their use except after chemical analysis showing deficiency of ingredients, etc., with further provision allowing either party to make further agreement for their reasonable and lawful protection: *Held*, a waiver by the purchaser of any demand for damages, except such as may be ascertained in the manner specified in the statute, is valid and enforcible under the present law. *Ibid.*

FILING. See Deeds and Conveyances, 16.

FINDINGS. See Appeal and Error, 9, 41, 48; Evidence, 25; Contempt, 5.

FIRES. See Actions, 2; Railroads, 2, 4, 10, 12, 13; Demurrer, 1; Appeal and Error, 29; Negligence, 13.

FIRE ENGINES. See Street Railways, 1.

FIRE REGULATIONS. See Municipal Corporation, 6.

FORECLOSURE. See Costs, 3, 5, 6; Mortgages, 9, 10, 11, 12.

FORFEITURES. See Insurance, 4.

FORMER TRIAL. See Evidence, 5.

FRATERNAL ORDERS. See Insurance, 6, 7; Contracts, 21.

1. *Fraternal Orders—Mutual Insurance—Assessments—Statutes—Royal Arcanum.*—Fraternal and assessment orders of another State, having by its charter the right to issue certificates of insurance for the benefit of its members and without profit is, since the amendments of 1899, governed by its own laws, rules and regulations, as authorized by the State of its origin; and since that amendment a raise of an assessment by the Royal Arcanum, under a purely mutual plan, necessary to protect its policies and made in accordance with its constitution and by-laws without discrimination, and referred to in the applications and policies, is valid. Revisal, sec. 4791; *Wilson v. Order of Heptasophs*, 174 N.C. 634, cited and distinguished. *Hollingsworth v. Supreme Court*, 615.

2. *Same—Constitutional Law.*—Under the full faith and credit clause of the Constitution of the United States, Act IV, sec. 1, the question of whether an assessment upon a policy of life insurance in a fraternal order for the benefit of its members and issues without profit can be raised when necessary for the protection of its policyholders is one to be determined under the laws or decisions of the State of its incorporation, and the Royal Arcanum, being a Massachusetts corporation, the law of that State permitting it to be done is controlling. *Ibid.*

3. *Fraternal Orders—Mutual Insurance—Assessments—Policies — Contracts.*—The provision in a policy of insurance of the Royal Arcanum, after stating the premium rate, providing for periodical payments of the same amount "so long as the membership continued," is not a contract, but a regulation subject to the society's constitution and by-laws binding upon its members as to the raising of the assessment when necessary to the protection of its policies or to its continued existence for the purpose contemplated by its charter. *Ibid.*

FRAUD. See Actions, 1; Contracts, 3, 10; Trusts and Trustees, 2, 3; Landlord and Tenant, 2; Statute of Frauds, 1; Evidence, 21; Deeds and Conveyances 12; Corporations, 10; Mortgages, 13; Contracts, 21; Bigamy, 1.

Fraud—False Pretense—Corporations—Principal and Agent—Vendor and Purchaser—Secret Agreement.—Where one actively secures subscribers to shares of stock in a corporation to conduct its business on a certain lot of land, representing that the lowest price for the property was a certain sum, and he has a secret agreement with the owner that he was to receive certain compensation for the sale, and upon the formation of the corporation by acceptance of the charter he has obtained, induces it to purchase the land at the price stated, it was his duty to have disclosed his secret agreement with the owner, and his misrepresentation of the lowest price obtainable was fraudulent and obtaining money by deceit and false pretense. *Hospital Co. v. Sutphen*, 94.

FRAUDULENT JOINDER. See Removal of Causes, 4.

FUNDS. See Estates, 4, 5.

FUTURES. See Evidence, 26.

GARNISHMENT. See Attachment, 1.

GIFTS.

Gifts—Possession—Title—Wills.—Where the donor has given possession personal property to another to be delivered to a third person after his death, whether such third person is entitled to the property after the donor's death depends upon whether the words or expressions of the donor, when parting with the possession, were sufficient to pass the title as well as the possession. *Askew v. Matthews*, 187.

GOOD FAITH. See Insurance, 2; Evidence, 21; Corporations, 4.

GOVERNMENT. See Municipal Corporations, 2.

GOVERNOR. See Courts, 9, 10.

GRAND JURY. See Jurors, 1.

GRANTEES. See Deeds and Conveyances, 7.

GRANTS. See State Lands, 1.

GUARDIAN AD LITEM. See Parties, 1.

HABEAS CORPUS. See Parent and Child, 3; Appeal and Error, 14.

1. *Habeas Corpus—Appeal and Error—Certiorari — Court's Discretion.* Appeal to the Supreme Court will not lie from the refusal of a Superior Court judge to discharge the defendant from custody in proceedings in *habeas corpus*, the remedy being by a petition for a writ of *certiorari* which is addressed to the sound discretion of the Supreme Court. *In re Lee Croom*, 455.

2. *Habeas Corpus—Judgments—Collateral Attack—Statutes.*—Where the petitioner in *habeas corpus* proceedings directed to a Superior Court judge has previously been convinced in that court of an offense of which it had jurisdiction, and accordingly sentenced to imprisonment under a final order, the judgment imports verity and evidence to collaterally impeach it is incompetent, and the application to prosecute the writ will be denied. Revisal, sec. 1832. *Ibid.*

3. *Habeas Corpus—Certiorari.*—A petition for certiorari in the Supreme Court will be denied in *habeas corpus* proceedings when it appears therefrom that the prisoner is not entitled to his discharge. *Ibid.*

HARMLESS ERROR. See Vendor and Purchaser, 3; Appeal and Error, 13, 16, 18, 24, 42; Instructions, 22.

HEIRS. See Estates, 10.

HOLDING OVER OFFICER DE FACTO. See Public Officers, 4.

HOMESTEAD. See Deeds and Conveyances, 15.

Homestead—Judgments—Execution — Clerks of Court—Dormant Judgments—Motions—Statutes.—The homestead is only a right of exemp-

HOMESTEAD—*Continued.*

tion given the debtor in his land which is set apart to him and freed from execution during its continuance (Revisal, sec. 685), and where it has been laid off to him under execution of judgment, the judgment creditor may not have leave to issue execution against the homestead upon a dormant judgment against the homestead insured in a valid deed of trust by motion under the provisions of the Revisal, sec. 620. *Hicks v. Wooten*, 597.

HOMICIDE. See Appeal and Error, 42; Mistrials, 1, 2.

1. *Homicide—Murder—Evidence—Trials—Questions for Jury*—Evidence that the prisoner, on trial for murder of his wife who was expected to return home from a visit to relations and friends, stated she would return "home that morning, and there was going to be hell to play"; that he, as soon as she returned and entered the house, cursed and abused her, and said he was going to kill her, and the fatal shot was fired fifteen or twenty minutes later: *Held*, sufficient of premeditation and deliberation to sustain a verdict of murder in the first degree. *S. v. Roderick*, 722.

2. *Homicide — Evidence—Intoxication—Cursing.—Upon the trial for a* homicide where the evidence tended to show that the prisoner was beaten in drunken row by his associates, then went to a house near by, got his pistol and returning, shot and killed the deceased, evidence as to whether he was cursing before the altercation took place is immaterial. *S. v. Davis*, 723.

3. *Homicide—Deadly Weapon—Malice — Presumptions.—The law pre*sumes malice from the killing of a human being with a deadly weapon and places the burden upon the defendant to satisfy the jury as to any matter of mitigation or excuse. *Ibid.*

4. *Homicide—Self-defense—Cooling Time — Evidence.—Where the evi*dence tends only to show that the defendant, after having been beaten by his associates, went to a near-by house and immediately returning with a pistol shot and killed the deceased, the question of self-defense does not arise and that of "cooling time" was not relied on. *Ibid.*

5. *Homicide — Evidence—Questions for Jury—Trials.*—Where there is conflicting evidence as to whether the deceased was killed by a pistol shot of the defendant, or met his death from another source by being stabbed with some sharp instrument, the question is for the jury under a proper charge from the court. *Ibid.*

6. *Homicide—Evidence—Self-defense—Character of Deceased — Circumstantial Evidence.*—Where, upon a trial for homicide with a pistol. there is no evidence of self-defense, and the evidence is not circumstantial, evidence of the character of the deceased for violence is properly excluded. *Ibid.*

7. *Homicide—Murder — Manslaughter—Deadly Weapon—Malice—Presumptions—Conspiracy—Arrest—Officer—Evidence — Questions for Jury.*—The two defendants, a special policeman and his friend, were tried for murder in the second degree, upon agreement with the solicitor, with evidence tending to show that the officer ran after

the deceased after being struck by him, calling on the bystanders, especially his friend, to help in the arrest; that he caught the deceased and upon request of his friend to turn him loose, turned so as to expose the deceased to the pistol his friend had drawn on him, who then fired the fatal shot; *Held*, some evidence to be considered with other facts of a conspiracy to kill, and the law presuming malice from the use of the deadly weapon, other evidence was at least sufficient to sustain a verdict of manslaughter against the officer and murder in the second degree for his coconspirator; and *Held further*, that a remark made by the former to the latter that he should not have fired should only be considered by the jury in the officer's favor, and was not conclusive. *S. v. Kirkland*, 772.

8. *Homicide—Criminal Law—Instructions — Reasonable Doubt.*—Where the charge of the court upon a trial for a homicide clearly gives the prisoner the full benefit of the doctrine of reasonable doubt, and of the presumption of innocence, construing it as a whole, it is not necessary that the judge should repeat the instruction regarding reasonable doubt as his preface to each of his other instructions upon the relevant evidence. *Ibid.*

9. *Homicide—Deliberation—Premeditation.*—It is not required that deliberation and premeditation be of any preceptible time to constitute a homicide as murder in the first degree. *S. v. Bynum*, 777.

10. *Same—Evidence—Questions for Jury.*—Where there is evidence sufficient to convict the prisoner of a homicide, with further evidence that the prisoner, in a wagon, followed the deceased, a woman, who was walking, stopped his wagon for an hour near the place the homicide occcurred, from which during that time female screams of terror were heard; several days thereafter the body of the deceased was found, her throat cut with a razor or knife, with wounds upon her face evidently made by a stick or club, with blood on it; indication that a knife had been wiped on leaves or bushes; that the body had been dragged along the ground, and that the woman's clothes were disarranged and so arranged as to indicate rape, etc.: *Held*, sufficient evidence of deliberation and premeditation to sustain a verdict of murder in the first degree, there being no evidence of a quarrel between the prisoner and the deceased, or that they were acquainted. *Ibid.*

11. *Homicide — Criminal Law—Prisoner—Voluntary Witness—Statutes—Circumstances.*—While the failure of the prisoner charged with homicide to voluntarily take the witness-stand will not create a presumption against him, the fact that he did not testify, under the circumstances of this case, was a circumstance, though not evidence, which with the evidence introduced may have some weight with the jury as to the nature of what occurred in bringing in a verdict of guilty of murder in the first degree. *Ibid.*

12. *Homicide—Murder—Robbery—Identified Money — Evidence.*—Where the prisoner is tried for the murder of the custodian of a safe which had been robbed, testimony of a witness as to a mended bill which had been deposited therein competent for the purpose of identifying a similar bill found on the prisoner, and testimony that the

HOMICIDE—*Continued.*

bill looked like the same one is either competent in corroboration or harmless. *S. v. Cain*, 825.

13. *Same—Motive.*—Where a safe has been robbed and its custodian killed, it is competent to show that the prisoner was in need of money which he knew was kept therein to show motive. *Ibid.*

14. *Homicide—Murder—Evidence—Circumstance.*—Evidence in this case is held sufficient to sustain a verdict against the prisoner of murder in the first degree, and testimony that some unidentified person was seen at night near the place of the crime on a mule resembling that owned by the prisoner was, with the other evidence, a circumstance to be considered by the jury. *Ibid.*

HOSPITALS. See Physicians, 1.

HUSBAND AND WIFE. See Limitation of Actions, 11; Principal and Surety, 1.

1. *Husband and Wife—Criminal Law—Evidence—Witness—Third Party.* A witness may testify to a conversation between husband and wife, on the trial of the former for a criminal offense, tending to incriminate him occurring at the time of the arrest and in the presence and hearing of the witness. *S. v. McKinney*, 784.

2. *Same—Spirituous Liquors—Sale.*—Where there is sufficient evidence of the possession of more than a gallon of spirituous liquor in the defendant's possession, it is competent for a witness to testify that in his presence at the time of the arrest the prisoner's wife said to the prisoner that she had repeatedly told him about selling whiskey, to which he told her to shut her mouth. "he would attend to his own business," the reply being in the nature of a rebuke and not a denial and evidence of unlawful purpose of sale. *Ibid.*

3. *Husband and Wife—Abandonment—Instructions—Willful — Criminal Law—Statutes.*—Where the husband is indicted for abandonment under the provisions of Revisal, sec. 3355, there is no reversible error in the charge of the court for omitting the word "willful" in one part thereof when he has elsewhere repeatedly instructed the jury that in order to convict the abandonment must have been willful, which must be proved beyond a reasonable doubt. *S. v. Taylor*, 833.

IDENTIFICATION. See Contracts, 12; Constiutional Law, 12.

ILLEGAL. See Contracts, 1, 3.

ILLUSTRATIONS. See Evidence, 28.

IMPRESSIONS. See Evidence, 34.

IMPROVEMENTS. See Trusts and Trustees, 5.

INCRIMINATION. See Evidence, 12, 14, 15.

INDEMNITY COMPANIES. See Principal and Surety, 4.

INDEPENDENT CONTRACTORS. See Principal and Surety, 4.

INDEXING. See Deeds and Conveyances, 5, 6.

INFANTS. See War, 2; Negligence, 6.

Infants—Contracts—Deeds and Conveyances.—The deed of an infant is only voidable, and a mortgage on his lands must be repudiated by him within a reasonable time after he reaches his majority or he will be deemed to have ratified it, and after three years it will become valid and binding. *Hogan v. Utter*, 332.

INJUNCTION. See Stock Law, 1; Elections, 1; Municipal Corporations, 5.

1. *Injunction—Title of Lands—Admission—Partial Recovery—Damages—Principal and Surety.*—Where defendant, enjoined from cutting timber on the lands in controversy, admits the title of the plaintiff to the lands covered by his grant or deed, but the location of the lands thereunder is the disputed question, upon order dissolving the injunction as to a part of the *locus in quo*, the defendant is entitled to the damages he may have sustained by reason of having been wrongfully enjoined from cutting the timber, etc., on that part and to judgment accordingly against the plaintiff and his surety on the injunction bond. Revisal, sec. 818. *Davis v. Fiber* Co., 25.

2. *Injunction — Equity—Cloud on Title—Statutes—Corporations—Public Utilities.*—The plaintiff corporation perfected its right under its charter provisions to acquire lands for the purpose of generating electricity for public use by water-power, which was being wrongfully and seriously interfered with by a rival corporation that had not acquired the right: *Held*, the equitable remedy by injunction was available by the plaintiff; and *Held further*, that such relief was proper under our statute, as construed by this Court, to remove a cloud upon title to real property. Revisal, sec. 1589. *Power Co.*, 670.

IN PARI DELICTO. See Contracts, 2.

IN PARI MATERIA. See Statutes, 1.

INSOLVENCY. See Partnership, 1; Corporation, 9.

INSTRUCTIONS. See Appeal and Error, 1, 19, 22, 23, 25, 29, 30, 32, 35, 43; Negligence, 2, 8, 11; Ejectment, 3; Animals, 1; Evidence, 9, 28; Vendor and Purchaser, 3, 4; Courts, 2, 6; Assignment for Benefit of Creditors, 3; Tax Deeds, 1; Railroads, 9; Master and Servant, 7, 9; Contracts, 20; Spirituous Liquors, 2; Intoxicating Liquors, 1; Bigamy, 3; Criminal Law, 3, 4, 9, 14; Homicide, 8; Larceny, 3; Burglary, 2, 3; and Wife, 3.

1. *Instructions—Deeds and Conveyances—Title—Adverse Possession.*—In an action to recover land where there is evidence that defendant had been in adverse possession under color of title for a sufficient time, and the jury has so found under proper instructions from the court, it is not error by the judge to treat as invalid a deed with which the defendant has not connected his paper title. *Simmons v. Lumber Co.*, 232.

2. *Instructions—Verdict Directing—Tort Feasors.*—Where there is evidence tending to show that one of several joint tort feasors has compromised with the damaged person for a separate and independent tort, it is error for the trial judge to instruct a verdict, in an

INSTRUCTIONS—*Continued.*

action against another of the tort feasors, that such compromise operated as a release to the defendant in the action. *Slade v. Sherrod*, 346.

3. *Instructions—Evidence — Contributory Negligence—Rule of Prudent Man.*—Where the evidence in an action to recover damages for the alleged negligence of the defendant is sufficient to establish contributory negligence on the plaintiff's part, if so found by the jury, it is reversible error for the trial judge to add to an instruction containing the facts showing such negligence, that they should find for the plaintiff if they found that he acted as a reasonably prudent man under the circumstances. *Hinson v. Telegraph Co.*, 132 N.C. 466, cited and applied. *Cohoon v. Davis*, 145.

4. *Instructions—Charge as a Whole—Appeal and Error—Instructions.*—A charge by the court to the jury should be construed as a whole, each part in connection with the others, and if correct when so construed, error assigned as to one portion thereof, separately construed, will not be upheld on appeal. *Brown v. Mfg. Co.*, 201.

5. *Instructions—Contentions—Tax Deeds—Deeds and Conveyances—Appeal and Error.*—Where the plaintiff has permitted the lands in controversy to be sold for taxes, and the defendant claims under the tax deed, it is not error for the court to forbid the defendant's counsel to argue to the jury that neither the plaintiff nor his ancestor had paid anything for the land. *McLaurin v. Williams*, 291.

6. *Instructions—Contentions—Appeal and Error—Objections and Exceptions.—A statement by the court of the contention of a party properly* arising in the controversy is not error and will not be considered on appeal when not excepted to at the time. *Ibid.*

7. *Instructions—Colored Persons—Fair Trials—Appeal and Error.*—A charge to the jury, where one of the parties is a white and the other a colored man, that they should give the litigant a fair and impartial trial regardless of color is not erroneous. *Ibid.*

8. *Instructions—Trials—Requests — Contracts—Options—Acceptance — Evidence—Omissions.* — Where the evidence is conflicting as to whether the terms of an option without consideration to sell lands given to an agent for that purpose upon commission were withdrawn before acceptance, the question is one for the jury under proper instructions from the court; and where the court instructs the jury that it would be binding if the agent had procured a purchaser who was at all times ready, able and willing to purchase the property upon the stated terms, it is reversible error for him to omit or refuse to charge that the defendant would not be bound by his option if he withdrawn it before its acceptance. *Real Estate Co. v. Moser*, 256.

9. *Instructions—Trials—Evidence* — A correct request for instruction which is not supported by the evidence is properly refused. *Ibid.*

10. *Instructions—Evidence—Negligence—Prayers for Instructions.* — A modification of defendant's request for instruction in a personal injury negligence case, so as to incorporate other negligence acts of defendant, the evidence tended to show and omitted from the request is proper. *Spittle v. R. R.*, 497.

INSTRUCTIONS—*Continued.*

11. *Instructions—Negligence—Concurring Negligence — Prayers for Instruction.*—Where the evidence tends to show concurring negligence of the defendant in a personal injury negligence case, defendant's request for instruction which omits this phase of the controversy is properly refused. *Ibid.*

12. *Instructions—Evidence—Questions of Fact—Prayers for Instruction.* A request for instruction is properly refused in a personal injury negligence case when erroneously based upon a conclusion of law instead of an issue of fact, or upon a principle of law unsupported by the evidence. *Ibid.*

13. *Instructions—Negligence—Issues—Trials.*—The issues in this case as to defendant's negligence and the last clear chance are *Held* to include an inquiry as to the proximate cause of the injury complained of and to require instruction thereon under the evidence. *Lea v. Utilities Co.*, 460.

14. *Instructions—Negligence—Proximate Cause—Appeal and Error.*—The error of the trial judge in his charge to the jury in failing to instruct upon the principle of the proximate cause of the defendant's negligence involved in an action for damage is not cured, in construing the charge as a whole by a definition of negligence and proximate cause stated in the beginning thereof, without explanation of the relation of the one to the other and its application to the evidence. *Ibid.*

15. *Instructions—Intimation of Opinion—Ultimate Facts.*—As to whether a fact is sufficiently proven by the evidence is within the province of the jury to determine, and upon which the court may not intimate an opinion, Revisal, sec. 525; and this inhibition extends not only to the ultimate facts, but to all the essential inferences of fact arising from the testimony upon which the ultimate facts necessarily depend. *Phillips v. Giles.* 410.

16. *Same—Limitation of Actions—New Promise — Writing—Signature.* Where an acknowledgment of a debt contained in a writing purporting to have been signed by the debtor, is relied upon to repel the bar of the statute of limitations as a new promise to pay, in an action thereon, and there is evidence that the signature was in the handwriting of the deceased debtor, the question as to whether the debtor signed it was an inference of fact for the jury to determine upon the evidence, and a charge by the court that the jury find the issue in the affirmative if they found the facts to be as testified is an expression of opinion on the ultimate fact to be proved, prohibited by statute, and constitute reversible error. Revisal, sec. 535. *Ibid.*

17. *Instructions—Evidence—Peremptory — Appeal and Error.*—An instruction based upon the findings of the jury upon unconflicting evidence is not objectionable as peremptory. *Cole v. Boyd*, 556.

18. *Instructions—Evidence—Negligence—Contributory Negligence—Proximate Cause—Appeal and Error.*—Where there is evidence tending to show that the plaintiff's intestate was killed by the negligence of the defendant railroad company in striking him with a locomotive mov-

INSTRUCTIONS—*Continued.*

ing along its track, without proper lookout or signals, or warnings of its approach, and also evidence that the intestate, by the observance of proper care, could have nevertheless avoided the injury: *Held*, reversible error for the court in his charge to the jury to make the answer to the issue of negligence solely depend upon the question as to the proper lookout or warnings of the engine's approach and omit to charge them upon the principle of proximate cause. *Davis v. R. R.*, 648.

19. *Instructions—Evidence—Contracts.*—The plaintiff contracted with the defendant to cut and deliver to it a certain quantity of cordwood on gondola cars to be procured by him from a railroad, delivered to the defendant, operating a logging road, and in turn to be delivered by it to the plaintiff. There was evidence tending to show, and *per contra*, that the plaintiff was damaged on account of the defendant's using these cars for other purposes: *Held*, an instruction to the jury was erroneous and to defendant's prejudice which imposed a duty on it to furnish to the plaintiff all of the gondola cars it had received from the railroad and not confirming the question to the cars the plaintiff had procured from the railroad company. *Walls v. Spruce Co.*, 662.

20. *Instructions—abandonment—corporations—charters* — The charge of the court to the jury in this case upon the law of abandonment, when construed as a whole, is held to instruct them that the period of delay in which no work was done by the plaintiff corporation in acquiring land for public use was only evidence of abandonment of its charter rights, which could not have misled the jury, and was not erroneous. Whether the defense of abandonment is open to the defendant under the evidence in this case, *Quare? Power Co. v. Power Co.*, 669.

21. *Instructions—Intoxication—Appeal and Error.*—Where the defendant on trial for murder in the second degree has been convicted of manslaughter and has received full benefit of the defense of intoxication under the court's instruction, a reference therein to unconsciouness by voluntary drunkness for the purpose of illustrating the charge will not be held as error. *S. v. Davis*, 724.

22. *Instructions—Contentions—Appeal and Error—Objections and Exceptions—Harmless Error.*—Where upon trial of a criminal action the judge has properly charged the jury on the presumption of prisoner's innocence and the burden of proof required of the State, his statement, if erroneous, of defendant's contention, not properly objected to, that the question of prisoner's identification arose from a mistake of the prosecutrix and not from false testimony, is not reversible error. *S. v. Neville*, 731.

23. *Instructions—Conflicting Charge—Intoxicating Liquors — Burden of Proof—Appeal and Error.*—A charge of the court to the jury erroneously requiring the defendant to show that his possession of a gallon or more of spirituous liquor was not for forbidden purposes, several times repeated, is not cured by an instruction elsewhere therein correctly given, and the conflicting instructions constitute reversible error. *S. v. Bean*, 748.

INSTRUCTIONS—*Continued.*

24. *Instructions—Singling Evidence.*—The mere calling the name of a witness by the judge in reciting the contention of the parties is not objectionable as singling out the testimony of a witness when the appellant's contentions are fairly stated at length, free from bias. *S. v. McIver*, 762.

25. *Instructions—Courts—Expression of Opinion.*—Reversible error will not to be found for expression of opinion on the evidence by the trial judge when he refers to certain evidence as a fact as testified to by a witness and so fully understood by the jury, and not as a statement made by the court that such evidence had been established as a fact. *S. v. Griffin.*

26. *Instructions—Criminal Law—Several Defendants.*—Where the judge instructs the jury that they could find any one of several defendants on trial for larceny, or any two or all three guilty, or they may render a verdict of not guilty as to all of them, it is not objectionable as an instruction to find them all guilty, if they so found one of them. *S. v. Ford*, 798.

INSURANCE. See Contracts, 16, 21; Fraternal Orders, 1, 3.

1. *Insurance — Beneficiary—Policies—Contract—Vested Interest*—The beneficiary designated in an ordinary life policy or a life, accident and health policy of insurance has a vested interest therein which, in the absence of stipulation or condition affecting it, cannot be altered or destroyed without his consent. *Walser v. Insurance Co.*, 350.

2. *Same—Stipulations—Elections—Payment to Others—Good Faith*—A stipulation incorporated into a life, accident and health insurance policy appearing on the back thereof and referred to on its face as affecting the rights of the named beneficiary, permitting the insurer to pay the loss, among others, to the brothers and sisters of the deceased, etc., is for the lawful and desirable purpose of saving cost of administration and expense of contest among conflicting claimants; and where the insurer in good faith has made payment to the brothers and sisters of the deceased, who had incurred expenses in consequence of his last illness and his burial, its election will not be disturbed in favor of the wife, the named beneficiary, who had neglected him. *Ibid.*

3. *Insurance, Fire—Policies—Contracts—Stipulations.*—The rule that contracts of fire insurance are construed against the insurer in favor of the insured is not changed by the adoption of the standard statutory form, and ambiguous terms and phrases therein are resolved in favor of the latter; and where two interpretations are permissible the one which without violence to the terms employed will sanction the claim and cover the loss will be adopted. *Smith v. Fire Ins. Co.*, 314.

4. *Insurance, Fire—Policies—Contracts—Forfeitures* — The courts look with disfavor upon interpretating a contract of fire insurance to effect a forfeiture, and a provision in such policy which might avoid it cannot have this effect if its violation has in no way contributed to a loss thereunder, the subject of the action. *Ibid.*

INSURANCE—*Continued.*

5. *Same—Lumber—Clear Space Clause—Damages—Woodworking Enterprise—Sawmills.*—Where the policy of insurance on lumber against fires provides that the policy would be void unless a continuous clear space of 200 feet shall be maintained between it and "any woodworking establishment or drykiln," excepting tramways and the transportation of lumber across such space; and in action to recover damages for the loss of the lumber it is shown that the required space was not kept between it and a sawmill operated by steam, but that the plant had been shut down for several days in anticipation of moving it elsewhere, and the fire causing the damages had originated elsewhere without negligence on the part of the insured; *Held*, the clause referred to does not invalidate the policy or prohibit recovery thereunder. *Semble*, a sawmill is not a woodworking establishment in contemplation of the policy. *Ibid.*

6. *Insurance—Fraternal Orders — Pleadings — Evidence.*—Where the plaintiff sues to recover on a membership life insurance policy on her husband, alleging the loss of the policy, her inability to find it, and that her husband had been dropped on the defendant's roll at the time of his death without charge or cause and against his protest, is unavailable without proper allegation and proof of the lost policy, that recovery was not barred by the contract or lapse of time, and that he had illegally been dropped, and had regularly tendered his fees. *Phillips v. Junior Order*, 133.

7. *Insurance— Fraternal Orders— Pleadings— Demurrer Ore Tenus.*— Where the wife of a deceased insured brings action individually and not as administratrix to recover upon the life insurance policy of her husband she must allege that she was the beneficiary named therein, or the action will be dismissed *ore tenus*. *Ibid.*

8. *Insurance, Life—Assessment Companies—Assessments Increased—Policies—Contracts.*—A provision in the policy of a purely mutual assessment life insurance company that the insurer has the authority to increase the assessment fixed in the policy itself, when necessary to pay death claims, in accordance with the actuary's table of mortality, or as the mortality experience of the company may require, is a valid defense in an action by the insured to recover the assessments he had theretofore paid, on the ground that his assessment had been raised, when it is shown that such increase was in accord with the terms of the policy; and the insurer is not required to give previous notice of the increase in the assessment. *Richardson v. Ins. Co.*, 714.

INTENT. See Deeds and Conveyances, 1, 3, 9, 17; Wills, 1, 16, 26; Estates, 7, 11; Burglary, 1, 3.

INTEREST. See Vendor and Purchaser, 1; Boundaries, 2; Wills, 6; Evidence, 18; Estates, 5; Corporations, 13.

INTERPRETATION. See Deeds and Conveyances, 9; Wills, 15, 16, 20.

INTESTACY. See Wills, 7.

INTIMATION OF OPINION. See Instructions, 15.

INTOXICATING LIQUORS. See Instructions, 23.

Intoxicating Liquors—Possession—Statutes—Prima Facie Case—Presumptions—Burden of Proof.—Upon a trial for violating the prohibition laws of the State, when evidence is conflicting as to whether the defendant had in his possession at any one time a gallon or more of spirituous liquor, made *prima facie* evidence of its violation by chapter 44, Laws of 1913, the presumption of innocence remains with the defendant throughout, with the burden of the State to show the fact of the possession or of the forbidden purpose; and a charge by the court that the defendant must prove to the satisfaction of the jury that he did not have it for sale, if he had it in his possession, is reversible error. *S. v. Bean*, 748.

INTOXICATION. See Homicide, 2; Instructions, 21.

ISSUANCE. See Statutes, 2.

ISSUANCE AND ANSWERS. See Appeal and Error, 20.

ISSUES. See Alimony, 2; Judgment, 5; Appeal and Error, 18, 19; Master and Servant, 6; Instructions, 13; Criminal Law, 14.

Issues—Deeds and Conveyances—Mental Incapacity.—An issue which sets out the date of the deed with inquiry as to the grantor's sufficient mental capacity to execute the deed of that date is sufficient in form and definiteness as to the time of such capacity to sustain a judgment in plaintiff's favor. *Burns v. Burns*, 447.

JOINDER. See Removal of Causes, 7.

JUDGE. See Courts, 7, 8, 9.

JUDGMENT. See Drainage Districts, 1, 2, 3, 4; Attorney and Client, 1; Estoppel, 1; Appeal and Error, 8, 9, 15, 34; Principal and Agent, 1; Attachment, 1; Alimony, 6, 7; Habeas Corpus, 2; Limitation of Actions, 5; Divorce, 1; Evidence, 30; Principal and Surety, 4; Clerks of Court, 1, Homestead, 1; Deeds and Conveyances, 15; Bigamy, 1.

1. *Judgment—Consent—Partnership—Motion to Set Aside—Laches.*—A member of a partnership against which a consent judgment has been entered in open court, in his absence with the approval of another member of the firm, is charged with knowledge thereof, and his motion to set it aside will be barred by his laches in failing to act thereon, in this case for over seven years. *Chemical Co. v. Bass*, 427.

2. *Judgments—Estoppel—Estates—Tenant for Life.*—Where the right to compensation for betterments placed by the life tenant upon lands has been adjudged against him, or that he "is not entitled to a sale of the land to collect the improvements put thereon by him," the judgment reciting that the "cause is heard by consent on the pleadings, report of commissioner, and other records," with leave to plaintiff to amend his complaint, which was not done, with exception to the judgment appealed from but not perfected; *Held*, the judgment is conclusive between the parties and operates as an estoppel in another action between them upon the same subject-matter. *Northcott v. Northcott*, 148.

3. *Judgments—Estoppel—Nonsuit—Appeal and Error.*—Where the court has by consent considered the action upon the evidence and the plead-

JUDGMENT—*Continued.*

ings and enters judgment therein for defendant as if upon demurrer, which is excepted to without perfecting the appeal, in another action upon the same subject-matter between the parties, it is *Held*, the judgment so entered is equivalent to one of nonsuit under our statute. *Ibid.*

4. *Judgments—Extraneous Matters—Excuse—Appeal and Error—Actions.* Where judgment has been excepted to and the appeal not perfected, the appellant in another action involving the same subject-matter may not dispute the finality and conclusiveness of the judgment by showing he had another cause of action which he had not brought forward. *Ibid.*

5. *Judgments—Negligence—Issues—Answers.*—Where damages sought to be recovered against a father and son for a wrongful death are apparent from the pleadings and trial as depending upon the negligence of the son, running an automobile at the time of the injury with the permission of the absent father, and the jury have found by their verdict that the son was not negligent, without answering the issue as to the negligence of the father, a judgment in favor of them both is properly entered. *Taylor v. Stewart*, 199.

6. *Judgment—Estoppel—Estates—Contingent interests—Statutes.*—A former action determined before the enactment on the subject by the Legislature, holding that contingent remainders in lands, etc., cannot be sold unless all persons who may by any possibility be interested, united in such decree, cannot estop the parties to proceedings thereafter brought under the provisions of the Statute, Pell's Revisal, sec. 1590, authorizing the judicial sale of property, or portions thereof, when there is a vested interest with remainder over to persons not in being, or when the contingency has not yet happened, etc. *Pendleton v. Williams*, 248.

7. *Judgments—Pleadings—Demurrer—Estoppel.*—A judgment sustaining a demurrer to the pleadings upon the merits, while it stands unreversed, is conclusive as an estoppel in another action between the same parties upon the same subject-matter. *Bank v. Dew*, 79.

8. *Judgments—Appearance—Trials—Default—Attorney and Client—Laches—Motions.*—The plaintiff allowed the return term of court to pass without filing complaint, and also negligently delayed filing reply after the answer, alleging a counterclaim had been filed. The defendant's attorneys were nonresident of the county, but practitioners therein, and repeatedly informed their client that no advantage could be taken by plaintiff, and they knew that the case would not be reached, according to the usual setting of the trial calendar, until a year or more thereafter. The reply was filed near the end of a term, the case specially set by the judge and called therein, but continued to a fixed time at the next term with order to notify defendant's attorneys. The only notification was by sending a copy of the calendar by mail in an unsealed envelope, showing the setting thereon of the case in question. A meritorious defense being shown on defendant's motion to set aside the judgment consequently rendered by default, it is *Held*, the action of the trial court in setting aside the judgment for excusable neglect was not erroneous; and even if the defendant's

JUDGMENT—*Continued.*

attorneys were in laches, it would not bind the defendant, who had shown himself free therefrom. *Grandy v. Products Co.*, 512.

9. *Judgments—Default—Terms of Court—Orders—Clerk of Court.*—A judgment by default for the want of an answer must be rendered in term; and where, in an action to recover land, the court enters an order that the clerk enter judgment for plaintiff, if the defendant does not answer and file justified defense bond within ten days after adjournment for the term, the judgment so entered after the term by the clerk is a nullity and unenforcible by writ of possession, though the judgment was duly signed in term and attached to the order. *Puette v. Mull*, 535.

10. *Judgments—Bills and Notes—Collateral Security—Cash Payments—Principal and Surety.*—In an action against an administrator to cancel a note, the plaintiff had given to the intestate, it appeared that the intestate debt to another payment of the plaintiff's debt to another, and had taken the note secured by a mortgage as collateral security, together with a certain sum of money. The intestate paid the debt, applying the money thereto; *Held:* a judgment was properly ordered in the defendant's favor for the difference betweeen the amount of the cash payment and the actual amount of the indebtedness which the intestate had paid. *Whisnant v. Price*, 611.

JUDICIAL SALES. See Estates, 1, 2, 5.

JURISDICTION. See Ejectment, 1; Justice of the Peace, 1; Courts, 1, 5; Removal of Causes, 5, 6; Contempt, 6.

JURORS. See Courts, 10; Mistrials, 1, 2; Appeal and Error, 48.

1. *Jurors—Grand Jury—Constitutional Law—Number of Jurors—Statutes—Courts.*—Where the jurors are regularly drawn for a two weeks term of court, Revisal, sec. 1959, but it is held only for the second week and by a different judge commissioned thereto by the Governor, it is proper for the presiding judge to use the second week jurors for the grand jury, though but 16 in number, without requiring that their names be again put in a hat and drawn therefrom by a child under 10 years of age; and it will be presumed, nothing to the contrary appearing, that the judge had satisfactorily questioned them as to their qualifications. *S. v. Brittain*, 143 N.C. 689, cited and applied. The constitutional requirements as to the requisite number of grand jurors and its history discussed by CLARK, C.J. *S. v. Wood*, 809.

2. *Jurors—Selection—Objection to Jurors.*—Defendants in a criminal action have no right to select a jury, but only to object to jurors, which applies both to grand and petit juries. *Ibid.*

JUSTICE OF THE PEACE. See Ejectment, 1.

Justices of thee Peace—Jurisdiction—Ejectment—Landlord and Tenant—Equity—Option—Acceptance.—Where it appears in an action of ejectment that the plaintiff had leased lands to the defendant, and under a writing containing an option to purchase on certain terms within a stated time, and the option, if exercised at all, had been done so thereafter, about a week in this case, the defendant has no such in-

JUSTICE OF THE PEACE—*Continued.*

terest or equity in the lands as will deprive the justice's court of its jurisdiction. *Jerome v. Setzer*, 392.

KILLING. See Animals, 1.

KNOWLEDGE. See Trust and Trustees, 6.

LACHES. See Appeal and Error, 3, 5; Judgment, 1, 8; Clerks of Court, 2.

LANDS. See Costs, 1, 2; Wills, 7, 23; Contracts, 12, 13; Evidence, 17 18, 19, 20; Mortgages, 7; Corporations, 13.

LANDLORD AND TENANT. See Ejectment, 1; Justices of the Peace, 1.

1. *Landlord and Tenant—Lease—Option—Acceptance—Contract.*—A contract for the lease of lands giving the lessee the privilege to buy within a certain specified time upon a partial payment on the purchase price of so much cash and the balance according to stated terms is a lease with an option to purchase, which option must be exercised within the time stated and in accordance with its terms, and creates no interest in the property itself unless and until such is accepted accordingly or sufficiently waived by the optionee. *Jerome v. Setzer*, 392.

2. *Landlord and Tenant—Leases—Fraud—Title.*—Where the plaintiff has been in possession of the lands in dispute for twenty-three years and continues therein, and has executed a lease thereof to the defendant, it may be shown in evidence that the defendant induced the lease by fraud and misrepresentation, and upon establishing this as a fact, the relation of landlord and tenant is unavailable as a defense. *McLaurin v. Williams*, 291.

3. *Landlord and Tenant—Evidence—Questions for Jury—Trials.*—Evidence that the defendant has induced the plaintiff, an ignorant colored man, to accept a lease of his own land upon defendant's representation that it was necessary to get a paper title to the lands after it had been sold for taxes, is sufficient upon the question of defendant's fraud and misrepresentation to take the issue to the jury. *Ibid.*

LARCENY.

1. *Larceny—Criminal Law—"Recent Possession"—Presumptions.*—The doctrine of recent possession, as applied under indictment for larceny, should be kept within proper limits, and a presumption of guilt will only apply when the possession is of such character as to manifest that the stolen goods came to the possessor by his own act or with his undoubted concurrence. *S. v. Ford*, 797.

2. *Larceny—Facts.*—The presumption of larceny from "recent possession" when it exists, is one of fact, and is stronger or weaker as the possession is more or less recent, and as the other evidence tends to show it to be exclusive or otherwise. *Ibid.*

3. *Same—Instructions—Trials.*—When "recent possession" is relied upon to convict for larceny, on a Saturday night, and there is evidence that the goods were found on Sunday in a warehouse at the rear of a store of a partnership of which one defendant was a member, and

LARCENY—*Continued.*

that a certain third person committed the theft at night with an unidentified person, under this and the further evidence of this case, it is *Held* that there was sufficient evidence for conviction; but, as there was evidence that the warehouse was readily accessible by others, and the store had been left in charge of a clerk, etc., it was reversible error for the trial judge to instruct the jury that the "recent possession" of the goods in the warehouse raised the presumption of guilt of the defendant, a member of the firm. The guilt of the other partner was not involved in the case. *Ibid.*

4. *Larceny—Evidence—Trials—Questions for Jury.*—Where the evidence in a prosecution for larceny, tends to show that one of the defendants with an unidentified person, took the goods at night and carried them away with the cart and horse of his codefendant and put them in a warehouse, where they were found the next day; that the cart was driven to the house of the codefendant, where both of them were carousing or drinking that night, etc., it is sufficient to sustain a verdict of conviction for them both. *Ibid.*

LEASE. See Landlord and Tenant, 1, 2; Trust and Trustees, 5, 6, 7; Trusts, 2; Criminal Law, 7.

LETTERS. See Contracts, 11; Evidence, 29; Appeal and Error, 26.

LIABILITY. See Contracts, 7; Principal and Agent, 1.

LIENS. See Tax Deeds, 1.

LIFE TENANT. See Estates, 5.

LIMITATIONS. See Deeds and Conveyances, 4; Estates, 6, 9.

LIMITATION OF ACTIONS. See Ejectment, 3; Pleadings, 2; Trusts, 8; Railroads, 6; Instruction, 16; Bills and Notes, 5.

1. *Limitation of Actions—Mortgages—Principal and Surety—Statutes.*—Where sureties on a note join in a mortgage on land in which they with the maker of the note hold the fee, the fact that the three-year statute bars the note does not prevent the mortgagee from foreclosing, the statute applicable being ten years after forfeiture of the mortgage, or after the power of sale became absolute, or after the last payment made thereon. Revisal, sec. 391 (3). *Jenkins v. Griffin*, 184.

2. *Same—Interpretation of Statutes—Prospective Effect.*—While formerly there was no bar to the execution of a power of sale contained in a mortgage of lands, mortgages then executed are made subject to the ten-year statute. Revisal, sec. 311 (3), by Revisal, sec. 1044. *Ibid.*

3. *Limitation of Actions—Trusts—Slaves—Title—Possession—Reentry—Ouster.*—Title to lands may be conveyed in trust to the use of those who may not lawfully hold it *sui generis*, and the statute of limitations will not begin to run against the remainderman in a devise in trust for the support of certain named slaves for life, until the death of the last survivor of them in favor of their heirs or assigns; and were it otherwise it would require a reentry and ouster in order to set the statute in motion, the claimants being in possession under the

LIMITATION OF ACTIONS—*Continued.*

will. The date of the emancipation of slaves discussed by CLARK, C.J. *Shaw v. Ward*, 192.

4. *Limitation of Actions—Color—Adverse Possession—Title—State.*—Evidence of necessary adverse possession and location of lands under color for thirty years is sufficient to take title out of the State; as, also, in this case, a grant from the State. *Canter v. Chilton*, 406.

5. *Limitation of Actions—Adverse Possession—Partition—Color—Boundaries—Judgments—Deeds and Conveyances.*—An entry upon and taking possession of lands under a judgment in partition proceedings constitute color of title, but it is necessary, in an action to recover lands, for the party thus claiming to introduce in evidence the petition or a description of the land thus entered; and where he has failed to do so and introduces a later and sufficient deed to show color, his adverse possession will only be considered from the later period. *Ibid.*

6. *Limitation of Actions—Adverse Possession—Color.*—Where the only disputed question in an action to recover lands is the dividing line betweeen two adjoining owners, depending upon the location of a controverted corner, the question of adverse possession under color does not arise. *Ibid.*

7. *Limitation of Actions—New Promise—Statutes.*—Revisal, sec. 371, does not change the character or quality of the acknowledgment or new promise theretofore required to repel the bar of the statute of limitations in an action on contract, except that the new promise should be "in some writing signed by the party to be charged." *Phillips v. Giles*, 409.

8. *Same—Implication of Law—Promise to Pay.*—In order to revive a debt which is barred by the statute of limitations, there must be an express unconditional promise to pay the same in writing or a written definite and unqualified acknowledgment of the debt as a subsisting obligation, signed by the debtor, etc., and from which the law will imply a promise to pay. *Ibid.*

9. *Same—Implication Repelled.*—Where the debtor has by a signed written instrument, unqualifiedly and definitely acknowledged the debt as his subsisting obligation, the law will imply a promise to pay it, and it is sufficient to repel the bar of the statute of limitations unless there is something in the writing to repel such implication. *Ibid.*

10. *Same.*—A paper-writing signed by a parent certifying that she owes her daughter a sum of money, in a stated amount, for moneys she had borrowed from her at various times, and stating the daughter was to have a certain sum of money from her estate, giving her reasons, is sufficiently definite to imply a promise to pay the amount of the debt, and as a new promise, to repel the bar of the statute of limitations. *Ibid.*

11. *Limitation of Actions—Deeds and Conveyances—Tax Deeds—Possession—Evidence—Husband and Wife.*—The right of action to recover lands under a tax deed is barred by the three-year statute of limitations; and where the evidence tends only to show that the wife was the purchaser and remained in possession with her husband, the owner, the latter of whom continued to exercise acts of ownership,

LIMITATION OF ACTIONS—*Continued.*

such possession does not, for its duration, suspend the operation of the statute or repel its bar to the wife's action brought after a delay of more than three years from her acquisition of the tax deed. *Jordan v. Simmons*, 537.

12. *Limitation of Actions—Vendor and Purchaser—Consignment.*—The statute of limitations began to run when the relationship between the parties became adverse, in an action by the vendor to recover for goods sold and delivered on consignment. *Lucas v. Hardin*, 719.

LIQUIDATION. See Corporation, 8.

LIVE STOCK. See Carriers of Goods, 3, 5; Carriers of Passengers, 1.

LOCAL LAWS. See Constitutional Law, 5.

LOGGING ROADS. See Railroads, 1.

LUMBER. See Insurance, 5.

LUMBER ROADS. See Railroads, 4.

MALICE. See Homicide, 3, 7.

MANDAMUS. See Drainage Districts, 2.

MANSLAUGHTER. See Automobiles, 3; Homicide, 7.

MANUFACTURE. See Spirituous Liquors, 1.

MARRIAGE. See Deeds and Conveyances, 4; Alimony, 1.

Marriage—Divorce—Residence.—Where the laws of another State require that a party seeking a divorce, there must be a residence of twelve months preceding the commencement of the suit, he may not obtain a *bona fide* domicile there by remaining a few days or weeks, but spending practically all of his time in this State. *S. v. Herron*, 754.

MARRIAGE LICENSE. See Register of Deeds, 1.

MASTER AND SERVANT. See Negligence, 4; Trials, 2; Commerce, 2, 4; Railroads, 11.

1. *Master and Servant—Employer and Employee—Pleadings — Negligence—Railroads—Demurrer Ore Tenus—Car Couplings.*—Where the complaint in an action to recover damages for a personal injury alleges that the defendant employer, an industrial enterprise, owned and operated cars on a railroaod siding, also so used by the railroad company, and while coupling cars, in the course of his employment furnished with a defective coupler, the plaintiff was compelled to kick the coupling with his foot, which was caught by a splinter and crushed, when his position rendered it impossible for him to signal the engineer of the railroad company to stop, etc.: *Held*, contributory negligence does not appear as a matter of law, and a demurrer *ore tenus* on the ground that the complaint does not set out a cause of action is bad. *Parks v. Tanning Co.*, 29.

2. *Master and Servant—Negligence—Evidence—Contributory Negligence—Assumption of Risks—Res Ipsa Loquitur.*—Where the plaintiff sues to

MASTER AND SERVANT—*Continued.*

recover damages for a personal injury caused by the alleged negligence of the defendant, and there is evidence tending to show that the injury was received while he was working, in the course of his employment, at defendant's planer of an old style, and that a safer machine had been approved and in general use for a number of years, which is so constructed as to prevent the injury complained of, the questions of negligence, contributory negligence and assumption of risks are for the determination of the jury, under the rule of the prudent man. As to whether the doctrine of *Res ipsa loquitur* applies to the facts of this case, *Quaere? Lynch v. Dewey Bros.*, 152.

3. *Master and Servant—Employer and Employee—Duty of Master—Safe Place to Work—Evidence—Negligence—Accident.*—The plaintiff, employed to assist in loading slabs upon railroad cars, conveyed to him for the purpose, upon a triangular "slide" 50 or 70 feet long, was injured by some of the slabs coming down the slide upon him unexpectedly, and in his action to recover damages of his employer there was evidence in his behalf that it was caused by a defective or knotted rope, operating a "tipple," used for the purpose of sending down the slabs when wanted for the purpose of loading; and in defendant's behalf that the plaintiff had been instructed and knew how to operate the rope controlling the "tipple," and that his injury was caused by his own negligence therein: *Held*, the court having properly charged the jury upon the law of negligence, contributory negligence, and the negligence of a fellow servant, the verdict in plaintiff's favor should be sustained under the rule that when a thing which causes injury is shown to be under the defendant's management and the accident would not ordinarily happen if proper care had been observed by him, it furnishes evidence of the defendant's negligence in failing to exercise the care required of him. *Cochran v. Mills Co.*, 169 N.C. 63, cited and applied. *Brown v. Mfg. Co.*, 201.

4. *Master and Servant—Negligence—Assumption of Risks—Contributory Negligence—Employer and Employee.*—The doctrine of assumption of risks by the servant engaged in a dangerous employment arises by contract, and does not embrace an injury received through the negligence of the master in failing to perform a distinctive duty that he owes to the servant therein engaged; and where through the negligence of a railroad company some of its box cars became loose and ran into its freight train, injuring the conductor thereon, evidence that the conductor was running his train without a headlight in violation of a statute, riding at the time in a caboose car which he had placed in front of the locomotive, and might not have been injured if it had been properly placed in the train, bears on contributory negligence to be considered by the jury in diminution of the damages under the Federal Employers' Liability Act. *Horton v. R. R.*, 472.

5. *Master and Servant—Negligence—Contributory Negligence—Statutes—Trespassers.*—The conductor on a railroad train does not become a trespasser to whom the company owes no duty except to refrain from willful injury by running his train without a headlight in violation of a statute. *Ibid.*

MASTER AND SERVANT—*Continued.*

6. *Master and Servant—Federal Employers' Liability Act—Damages—Dependents—Issues—Statutes.*—In an action to recover damages under the Federal Employers' Liability Act for the legal dependents of an employee suffering injury or death through the negligence of a railroad company while engaged in interstate commerce at the time of such injury, each of the beneficiaries coming within its provisions is entitled to recover the pecuniary benefit he or she may have sustained from the negligent act, and issues as to the amount as to each, should be submitted to the jury. Our State Statutes, Revisal, secs. 59-60, relating to a recovery by a personal representative of the deceased for a wrongful death, have no application. *In re Stone*, 173 N.C. 208, cited and distinguished, and the dictum therein overruled. *Ibid.*

7. *Master and Servant—Federal Employers' Liability Act—Instructions—Damages—Appeal and Error.*—Upon the measure of damages to be awarded to the dependent children of an employee of a railroad company, killed by the negligence of the company while he was engaged in interstate commerce, a charge is proper that the jury should award as to each such an amount as the deceased would reasonably be expected under all the facts and circumstances in the case to have contributed to the maintenance and education of the child, the loss sustained being peculiarly its own and including a recovery for the loss of that care, counsel, training, and education which the child might, under the evidence, have received from the parent, and which only could be supplied by the services of another by compensation; and where it is necessarily implied from the language used, that it is limited to the minority of such children, it will not be held objectionable as not restricting the maintenance allowable to their minority. *Ibid.*

8. *Master and Servant—Employer and Employee—Federal Employer's Liability Act—Contributory Negligence—Evidence—Nonsuit—Trials.* Contributory negligence is not a defense under the Employers' Liability Act, and evidence thereof may not be regarded upon motion to nonsuit upon the evidence. *Davis v. R.R.*, 648.

9. *Master and Servant—Employer and Employee—Federal Employer's Liability Act—Damages—Contributory Negligence—Instructions.*—An instruction to the jury for the admeasurement of damages under the Federal Employer's Liability Act, where there is evidence of both negligence and contributory negligence, should follow the rule of proportion specified in the statute, or refer to the occasion for contrasting the negligence as a means of ascertaining what proportion of the full damages should be excluded from the recovery; and leaving it to the jury to determine otherwise the reasonableness of the deduction, is reversible error. *Ibid.*

MATURITY. See Contracts, 15.

MAYORS. See Public Officers, 6.

MEASURE OF DAMAGES. See Railroads, 8.

MEMORANDUM. See Mortgages, 11.

MENTAL ANGUISH. See Damages, 3; Telegraphs, 1, 5.

Mental Anguish—Negligence—Physical Injury.—Under allegations of the complaint in an action to recover damages for a physical injury caused by defendant's negligence, that plaintiff suffered certain serious injuries, from which he continues to suffer, etc., "great pain and distress," he may recover for actual suffering, both of mind and body, when they are the immediate and necessary consequence of the negligent injury. *Hargis v. Power Co.*, 31.

MENTAL CAPACITY. See Wills, 9, 12; Issues, 1; Deeds and Conveyances, 13.

MENTAL DISEASE. See Deeds and Conveyances, 14.

MERCHANDISE IN BULK. See Statutes, 3, 4.

MINOR SON. See Automobiles, 2.

MISAPPROPRIATION. See Trusts, 1; Appeal and Error, 6.

MISDEMEANOR. See Criminal Law, 7.

MISJOINDER. See Actions, 3; Demurrrer, 1.

MISREPRESENTATION. See Contracts, 21.

MISTRIALS. See Appeal and Error, 48.

1. *Mistrials—Murder—Homicide—Capital Felony—Jurors Withdrawn—Trial—Courts.*—In maintaining a fair and impartial trial, the court may withdraw a juror in the trial of a capital felony when it is necessary for exact justice to be done; and where a juror has, under a misunderstanding, told the solicitor, upon his examination, that he could convict in the first degree the prisoner upon trial for murder under circumstantial evidence, and after the jury had been impaneled he could not do so, and that it was his own fault that he had answered to the contrary, the court may withdraw a juror, enter a mistrial, impaneled another jury, and proceed to try the prisoner. It is not required that the court should wait until the introduction of the evidence and then make a mistrial by withdrawing a juror. *S. v. Cain*, 825.

2. *Mistrial—Murder—Homicide—Capital Felony—Appeal and Error—Findings—Juror Withdrawn.*—Where a mistrial in a capital felony has been properly made by the court, by withdrawing a juror, and thereupon another and impartial trial has been given, objection on appeal that the prisoner has been deprived of his plea of former jeopardy is untenable. *Ibid.*

MODIFICATION. See Alimony, 6; Drainage Districts, 4.

MONEY ORDERS. See Telegraph, 3.

MORTGAGEE. See Mortgages, 9, 15.

MORTGAGEE'S DEED. See Mortgages, 6.

MORTGAGES. See Ejectment, 2, 4; Costs, 3, 5, 6; Tenants in Common, 1, 2, 3; Limitation of Actions, 1; Principal and Surety, 2; Bills and Notes, 6.

1. *Mortgages—Title—Trusts.*—A mortgage of lands conveys to the mortgagee the legal title in trust for the security of his debt. *Weathersbee v. Goodwin*, 234.

MORTGAGES—*Continued.*

2. *Same—Default—Possession.*—A mortgagee of lands, or his assignee, after default by the mortgagor, is entitled to the possession, but accountable to the latter for the rents and profits thereof. *Ibid.*

3. *Mortgages—Powers—Sales—Notice—Statutes.*—Revisal, sec. 641, as to notices of sales of land, is construed to apply to sales under foreclosure of a mortgage by order of court and other judicial sales, and not to such notice when sale is made under the power contained in the mortgage itself, leaving the parties free to contract with reference to the notice thereof. The dictum in *Palmer v. Latham*, 173 N.C. 61, that the requirements as to advertising are directory only, is overruled except in its application to execution sales. *Hogan v. Utter*, 333.

4. *Mortgages—Sales—Powers—Notice—Advertisement—Statutes.*— Revisal, sec. 641, requiring notice under mortgage, etc., for thirty days is by express terms prospective in effect and is amended by the Laws of 1909, ch. 705, prescribing publication in a newspaper "once a week for four weeks"; therefore it does not affect mortgages made prior thereto coming under the provisions of Revisal, sec. 1042, requiring that whether advertised in a newspaper or otherwise, the sale "shall be advertised by posting a notice at some conspicuous place at the courthouse door," etc., for twenty days, etc. *Jenkins v. Griffin*, 184.

5. *Mortgages—Sales—Powers—Execution of Presumptions.*—While powers of sale under mortgage are closely scrutinized by the courts and held to the letter of the contract, the law presumes the regularity of the sale in the execution of such powers and places the burden of proof on the party claiming a failure of proper notice or advertisement to show it. *Ibid.*

6. *Same—Mortgagee's Deed—Recitals—Presumptions—Statutes.*—A recital in the mortgagee's deed to lands that the sale was duly advertised is *prima facie* evidence of its correctness; and *Held*, in this case, an advertisement of the sale under the power of the mortgage for thirty days at the courthouse door and three other public places, and a publication in a newspaper of four weeks, was a sufficient compliance with a provision in the mortgage requiring advertisement for "thirty days, or as the law directs." *Ibid.*

7. *Mortgages, Chattel—Real Estate—Lands.*—A written instrument creating a lien on crops to be raised on adequately described lands, to secure advancements made, with provision that should the crops be insufficient "said paper is to be considered a mortgage on his lands"; *Held*, the writing creates a lien on the land itself for the amount found to be due and unpaid, after the application of the proceeds of sale of the crops, and enforcible by judgment of foreclosure. As to whether the writing is an equitable or legal mortgage, *Quare? Semble*, the latter. *Ely v. Norman*, 294.

8. *Mortgages—Original Parties—Registration—Junior Mortgages—Priorities—Distribution.*—Where a paper-writing has the effect of a mortgage on lands, the question of proper registration as between the original parties is immaterial, but becomes necessary for consideration when a junior mortgagee under a registered mortgage is made a party to the action, and the question of priorities has arisen in the distribution of the proceeds of the sale. *Ibid.*

MORTGAGES—*Continued.*

9. *Mortgages—Tenants in Common—Division of Lands—Foreclosure—Rights of Mortgagee—Rights of Purchaser.*—Where a mortgagee sells lands under the power contained in the mortgage given by tenants in common, without suggestion of fraud or irregularity, the fact that subsequent to the execution of the mortgage and before the sale the mortgagors served the cotenancy by dividing the lands in no wise affects the rights of the mortgagee to his lien upon the whole land or that of the purchaser to receive his deed upon paying the amount of his bid. *Everhart v. Adderton*, 403.

10. *Mortgages—Foreclosure—Sales for Cash—Payment—Rights of Mortgagors.*—Where, according to the terms of the mortgage, the lands have been advertised and sold for cash, the fact that the mortgagee did not require the purchaser to pay his bid for nineteen days cannot, alone, advantage the mortgagor in his endeavor to set aside the sale. *Ibid.*

11. *Mortgages— Foreclosure— Auctioneer— Memorandum— Contracts—Rights of Purchaser.*—The purchaser at a sale under foreclosure under the power conferred in a mortgage of lands may enforce the contract and demand his deed upon payment of his bid after the auctioneer has signed the memorandum thereof. *Ibid.*

12. *Mortgages—Foreclosure—Purchaser—Mortgagee.*—The principle forbidding a mortgagee to buy in the lands subject to his mortgage has no application to a mortgagor's becoming the purchaser at the sale, in the former instance the mortgage remaining notwithstanding the sales thereunder. *Ibid.*

13. *Mortgages—Purchases by Mortgagee—Fraud—Presumptions—Burden of proof—Issues—Pleadings.*—Where the mortgagee takes by absolute deed a part of the mortgaged land from his mortgagor, fraud or duress is *prima facie* presumed, and in the latter's suit to redeem the mortgagee must allege and show that he paid full price and without oppression, and upon his failure to do so no issue as to such matter is raised. *Cole v. Boyd*, 555.

14. *Mortgages—Purchase by Mortgagee—Registration—Vendor of Mortgagee.*—A purchaser for full value after registration of the mortgage from a mortgagee who has since taken an absolute deed from his mortgagor acquires no superior right to the land than his grantee had. *Ibid.*

15. *Mortgages—Mortgagee—Outstanding Title—Additional Security.*—An outstanding title to lands afterwards acquired by the mortgagee is only an additional security to the mortgage debt. *Ibid.*

16. *Mortgages—Bills of Sale.*—A paper-writing conveying personal property, reciting that it is to better secure the payment of a debt, and upon its payment to be satisfied in the same manner as deeds may be canceled at law, though called a bill of sale by the creditor, is in effect a mortgage, and will be so regarded. *Sumner v. Lumber Co.*, 657.

17. *Mortgages—Personal Property—Registration—Attachment.* — A mortgage of personal property made to a nonresident must be registered in the county where the property is situated to have priority over the

MORTGAGES—*Continued.*

rights of attaching creditors of the mortgagor. *Hornthal v. Burwell*, 109 N.C. 10, is cited and distinguished. *Ibid.*

18. *Mortgages—Parol Evidence—Appeal and Error.*—Where a chattel mortgage has been introduced in evidence in a controversy to determine the rights of the mortgagee and attaching creditors, the exclusion of testimony in mortgagee's behalf tending to show that the parties intended the writing to be a mortgage, is harmless and not to the mortgagee's prejudice. *Ibid.*

19. *Same—Hearsay—Opinion.*—Testimony of a witness as to a conversation between himself and the mortgagee relating to a paper-writing put in evidence and appearing upon its face to be a mortgage, if otherwise competent, is hearsay and incompetent as substantive evidence, as is also the opinion of the witness as to the effect of the transaction. *Ibid.*

20. *Mortgages—Attachment—Priorities.*—The owner of an improperly registered mortgage of personal property in his possession holds it subject to the prior claims raising under attachment of the mortgagor's creditors. *Ibid.*

MORTGAGOR. See Mortgages, 10.

MOTIONS. See Appeal and Error, 3, 5, 8, 9, 33, 40; Judgment, 1, 8; Alimony, 6; Removal of Causes, 2; Pleadings, 7, 9, 12; Homestead, 1.

MOTION TO QUASH. See Criminal Law, 15.

MOTIVE. See Homicide, 13.

MUNICIPAL CORPORATIONS. See Statutes, 1; Courts, 1; Constitutional Law, 1, 6; Public Officers, 1, 2, 4, 6; Street Railways, 1, 3.

1. *Municipal Corporations—Cities and Towns—Election—Voting Places—Booths.*—Where it is admitted that no voter had been interfered with or prevented from voting a free ballot at a municipal election to change the charter it becomes immaterial that no place had been provided with booths in which the voters could retire to prepare their ballots. *Taylor v. Greensboro*, 423.

2. *Municipal Corporations—Cities and Towns—Charter—Amendments—Education—Taxation—Coordinate Government.*—An amendment by referendum made to a city charter under ordinance passed in pursuance of chapter 136, Public Laws 1917, and of the recent constitutional amendments creating a board of education with power to ascertain and certify the necessary amount of a tax necessary to maintain the schools to be levied by the town commissioners, does not create a separate and unrelated corporation, but a coordinate branch of the city government under the express and valid legislative power conferred. *Ibid.*

3. *Municipal Corporations—Cities and Towns—Charter—Amendments—Ballots—Elections.*—Where the question of amending a city charter in several respects are, under a valid ordinance, submitted to its voters upon ballots expressing the choice of the voter as either for or against the amendment, the forms of the ballots are sufficient. *Bank v. Win-*

MUNICIPAL CORPORATIONS—*Continued.*

ston, 158 N.C. 512, cited and distinguished. *Semble*, the method of submitting the question is regulated by the Legislature and not restricted by the Constitution. *Ibid.*

4. *Municipal Corporations—Cities and Towns—Bond Issues—Electric Lights— Water-works— Sewerage— Discretionary Powers— Repeal.*— Where the rights of third parties have not supervened, a present board of aldermen of an incorporated town, within their discretion, may revoke the action of a preceding board thereof, differently constituted calling for a valid issuance of bonds for an electric light, water-works and sewerage system, which discretion the courts may not supervise. *Lucas v. Belhaven*, 124.

5. *Municipal Corporations— Cities and Towns— Public Improvements— Bonds— Contracts— Condition Precedent— Injunction.*— Where a former board of aldermen of an incorporated town have passed resolutions for a bond issue for electric light, water-works, etc., systems, and have entered into a contract for their erection upon conditions that the bonds bring par, and pending an injunction against the action of the board its attorney delivers the bonds to purchasers thereof and allows, under his instructions, damages to the purchasers of $2,775 and expenses, etc.: *Held*, the contract for the erection of the various systems is unenforcible for failure of the conditions under which it was entered into and the pendency of the restraining order. *Ibid.*

6. *Municipal Corporations—Fire Regulations—Ordinances.*—An ordinance regulating the speed of street cars therein outside of the fire limits, requiring them to stop for the passage of fire engines going to a fire, etc., giving the firemen thereon the right of way upon the streets, etc., is a valid one. *Spittle v. R. R.*, 498.

7. *Municipal Corporations—Cities and Towns—Streets and Sidewalks—Surface Waters—Negligent Construction—Damages—Negligence.*—A municipal corporation is not ordinarily responsible in damages for the increase of water upon an abutting owner in regard to the flow and disposal of surface water incident to the grading and pavements of its streets, acting in pursuance of legislative authority, unless there has been negligence on its part which caused the damages complained of. *Yowmans v. Hendersonville*, 574.

8. *Same—Dedication of Streets—Powers Conferred.*—The right of a municipality to change the grade of its streets and improve them according to modern and generally approved methods passes to the municipality in the original dedication and may be exercised by its authorities as the good of the public may require, subject to the condition that it be exercised with proper skill and caution; and if, in a given case, or as it may affect the property of some abutting owner, there is a breach of duty in this respect causing damage, the municipality may be held responsible. *Ibid.*

9. *Municipal Corporations—Cities and Towns—Surface Waters—Negligence—Damages—Compensation.*—While municipal corporations may ordinarily pave and grade their streets without liability for an increase of surface water naturally falling on the lands of a private owner, where the work is properly done, they are not allowed, from this or other cause, to concentrate and gather such water into arti-

MUNICIPAL CORPORATIONS—*Continued.*

ficial drains and throw them on the lands of an individual owner in such manner and volume as to cause substantial injury to same without making adequate provisions for its proper outflow, unless compensation is made, and for a breach of duty in this respect an action will lie against them. *Ibid.*

10. *Municipal Corporations—Cities and Towns—Surface Waters—Drains—Connecting Pipes—Liability—Storms.*—In this action against a municipality for concentrating the surface water in grading and paving its street upon the land of an abutting owner to his damage, there was evidence tending to show that the city had placed a subsurface drain on the plaintiff's land, running beneath his dwelling, insufficient to carry off the water, and on the other hand that the injury was solely caused by insufficient and improperly laid connecting drain pipes placed by the plaintiff to carry off the water from his remaining land. The damages sought were caused by the rising of water in plaintiff's dwelling, etc.: *Held,* the defendant's liability depended chiefly upon whether the injuries sustained were likely to result and did result under and from defendant's negligence in placing an insufficient substance drain pipe, under the conditions presented, with regard to whether the defendant had made adequate provision for the surface water under all ordinary rains and storms likely to occur, or whether the injuries complained of were entirely caused by plaintiff's own default in negligently laying his connecting drains. *Ibid.*

11. *Municipal Corporations—Cities and Towns—Surface Waters—Negligence—Measure of Damages.*—Where a municipal corporation is liable in damages to the land of an owner abutting upon the street, caused by its negligence in failing to provide a sufficient drain to carry off the surface waters, a recovery may be had of such as may have directly resulted from the defendant's wrong, and all consequential damages which could reasonably be expected to occur, and did occur, under the conditions existing at the time. *Ibid.*

12. *Municipal Corporations—Surface Waters—Negligence—Damages—Duty to Minimize.*—Where a municipality has damaged the land of an abutting owner upon the street by reason of its failure to construct an adequate drain pipe to carry off the surface waters from the street, such owner is not required to minimize his damages by running a counter drain, or incur substantial expense in the protection of his property when it is largely experimental in its nature and might result in incurring liability to a lower proprietor. *Ibid.*

MUNICIPAL LIMITS. See School Districts, 1.

MUNICIPALITIES.

Municipalities—Cities and Towns—Charter—Amendments—Ballots—Elections—Schools—Taxation.—Upon a referendum by valid town ordinance to ascertain by ballot the will of the voters upon the question of an amendment to the charter to create a school board and increase the minimum rate of taxation for school purposes, the result in favor of the amendment will not be declared void because the ballots were small rectangular papers of two kinds, upon one being printed "For the proposed amendment to the city charter," and upon the other

MUNICIPALITIES—*Continued.*

"Against the proposed amendment to the city charter," the regulation in the existing charter as to the kind of ballot to be used being directory only. *Taylor v. Greensboro*, 423.

MURDER. See Homicide, 1, 7, 12, 14; Mistrials, 1, 2.

NECESSARY EXPENSES. See Drainage Districts, 2.

NEGLIGENCE. See Master and Servant, 1, 2, 3, 4, 8, 9; Mental Anguish, 1; Contracts, 6, 8, 10; Railroads, 1, 2, 4, 5, 9, 10, 11, 12, 13, 14; Principal and Agent, 1; Instructions, 3, 10, 11, 13, 14; Automobiles, 1, 2, 3, 4; Trials, 2; Judgments, 5; Trespass, 1; Street Railways, 1, 3; Damages, 3; Pleadings, 12; Telegraphs, 3; Municipal Corporations, 7, 9, 11, 12; Carriers of Goods, 3, 4, 5; Carriers of Passengers, 1; Appeal and Error, 29; Physicians, 1.

1. *Negligence—Imminent Peril—Contributory Negligence.*—Where one is employed in a tent on a mountainside as a blacksmith with other employees of defendant cutting trees thereon, and the evidence shows that one of these trees came down and a broken limb pierced the tent, broke the anvil, and another employee therein across from the anvil, which was in the way of plaintiff, safely escaped by running; that a limb struck the ground at a place from which the plaintiff had jumped; that he only received warning when the tree was a distance of about 20 feet, and that he was running away so fast he could not turn, and his impetus carried him over a railroad dump, which caused the injury: *Semble*, the plaintiff, under such circumstances, could not be considered guilty of contributory negligence. *Hargis v. Power Co.*, 31.

2. *Same—Rule of Prudent Man—Instructions.*—A charge of the judge to the jury must be construed as a whole, and, if so construed, it is a correct statement of the law applicable to the evidence arising under the pleadings, it will not be held as erroneous because unconnected fragments thereof, taken separately, may appear to be erroneous; and where exception is taken to a fragment of the charge, because of the judge's failure to charge the rule of the prudent man, this fragment will be construed with a preceding action, with which it is connected, and which states the rule of law contended for by the appellant. *Ibid.*

3. *Negligence—Measure of Damages.*—The rule for the measure of damages for a personal injury negligently inflicted was correctly charged by the judge to the jury under the decisions of *Wallace v. R. R.*, 104 N.C. 442; *Rushing v. R. R.*, 149 N.C. 162. *Ibid.*

4. *Negligence—Legal Duty—Act of God—Railroads—Cars as Dwelling—Storms—Master and Servant.*—A railroad company which has permitted an employee the use of its box cars at a siding as a residence for himself and family owes him no legal duty to have the cars moved to a place of safety upon the approach of a storm which floods the cars with water and destroys his household effects, and consequently is not liable for damages, they being caused by the act of God, for which the company is not responsible. *Matthews v. R. R.*, 35.

5. *Negligence—Personal Injury—Physician—Duty of Servant.*—The plaintiff cannot recover for his pain and suffering solely caused by his

NEGLIGENCE—*Continued.*

own neglect to call in a physician or his inattention to the wound, in his action to recover damages for a personal injury. The charge of the court in this case is approved. *Brown v. Mfg. Co.*,, 201.

6. *Negligence— Evidence— Explosives— Children— Infants—Trials—Nonsuit.*—Evidence in this case that defendant used blasting caps and explosives in its business, kept in an unenclosed and open and readily accessible house, exposed to view on a short pathway leading from a public road and near a village of from 100 to 150 people; and around which children were known to play, and that one of them, a lad of seven years, entered the open door of the unguarded house, took several of the caps from an open case without knowing of their nature or dangerous character, which exploded in his hand while he was exposing them to a fire at his home and injured him, is sufficient upon the issue of defendant's actionable negligence. *Barnett v. Cotton Mills*, 167 N.C. 580, cited and applied. *Krachanake v. Mfg. Co.*, 436.

7. *Negligence—Rule of the Prudent Man—Breach of Duty.*—Negligence is the absence of that care which under the circumstances should be exercised as a duty to another under the rule of the ordinarily prudent man. *Lea v. Utilities Co.*, 459.

8. *Same—Railways—Instructions—Trials—Appeal and Error.*—Where the evidence is conflicting as to whether the motorman on defendant's street car should have seen the plaintiff's danger in crossing the track in a buggy in front of the moving car in time to have slowed or stopped the car, and avoid the injury complained of, the defendant's liability does not solely depend upon whether its motorman should have perceived the plaintiff's danger, under the rule, but also upon whether he then should have stopped it, under the existing circumstances, in time, by the exercise of ordinary care, to have prevented the injury; and an instruction that does not present this latter phase of negligence when it arises under the evidence is reversible error. *Ibid.*

9. *Negligence—Proximate Cause.*—Negligence, to be actionable, must be the proximate cause of the injury complained of, or the cause that produced the result in continued sequence, without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such result was probable under the facts as they existed. *Ramsbottom v. R. R.*, 38 N.C. 51, cited and applied. *Ibid.*

10. *Negligence—Proximate Cause—Burden of Proof—Trials.*—The burden of proof is on the plaintiff to show that the injury complained of was the proximate cause of defendant's negligence, which is ordinarily a question for the jury. *Ibid.*

11. *Same—Instructions—Trials—Street Railways—Railroads—Appeal and Error.*—Where the defendant's actionable negligence depends upon whether its motorman on its moving street car should have seen the plaintiff's danger in crossing its track in a buggy in time to have stopped the car and avoid the injury complained of, an instruction to answer the issue of negligence in the affirmative if the motorman should have seen the danger, under the rule of the prudent man,

NEGLIGENCE—*Continued.*

leaves out the question of proximate cause from the jury's consideration, and is reversible error. *Ibid.*

12. *Negligence—Evidence: Corroborative; Contradictory—Subsequent Repair.*—Where damages are sought in an action by an employee against his employer for the latter's negligence in leaving a hole in a concrete floor with spikes in it, where plaintiff was required to work, and which caused the injury complained of, and there is conflicting evidence as to whether such condition existed at the time, it is competent in contradiction of the defendant's evidence and in corroboration of the plaintiff to show that the defect had since been remedied, though incompetent as substantive evidence of the negligence alleged. *Muse v. Motor Co.*, 466.

13. *Negligence—Fires—Evidence—Trials—Questions for Jury.*—Evidence tending to show that the defendant independently operated a logging road, and that fire was set out to the damage of plaintiff by defendant's skidder having no spark arrester or other protection against fire where inflammable matter had collected, and where sparks had fallen from the skidder and ignited, communicating to the plaintiff's property, is sufficient to take the case to the jury upon the question of defendant's actionable negligence. *Walls v. Spruce Co.*, 662.

14. *Negligence—Reckless Shooting—Towns—Ordinances.*—A person, while shooting sparrows with a 27 Winchester rifle in a town, who inadvertently shoots through a window in the toilet of a hotel 60 yards distanct is guilty of such conduct as makes it proper to submit to a jury the question of his liability in damages to a person he has thus injured, without the necessity of an ordinance prohibiting shooting within the town. *Townsend v. McCullum*, 698.

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 1, 3, 5, 7; Carriers of Goods, 2.

NEPHEWS. See Estates, 8.

NEW PROMISE. See Contracts, 16; Limitation of Actions, 7; Instructions, 16.

NEXT FRIEND. See War, 2.

NONRESIDENTS. See Attachment, 1; Costs, 9.

NONSUIT. See Torts, 2; Estoppel, 1; Evidence, 7; Principal and Agent, 2; Judgments, 3; Trials, 1; Railroads, 4, 11, 12; Automobiles, 1; Negligence, 6; Commerce, 3; Master and Servant, 8; Criminal Law, 12.

Nonsuit—Evidence—Trials.—On a motion for nonsuit, consideration may be given only to facts and legitimate inferences therefrom which tends to support the plaintiff's claim. *Avery v. Palmer*, 378.

NOTATIONS. See Evidence, 22.

NOTICE. See Attorney and Client, 4; Mortgages, 3, 4; Contracts, 15; Trusts, 3; Corporations, 4; Estoppel, 2; Bills and Notes, 3, 7; Constitutional Law, 10; Railroads, 14.

OATH. See Evidence, 15.

OBJECTIONS AND EXCEPTIONS. See Instructions, 6, 22; Appeal and Error, 15, 25, 27, 32, 35, 43; Pleadings, 14.

OBSTRUCTIONS. See Appeal and Error, 34.

OFFER. See Vendor and Purchaser, 2; Contracts, 17.

OFFER AND ACCEPTANCE. See Contracts, 19.

OFFICERS. See Corporation, 9; Homicide, 7.

OFFICES. See Constitutional Law, 13, 14.

OMISSION. See Instructions, 8.

OPINION. See Wills, 9; Courts, 2; Appeal and Error, 24; Mortgages, 19; Instructions, 25.

OPTION. See Landlord and Tenant, 1; Justices of the Peace, 1; Instructions, 8; Contracts, 17, 18.

ORDERS. See Judgments, 9.

ORDINANCES. See Street Railways, 3; Municipal Corporations, 6; Negligence, 14.

OUSTER. See Limitation of Actions, 3.

OWNERSHIP. See Automobiles, 2.

PARENT AND CHILD. See Appeal and Error, 14.

1. *Parent and Child—Custody of Child.*—The *prima facie* right of parents to the care and custody of their infant children is a natural and substantive one which will not be interfered with by the courts unless the good of the child clearly requires it. *Atkinson v. Downing*, 244.

2. *Same—Child's Welfare.*—While this parental right is fully recognized in this State, it is further held that the welfare of the child is also entitled to full consideration and on especial facts may become controlling in the disposition of its custody. *Ibid.*

3. *Same—Habeas Corpus.*—It appearing in the present case that a female child, now 11 years of age, has been in the care and custody of her grandparent since the death of her mother, four years ago and more; that said grandparent is amply able to take care of her, and that he has done so affectionately and properly; that she has a secure and comfortable home with desirable neighbors and associates; that the father, the petitioner, though spoken of as a man of good character, could not and was not circumstanced to give the child the same dependable advantages of education and religious training and environment necessary to the child's welfare, the judgment of the Superior Court awarding the child to the custody of the grandparent will not be disturbed on appeal. *Ibid.*

PAROL AGREEMENT. See Contracts, 14, 15, 16.

PAROL TRUSTS. See Trusts and Trustees, 1.

PARTIAL RECOVERY. See Injunction, 1.

PARTICEPS CRIMINIS. See Criminal Law, 7.

PARTIES. See Action, 2; Mortgages, 8; Corporations, 8, 15; Demurrer, 1.

Parties—Guardian ad Litem—Representation—Supreme Court—Appointment—Statutes.—Where a construction of a will by the court is sought and it appears that certain of the minors in interest had been served with process but inadvertently a guardian *ad litem* had not been appointed; and it appears that their rights had been thoroughly considered and determined in the Superior Court and presented on appeal, and there are no issuable facts involved, the case will not necessarily be remanded for the appointment of a guardian *ad litem* and the Supreme Court may appoint one under authority of Pell's Revisal, sec. 1545, *Perry v. Perry*, 144.

PARTITION. See Limitation of Actions, 5.

PARTNERSHIP. See Attorney and Client, 2; Judgment, 1; Trusts, 1.

Partnership—Individual Liability—Insolvency—Exemptions—Consent—Creditors—Exoneration.—Each member of a partnership is individually liable for partnership debts, with the right to have the firm's assets applied thereto in exoneration; and, in case of insolvency, neither member of the firm may claim his personal property exemption therefrom, without the consent of the other; and this principle applies in exoneration of the retiring partner, and for the benefit of the firm's creditors, when the continuing partner has bought out the other upon condition that he shall assume the indebtedness and pay them out of the assets of the partnership. *Farmer v. Head*, 273.

PAYMENT. See Vendor and Purchaser, 1; Costs, 4; Torts, 1, 3; Insurance, 2; Corporations, 12; Mortgagees, 10; Principal and Surety, 4; Judgment, 10; Contracts, 29.

PECUNIARY INTERESTS. See Public Officers, 3.

PENALTY. See Register of Deeds, 2.

PERIL. See Negligence, 1.

PERSONAL INJURY. See Damages, 11; Negligence, 5.

PETITION. See Drainage Districts, 5; Removal of Causes, 5, 7; Roads and Highways, 4.

PHOTOGRAPHS. See Spirituous Liquors, 3.

PHYSICAL INJURY. See Mental Anguish, 1.

PHYSICIANS. See Evidence, 8; Negligence, 5.

Negligence—Physicians—Hospitals—Evidence—Trials—Questions for Jury.—In an action by the husband to recover damages for the death of his wife alleged to have been caused by the negligence of defendant in failing to provide a suitable room for her while under treatment at his hospital, there was evidence tending to show that her health was good when she was taken there, except for injuries received in an automobile accident, and that on two or more occasions during a severe rainstorm the rain beat in through an improperly constructed window, so that it stood upon the floor of the room from which it

PHYSICIANS—*Continued.*

was soon removed, and that a cold to the patient at once resulted, followed by pneumonia, from which she died: *Held*, under this and the other evidence in the case, it was proper to submit the issue of defendant's actionable negligence to the jury. *Bailey v. Long*, 687.

PLATS. See Deeds and Conveyances, 9.

PLEADINGS. See Master and Servant, 1; Contracts, 3; Fertilizers, 2; Courts, 1; Attorney and Client, 6; Evidence, 11, 26; Verdict, 1; Drainage Districts, 3; Judgments, 7; Removal of Causes, 2, 3; Insurance, 6, 7; Mortgages, 13; Schools, 3; Demurrer, 1.

1. *Pleadings—Amendments—Cause of Action.*—Where negligence is alleged in an action for damages against a railroad company and its contractor for injury to plaintiff while engaged in building a bridge, that the place provided for the employee to work was insecure by reason of a scantling used in the construction of the bridge, where plaintiff was at work, having been nearly sawed in two, and therefore weak, it is within the discretion of the trial judge to permit an amendment, in conformity with defendants' evidence, that the weakness of the plank was caused by a knot-hole therein, such amendment not constituting a new cause of action. *Gadsden v. Crafts*, 358.

2. *Same—Limitation of Actions.*—Where such an amendment to the complaint is properly allowed by the trial judge, in his discretion, it relates back to the commencement of the action, and prevents the bar of the statute of limitations if the action was originally brought in time. *Ibid.*

3. *Pleadings—Admissions—Delivery—Evidence—Deeds and Conveyances.* Where declarations are relied on in an action to recover lands to show that a deed to lands had not been delivered, and the pleadings and admissions show that the deed was delivered; *Semble*, it is not open to a party on the trial to deny its delivery. *Roe v. Journegan*, 262.

4. *Pleadings—Evidence—Variance—Statutes.*—An objection to a variance between the allegations of the pleadings and the proof, when prejudicial and misleading, etc., should be taken in apt time, under the provisions of Revisal, secs. 515, 516. *Patterson v. Lumber Co.*, 90.

5. *Pleadings—Verdict—Amendments—Court's Discretion*—Appeal and Error.—It is within the discretion of the trial judge to allow, after verdict, amendments to the complaint in accordance with the evidence, when no change in the cause of action has been made, and in the absence of abuse of this discretion, no appeal therefrom will lie. Revisal, secs. 505, 507. *Ibid.*

6. *Pleadings—Amendments—Presumptions—Appeal and Error.*—The trial judge will be presumed to have found the facts necessary to support his order allowing an amendment to pleading, when no facts are stated in the record. *Ibid.*

7. *Pleadings—Indefiniteness—Motions—Courts—Discretion—Statutes.*—Where the complaint alleges that the defendant railroad company's locomotive, on or about a given day, negligently set out fire to the damage of plaintiff's land, and on defendant's motion to make the complaint more certain and definite, Revisal, sec. 496, the court orders

PLEADINGS—*Continued.*

that, within a fixed time, the complaint show "as near as practicable the hour and the direction of the train or trains"; *Held*, the plaintiff's objection to the order is addressed to the sound discretion of the trial judge, the exercise of which is not reviewable on appeal in the absence of its abuse. *Bristol v. R. R.*, 509.

8. *Same—Appeal and Error.*—Where a party has improvidently appealed from an order to make his pleading more definite and certain (Revisal, sec. 496) and has not addressed his objection to the sound discretion of the trial judge, based on his inability to comply, he may yet do so after the case has been remanded by the Supreme Court. *Ibid.*

9. *Pleadings—Indefiniteness—Motions—Certainty—Bill of Particulars—Statutes.*—Where the complaint sets out neither a defective cause of action, nor a defective statement of a cause of action, but an uncertain or indefinite statement of a cause of action, it can only be corrected by a motion to make the pleadings more definite (Revisal, sec. 496), or by application for a bill of particulars, Revisal, sec. 494. *Ibid.*

10. *Pleadings—Demurrer—Carrier of Goods—Bills of Lading—Receipt of Goods.*—Where a bank sues a carrier to recover on a bill of lading attached to a draft it had discounted, and the complaint alleges that the draft had been returned unpaid, that the plaintiff was informed and believed that the carrier did not receive the goods: *Held*, a demurrer was good. *Bank v. R. R.*, 415.

11. *Pleadings—Interpretation—Liberal Construction.*—Pleadings are liberally construed, and where it is apparent from the whole pleading that the complaint alleges a good cause of action, it will be sustained. Revisal, sec. 495. *Blackmore v. Winders*, 144 N.C. 215, cited and applied. *Muse v. Motor Co.*, 466.

12. *Pleadings—Indefiniteness—Motions—Demurrer.*—Objection that a complaint is too indefinite in its allegations as to a cause of action should be taken by motion that it be made more certain, and not by demurrer. *Ibid.*

13. *Pleadings—Negligence—Effect—Statutes.*—It is not necessary for the plaintiff to enumerate all of the particulars of the general damages alleged to have been caused by the negligent act of the defendant, in order to recover for them. *Conrad v. Shuford*, 174 N.C. 719, cited and applied. *Ibid.*

14. *Pleadings—Evidence—Scope—Amendments—Appeal and Error—Objections and Exceptions—Statutes.*—Where the allegations of the complaint are sufficiently broad under a liberal construction to include within their scope the evidence objected to, it will not be considered as a variance, and where there is a variance the objecting party must proceed under the statute, and if the trial judge may order an amendment, and if the proper course is not pursued, the variance will be deemed immaterial on appeal. Revisal, secs. 515-516. *Ibid.*

PLEAS. See Criminal Law, 15.

PLEAS IN BAR. See Actions, 1.

POLICE POWERS. See Statutes, 3.

POLICIES. See Insurance, 3, 4, 8; Fraternal Orders, 3.

POSSESSION. See Bailment, 1; Mortgages, 2; Ejectment, 4; Assignment for Benefit of Creditors, 3; Gifts, 1; Limitation of Actions, 3, 11; Intoxicating Liquors, 1.

POWERS. See Mortgages, 3, 4, 5; Wills, 23; Contempt, 1.

POWERS OF SALE. See Wills, 21.

PRAYERS FOR INSTRUCTIONS. See Instructions, 10, 11, 12.

PREFERENCE. See Assignments for Benefit of Creditors, 2; Corporations, 9.

PREJUDICES. See Appeal and Error, 42; Courts, 6.

PREMEDITATION. See Homicide, 9.

PRESIDING OFFICERS. See Public Officers, 2, 4.

PRESUMPTIONS. See Evidence, 9; Mortgages, 5, 6, 13; Deeds and Conveyances, 8, 11; Pleadings, 6; Public Officers, 8; Appeal and Error, 22, 23; Homicide, 3, 7; Intoxicating Liquors, 1; Larceny, 1.

PRIMA FACIE CASE. See Trusts, 1; Attorney and Client, 4; Railroads, 2; Intoxicating Liquors, 1.

PRINCIPAL AND AGENT. See Bills and Notes, 1; Contracts, 9; Automobiles, 1, 2; Evidence, 21, 32; Fraud, 1; Constitutional Law, 9; Counties, 1; Carriers of Goods, 1; Telegraphs, 3.

1. *Principal and Agent—Negligence—Liability to Third Persons—Relative Liability—Judgment Against Agent.*—Both the principal and agent are jointly and severally liable to an employee of the latter for injuries caused by the latter's negligence, the liability of the former being secondary; and where the agent has been sued alone, the principal is not bound by the judgment obtained; especially is this true when the agent has expressly indemnified his principal against such loss. The relative rights of and remedies against joint tort feasors discussed and applied by WALKER, J. *Gadsden v. Crafts*, 359.

2. *Same—Nonsuit as to Principal—Appeal and Error—Reversal—Trials—Railroads—Contractors.*—Where a railroad company and its contractor are sued for damages alleged to have been negligently caused by the latter to its employee in constructing a bridge for the former, and during the trial the plaintiff takes a nonsuit and appeals upon the intimation of the court that he could not recover against the roalroad company, but prosecutes his action to judgment against the contractor; and upon reversal on appeal to the Supreme Coourt the trial is proceeded with against the railroad company in the Superior Court; *Held*, the amount of the judgment formerly rendered against the contractor is not conclusive upon the railroad company as to the damages, and an instruction by the court that it is constitutes reversible error. *Ibid.*

PRINCIPAL AND SURETY. See Injunction, 1; Limitation of Actions, 1; Evidence, 30.

1. *Principal and Surety—Husband and Wife—Bills and Notes—Extension of Time—Release.*—Where the wife mortgages her lands to secure a

PRINCIPAL AND SURETY—*Continued.*

personal debt of her husband, an extension by his creditor of the time of payment of the mortgage note, without her consent, will release the wife as surety and discharge her property from liability. *Foster v. Davis*, 541.

2. *Same—Mortgages.*—Where a wife has signed as surety on her husband's note, and has mortgaged her separate property to secure it, and thereafter the husband gave the creditor a note in a larger amount, inclusive of the former note, and later maturing, the creditor may not successfully maintain his action against the principal on the joint note, until the maturity of his later one. *Ibid.*

3. *Same—Evidence—Trials—Questions for Jury.*—A purchaser of a pair of mules gave his note for them, in the absence of his wife, and thereafter she and the vendor obtained a mortgage on her lands, voluntarily given, to secure their joint note in the same amount and for the same purpose. Thereafter the husband, with the consent of the vendor, but without the knowledge of his wife, traded the mules, and again swapped, paying the vendor the boot which he had received, obtaining a credit on a note he had given in a larger amount, including that of the joint note, and later maturing. *Held*, between the original parties it was competent to show that the wife signed as surety and sufficient to release her, as such, by the extension of time given to her husband. *Ibid.*

4. *Principal and Surety—Indemnity Companies—Contracts—Independent Contractors—Judgments—Payment.*—The directors of a railroad company contracted with is promotor holding nearly all of its stock for the erection of a short connecting line, who in turn contracted with a partnership composed of himself and his superintendent for its construction, and took a policy in the defendant company in the name of the partnership to guarantee the turning over of the road to the railroad company free from all claims for damages. Judgment was obtained against the railroad company for injury to the contractor's employee upon the ground that it could not relieve itself of such liability by contract, the defendant guarantee company having been notified and taken charge of the suit. *Held*, the defendant was fixed with knowledge and was liable for the amount of the recovery; and the original contractor, having allowed the amount in settlement with the railroad company, is entitled to recover it under the defendant's policy as a liability which "arose by operation of law." *R. R. v. Guarantee Corp.*, 566.

PRINTING. See Appeal and Error, 4.

PRIORITIES. See Mortgages, 8, 20.

PRISONER. See Homicide, 11.

PROBATE. See Wills, 8, 9, 11.

PROCEDURE. See Appeal and Error, 8; Drainage Districts, 5.

PROFITS. See Trust and Trustees, 3; Contracts, 25.

PROMISE. See Statute of Frauds, 1.

PROMISE TO PAY. See Limitation of Actions, 8.

PROOF. See Trusts and Trustees, 1.

PROPERTY. See Assignment for Benefit of Creditors, 1.

PROTECTION. See Animals, 2.

PROXIMATE CAUSE. See Street Railways, 1; Railroads, 9; Negligence, 9, 10; Instructions, 14, 18; Contracts, 25.

PUBLIC OFFICERS.

1. *Public Officers—Terms—Holding Over—Municipal Corporations—Constitutional Law—Statute.*—The provisions in municipal charters that incumbents of offices, both elective and appointive, shall hold until their successors are selected and qualified, are recognized by our Constitution, Art. XIV, sec. 5, and our general statute, Revisal, sec. 2368; and whether regarded as a part of an original term or a new and conditional one by virtue of the statute, the holders are regarded as officers *de jure* until their successors have been lawfully elected or appointed and have properly qualified. *Markham v. Simpson*, 135.

2. *Public Officers—Presiding Officers—Casting Vote—Municipal Corporations.*—A duly qualified presiding officer of a municipal board, who is also a member, may lawfully vote on questions properly coming before the board for decision, and may cast the deciding vote as presiding officer when the law, or valid rule of the body itself, governing the proceedings confers such right upon the presiding officer. *Ibid.*

3. *Same—Voting for Self—Pecuniary Interest.*—While a member of a municipal corporation may not be allowed to vote on private matters directly affecting his own pecuniary interest, this does not prevent his voting for himself on a question of organization of the board of which he is a rightful member, such being a question of public concern and at times within the performance of his duty. *Ibid.*

4. *Public Officers—Municipal Corporations—Presiding Officer—Holding Over—Officer de Facto.—Semble*, in this case, the chairman of a municipal board, having the charter power to do so, lawfully gave his casting vote for the incumbent for mayor; and, *Held*, were it otherwise, such incumbent held the office as an officer *de facto*, with the right to exercise its powers, etc., under color of his former election. *Ibid.*

5. *Public Officers—Title—Quo Warranto.*—Direct proceeding in *quo warranto* is the proper one to test the validity of an election of mayor of an incorporated town by the vote of its governing board, etc., under its charter and the general law applicable. *Ibid.*

6. *Public Officers—Municipal Corporations—Mayors—Vote—Statutes.*—Ordinarily the duties of a mayor of an incorporated town are of an executive or administrative character, not permitting him a vote either as member or presiding officer of the municipal board, unless the privilege is conferred by correct interpretation of the charter or general law applicable. *Ibid.*

7. *Same—Charters—General Statutes.*—Where the charter of an incorporated town does not by proper construction confer upon the mayor the

PUBLIC OFFICERS—*Continued.*

right to vote either as a member or presiding officer of the municipal board, but does confer the right to preside at its meetings, sign contracts, veto ordinances, and other like powers, he may, under the general statute applicable when not inconsistent with the charter, give a casting vote, in reference to appointive officers, in the event of a tie, whose appointment is referred to the board under provisions of the charter. *Ibid.*

8. *Same—Repealing Acts—Presumptions.*—Where the right of the mayor of an incorporated town to vote as a member of the municipal board, and to give his casting vote as its presiding officer in case of a tie, exists under the general law applicable, the fact that such power was expressly given in the original charter of the town and left out of a subsequent act repealing the former one, and setting forth powers, etc., of the town, will raise the presumption that the later act contemplated and intended that such right should be exercised under the general statute applicable when such interpretation is not inconsistent with the new powers, etc., conferred on the town. *Ibid.*

PUBLIC IMPROVEMENTS. See Municipal Corporations, 5.

PUBLIC RECORDS. See Evidence, 22.

PUBLIC UTILITIES. See Injunctions, 2; Corporations, 13, 14.

PUIS DARREIGN CONTINUANCE. See Evidence, 31.

PUNISHMENT. See Contempt, 4.

PUNITIVE DAMAGES. See Trespass, 1; Damages, 2.

PURCHASE. See Corporations, 3.

PURCHASERS. See Wills, 21; Mortgages, 9, 11, 12; Tenants in Common, 2, 3.

PURCHASERS FOR VALUE. See Carriers of Goods, 1.

PURCHASERS WITH NOTICE. See Trusts, 6.

PURCHASES BY MORTGAGE. See Mortgages, 13, 14.

QUALIFIED FEE. See Estates, 3.

QUANTUM MERUIT. See Attorneys and Client, 5.

QUESTIONS FOR JURY. See Boundaries, 5; Railroads, 3, 5, 9, 13; Trials, 2, 3; Landlord and Tenant, 3; Trusts and Trustees, 7; Contracts, 18; Corporations, 5; Principal and Surety, 3; Carriers of Goods, 3; Carriers of Passengers, 1; Negligence, 13; Contracts, 24; Spirituous Liquors, 1; Physicians, 1; Homicide, 1, 5, 7, 10; Bigamy, 2; Automobiles, 3; Criminal Law, 3, 9.

QUESTIONS OF LAW. See Boundaries, 6; Alimony, 3; Street Railways, 3; Register of Deeds, 1.

QUO WARRANTO. See Public Officers, 5.

RAILROADS. See Master and Servant, 1; Negligence, 4, 11; Bailment, 1; Actions, 2; Principal and Agent, 2; Street Railways, 1; Commerce, 1, 4; Demurrer, 1; Appeal and Error, 29.

1. *Railroads—Logging Roads—Comparative Negligence—Statutes—Damages.*—A logging road operated by steam, but for the exclusive purpose of transporting logs, etc., over the company's own tracks on its own cars, for the furtherance of its own business, to an independent common carrier, by rail, which receives the logs and independently transports them, is in no sense a common carrier by railroad within the meaning of the "act relating to the liability of common carriers by railroad to their employees" (ch. 6, Laws 1913), and the doctrine of comparative negligence in awarding damages does not apply. *Hemphill v. Lumber Co.*, 141 N.C. 498, cited and distinguished. *Williams v. Mfg. Co.*, 226.

2. *Railroads—Fires—Negligence—Prima Facie Case.*—In an action to recover damages against a railroad company for negligently setting out fire to the damage of the plaintiff's land, evidence tending to show that the fire originated by sparks from defendant's locomotive, or that this is the more reasonable probability, makes out a *prima facie* case, requiring that the issue be submitted to the jury. *Boney v. R. R.*, 354.

3. *Same—Evidence—Trials—Questions for Jury.*—In an action to recover against a railroad company for negligently setting out fire to the damage of plaintiff's land, evidence tending to show that a heavy freight train passed the place about midnight, throwing out sparks, with the wind blowing in the direction of plaintiff's land, that plaintiff's gin, etc., was discovered, with bales of cotton thereat, on fire within one half to three-quarters of an hour thereafter and theretofore it was as usual; that there was indication from the character of the burning that it had commenced at the railroad, is sufficient for the determination of the jury of the issue of defendant's actionable negligence. *Moore v. R. R.*, 173 N.C. 311, cited and distinguished. *Ibid.*

4. *Railroads—Lumber Roads—Fires—Negligence—Evidence—Nonsuit—Trials.*—Upon motion as of nonsuit upon the evidence in an action against a lumber company operating a steam railroad, to recover damages to land alleged to have been caused by fire negligently set out by the defendant's locomotive, evidence that the defendant operated its road for handling logs on its right of way, that the right of way was in a foul and inflammable condition and the fire was seen burning thereon and into the cross-ties; that it spread therefrom to the plaintiff's lands, causing the damages complained of, and that the defendant's locomotive had passed the place about two hours prior to the time the fire was discovered, is *Held* sufficient to take the case to the jury upon the question of whether the fire was negligently set out by the defendant's locomotive in its foul right of way. *Moore v. Lumber Co.*, 205.

5. *Railroads—Negligence—Crossings—Evidence—Trials—Questions for Jury.*—Ordinarily, the question of whether the engineer on railroad locomotive, by the exercise of proper observation and care, can avoid a collision with a vehicle being driven over a crossing in unobstructed view, is a question of fact for the jury; and in this case, where there was evidence that defendant's team had become frightened and beyond

RAILROADS—*Continued.*

the driver's control, and was struck at a crossing by the locomotive going twice as fast as the team, it is held that plaintiff's motion for nonsuit was properly overruled. *Borden v. R. R.*, 177.

6. *Railroads—Construction—Waters—Damages—Limitation of Actions.*—Under the provisions of Revisal, sec. 394 (2), that actions to recover damages caused by the construction of a railroad, or repairs thereto, shall be commenced within five years, etc., after the cause of action accrues, the statute does not necessarily begin to run from the time the road or structures were originally erected if thereafter changes have been made therein which caused appreciable and substantial damages to adjoining lands. *Barclift v. R. R.*, 114.

7. *Same—Ditches—Increase of Flow.*—A railroad company in 1881, by lateral ditches, diverted quantities of water from their natural flow, conveying a part of the same by a drain ditch towards plaintiff's land, passing through a culvert under a county road, which method was sufficient at that time not to appreciably injure the plaintiff's land or crops growing thereon. In 1911 the company enlarged the ditch so as to increase the flow of the diverted water, to the substantial damages to the plaintiff's land and crops he endeavored to grow thereon, for which compensation is sought in the action: *Held*, the statute began to run from the later date, 1911. Revisal, sec. 394 (2). *Ibid.*

8. *Railroads—Waters—Measure of Damages—Entire Damages—Crops.*—The damages to land caused by the building of a railroad and structures within contemplation of Revisal, sec. 394 (2), are the entire damages, past, present, and prospective, including not only the depreciation of the land incident to the trespass, but also the injury to growth of crops during the period covered by the inquiry to the time of trial, which may be assessed by the jury on separate issues as to each. *Ibid.*

9. *Railroads—Negligence—Instructions—Evidence—Proximate Cause—Questions for Jury.*—Where the evidence tends to show that the plaintiff, an experienced section hand, ordinarily left a moving handcar of the defendant railroad to turn a switch for it to pass and boarded it again as it was running, under orders of his foreman in charge, and that he was injured under such circumstances by attempting to board the car running 7 or 8 miles an hour, driven at the time by gasoline, and that he was clumsy in doing so on this occasion, the mere fact that he attempted to board the car thus running and that he was ordered by his foreman to turn the switch, does not warrant an instruction to the jury to answer the issue of defendant's negligence in the affirmative, the question of negligence being for the jury to determine under the circumstances, as well as the question of the proximate cause of the injury. *Ware v. R. R.*, 501.

10. *Railroads—Fires—Rights of Way—Negligence—Burden of Proof.*—Where fire damages to plaintiff's lands are sought in an action against a railroad company, and there is no allegation or evidence that it was caused by a defective engine, or that it negligently operated, but only that it was caused by a foul right of way, the burden of proof is on the plaintiff to show that it was caused by the negligence alleged. *Bond v. R. R.*, 607.

RAILROADS—*Continued.*

11. *Railroads—Master and Servant—Employer and Employee—Negligence —Evidence—Nonsuit.*—In an action against a railroad to recover damages for the negligent killing of plaintiff's intestate, there was evidence tending to show that as a messenger boy he was at the time delivering a message to defendant's conductor at its locomotive where the tracks were too close together to admit of passing trains for his safety, and that he was struck by defendant's locomotive running with the tender in front, without signals or warnings of its approach, or watchman or lookout properly placed. *Held*, sufficient to be submitted to the jury upon the issue of the defendant's actionable negligence. *Davis v. R. R.*, 648.

12. *Railroads—Fires—Negligence—Act of God—Proximate Cause—Trials— Evidence—Nonsuit.*—Where there is evidence that a fire was set out and damaged plaintiff's land from a defective locomotive of defendant railroad company on its foul right of way, and also, in defendant's behalf, that the damages would not have resulted except for an unusually high wind, a judgment of nonsuit is properly refused, the defendant's initial negligence running through and being the proximate cause of the concurring acts which resulted in the injury complained of. *Ferebee v. R. R.*, 163 N.C. 331, and other like cases, cited and applied. *Brady v. Lumber Co.*, 704.

13. *Railroads—Fires—Negligence—Trials—Evidence—Questions for Jury.* In an action to recover damages against a railroad company for negligently setting out fire to the injury of plaintiff's lands, evidence is sufficient which tends to show that broomsedge and old cross-ties had been left upon the right of way from which the fire started, which was seen there about 25 or 30 minutes after the train passed or after the witness had gone about half a mile from the place, etc., and that no other fires were seen there. *Townsend v. McCullum*, 699.

14. *Railroads—Negligence—Evidence—Nonsuit—Infants—Minors—Release —Damages—Comparative Negligence—Trials.*—In this action the plaintiff, a section hand of defendant railroad company, sues to recover damages for a personal injury received by jumping off a loaded motor car, to start it by running and pushing it and then jumping thereon, under the order of the superior. There was a finding by the verdict that he signed a release during his minority, and, upon defendant's motion to nonsuit, it is held that the evidence in the case was sufficient for the determination of the jury upon the issue of defendant's actionable negligence, and also to sustain a recovery of damages under the doctrine of comparative negligence allowed by statute. *Jones v. R. R.*, 721.

RAILWAYS. See Negligence, 8.

RAPE. See Burglary, 1, 3.

RATIFICATION. See Trusts and Trustees, 6.

REBATE. See Vendor and Purchaser, 3.

RECEIPT OF GOODS. See Carriers of Goods, 1; Pleadings, 10.

RECEIVERS. See Mortgages, 6.

RECENT POSSESSION. See Larceny, 1.

RECITALS. See Mortgages, 6.

RECORD. See Appeal and Error, 4, 10, 22.

RECOVERY. See Costs, 2.

RE-ENTRY. See Limitation of Actions, 3.

REFERENCE. See Appeal and Error, 41.

1. *Reference—Exceptions—Evidence.*—Exception to the referee's report in an action upon contract wherein defendant alleges plaintiff's breach and consequent damages, finding defendant was due plaintiff a certain sum, that under all the evidence the referee should have found that plaintiff breached the contract and was not entitled to recover any sum, is equivalent to an exception that the findings are contrary to the evidence, permitting the judge to review the entire case and make his own findings thereon. *Dumas v. Morrison*, 431.

2. *Reference—Review—Courts.*—The statutory authority given the judge of the Superior Court to "review" the report of a referee is broad in its scope, conferring power upon him to set it aside or modify it in whole or in part, and his exercise of such authority may be independent and not confined to the exceptions taken, as is the case on an appeal to the Supreme Court. *Ibid.*

3. *Reference—Agreement to Review—Courts.*—When the parties to an action consent that the trial judge may pass upon the report of a referee out of term and "take the record, pass upon the whole case, and render judgment," etc., the agreement itself authorizes him to pass upon the whole case and make his independent findings from the evidence. *Ibid.*

REFUSAL TO ANSWER. See Evidence, 14.

REGISTER OF DEEDS.

1. *Register of Deeds—Marriage License—Statutes—Reasonable Inquiry—Evidence—Questions of Law.*—The question of reasonable inquiry to be made by the register of deeds as to the age of the woman for whom a marriage license is requested, or as to the consent of those required by the statute, Revisal, sec. 2088, is one of law when the evidence is not conflicting. *Julian v. Daniels*, 549.

2. *Same—Consent—Penalty.*—Where the uncontradicted evidence tends only to show that a register of deeds issued a license for the marriage of a woman under 18 years of age without the consent of her father, who lived about 20 miles distant, was well known in his community, accessible by telephone, and solely upon the oath of the prospective groom and his friend, unknown to him, and that he only made further inquiry of one person known to him, who was unaware of the information desired: *Held*, such inquiry was not reasonable under the statute, as a matter of law, and the register of deeds is liable for the penalty at the suit of the father. Revisal, secs. 2088, 2090. *Ibid.*

REGISTRATION. See Deeds and Conveyances, 2, 3, 5, 6, 11, 15, 16; Trusts, 6; Mortgages, 8, 14, 17.

REGISTRATION OF BIRTHS. See Evidence 10.

RELEASE. See Torts, 1; Principal and Surety, 1; Railroads, 14.

REMAINDERMEN. See Trusts, 7; Evidence, 18.

REMARKS. See Appeal and Error, 46.

REMEDIES. See Divorce, 3.

REMOVAL OF CAUSES.

1. *Removal of Causes—Diversity of Citizenship—Federal Courts—Statutes —Answer—Time to Plead—Extension of Time—Waiver.*—The Federal statute regulating the removal of causes from the State to the Federal courts for diversity of citizenship requires that the motion, supported by proper petition and bond, be made before the time for answering expires as fixed by the laws of the State or by rule of the State courts "in which said suit is instituted and pending," the expression "rule of court" referring to a standing rule having the force of law; and where a general order to plead has been made by the trial judge, without exception by the movant, and he afterwards files his answer in time therein allowed, but after the expiration of the statutory time, he will be deemed to have acquiesced in the order and to have waived his right, and jurisdiction will be retained in the State court. *Dills v. Fiber Co.*, 50.

2. *Removal of Causes—Extension of Time to Plead—Exceptions—Motions —Waiver—Pleadings.*—Where a nonresident defendant does not remove the cause to the Federal Court for diversity of citizenship within the statutory time to plead, and the court allows each party time therefor, to which neither has excepted or moved to dismiss for failure to file the complaint, his not having done so will be taken as his consent to the extension of the time allowed and a waiver of his right to remove the cause. *Patterson v. Lumber Co.*, 90.

3. *Removal of Causes—Pleadings—Allegation—Tort.*—An allegation of the complaint that plaintiff was injured in the course of his employment while obeying a negligent order of a vice-principal of his employer, which with other of their negligent acts caused the injury, the allegation is a joint tort and the plaintiff had the right to regard the wrong either as joint or several. *Ibid.*

4. *Removal of Causes—Fraudulent Joinder—Allegations.*—Where a nonresident is sued jointly with a resident defendant for a joint tort, a petition to remove the cause to the Federal Court for a fraudulent joinder must do more than allege the fraud by general averment by setting out the essential facts so that the court can see there has been such joinder. *Ibid.*

5. *Removal of Causes—Petition—Bond—Sufficiency—Jurisdiction—Courts.* Sufficiency of the petition and bond of a nonresident to remove the cause to the Federal Court is decided as a matter of law by the State courts, and if there are questions of fact arising on the motion, they are for decision in the Federal Court. *Ibid.*

6. *Removal of Causes—Courts—Jurisdiction.*—When a verified petition for removal of a cause from the State to the Federal court, accompanied by a proper bond, has been aptly and duly filed in the former

REMOVAL OF CAUSES—*Continued.*

court, with averment of facts sufficient to require a removal under the law, the jurisdiction of the State court is at an end, without authority to pass upon or decide the issues of fact so raised, but only to consider and determine the sufficiency of the petition and the bond. *Fore v. Tanning Co.*, 583.

7. *Same— Diversity of Citizenship— Joinder— Petition— Sufficiency.*— Where a plaintiff has sued a resident and nonresident defendant for a joint wrong the cause of action, as a legal proposition, must be taken and construed as the complaint presents it, and, in such cases, on motion to remove the cause to the Federal court, by reason of the alleged fraudulent joinder of the resident defendant, the right to removal does not arise from general allegation of bad faith or fraud on the part of plaintiff, however positive, but the relevant facts and circumstances must be stated with such fullness and detail and be of such kind as to clearly demonstrate or compel the conclusion that a fraudulent joinder has been made. *Ibid.*

8. *Same—Corporations—Resident Employees—Resident Defendants.*—The plaintiff joined a nonresident defendant corporation, its resident general manager and other employees, in his action as parties defendant to recover damages for a personal injury, and alleged with particularity that the negligent act complained of arose from the dangerous condition of the track under the supervision and control of the general manager, on which, through the negligent running of its train by another employee, a car had been derailed and thrown against a brick building within which he was engaged in the course of his duties to the nonresident corporation, causing the wall of the building to fall, to his injury: *Held*, a petition to remove the cause to the Federal court for the fraudulent misjoinder of the resident defendants with only general averments of their fraudulent joinder in the action, is insufficient to raise the issues of fact, and the cause is properly retained in the State court. *Rea v. Mirror Co.*, 158 N.C. 24, cited and distinguished. *Ibid.*

RENT. See Trusts and Trustees, 6

REPAIR. See Negligence, 12.

REPEAL. See Municipal Corporations, 4.

REPEALING ACTS. See Public Officers, 8.

REPRESENTATION. See Parties, 1.

REPUTATION. See Criminal Law, 13.

REPUTE. See Evidence, 8, 10.

REQUESTS. See Instructions, 8; Evidence, 27; Criminal Law, 3.

RESIDENTS. See War, 1, 2; Bigamy, 3; Marriage, 1.

RESIDENT DEFENDANTS. See Removal of Causes, 8.

RES IPSA LOQUITUR. See Master and Servant, 2.

RESTRICTIONS. See Evidence, 27.

REVIEW. See Reference, 2; Appeal and Error, 14.

REVISAL.

SEC.

266. Clerk may foreclose mortgage given to secure costs; or, better still, ask decree from Superior Court, the latter supervising sale to make property bring a better price, with power to set aside order confirming the sale at same term entered. *Clark v. Fairly*, 342.

311 (3). Mortgages sales made subject to this statute by Revisal, sec. 1044. *Jenkins v. Griffin*, 184.

371. Makes no change as to new promise to repel statutory bar in action on contract except as to the requirement of writing and signed by party charged, etc. *Phillips v. Giles*, 409.

390. *Quaere* as to whether this section applies to actions in ejectment. *Weathersbee v. Goodwin*, 234.

394 (2). Statute begins to run from changes in original road causing appreciable damages, the damages contemplated by this section being past, present, and prospective, including injury to crops. *Barcliff v. R. R.*, 114.

448. Section has no application as to taxing attendance of witness as costs who has not legally supoenaed, etc. *S. v. Means*, 820.

494-496. An indefinite statement of sufficient cause of action is corrected by motion to make more definite or application for bill of particulars. *Bristol v. R. R.*, 509.

495. Complaint, construed as a whole, alleging a cause of action will be sustained. *Muse v. Motor Co.*, 466.

496. Objection to order to make complaint more definite is to the court's discretion; and this may be done after remanding case by Supreme Court. *Bristol v. R. R.*, 509.

505-7. The discretion of the trial judge to allow amendment to pleadings, after verdict to conform to evidence without change of action not reviewable on appeal when not abused. *Patterson v. Lumber Co.*, 90.

515-6. Court may allow an amendment to pleadings to meet variance with proof. *Muse v. Motor Co.*, 466.

515-6. Objection to prejudicial and misleading variance between allegation and proof must be taken in apt time. *Patterson v. Lumber Co.*, 90.

535. An intimation by the judge upon essential inferences and ultimate facts is forbidden. *Phillips v. Giles*, 409.

591. Certificate of trial judge as to case settled is conclusive on appeal. *Thompson v. Williams*, 696.

610-13. Appellant's inexcusable laches in seeing that his appeal was perfected from refusal of clerk to issue execution against homestead barred his right in this case. *Hicks v. Wooten*, 597.

620. On refusal of clerk to issue execution against homestead, appellant must see proper legal steps are perfected. *Ibid.*

REVISAL—*Continued.*

SEC.

641. Section applies to sales under order of court, and not to power specified in mortgages, as to notice. *Hogan v. Utter*, 332.

641. Is prospective in effect, not requiring newspaper advertisement of sale prior to Laws of 1909, ch. 705, but comes under provision of Revisal, 1042. *Jenkins v. Griffin*, 184.

652. Life tenant not entitled to betterments. *Northcott v. Northcott*, 148.

685. Execution may not issue against homestead. *Hicks v. Wooten*, 597.

818. Defendant wrongfully enjoined from cutting timber on a part of the lands in dispute may recover from plaintiff and surety on his bond damages for being enjoined from cutting on that part. *Davis v. Fiber Co.*, 25.

859. On agreement to pay interest on past due bills for merchandise sold, the interest on such bills is regarded as the principal, and payment of the principal will not discharge the debt. *Grocery Co. v. Taylor*, 37.

865-6. Application to examine defendant must be upon affidavit showing movant's right, except where complaint has been filed, stating cause of action. *Ward v. Martin*, 287.

939 *et seq.* Courts may punish for contempt disorderly conduct, breaches of the peace, etc., near enough designed and reasonably calculated to interrupt its proceedings. *S. v. Little*, 743.

964a. This section is a valid exercise of police power. *Whitmore v. Hyatt*, 117.

967. Trustee in general assignment for cerditors may recover both real and personal property passed from debtor in four-month period, including executed contract of sale; and when time of agreement is in dispute, the question is for jury. *Teague v. Grocery Co.*, 195.

983. Conditional sales reserving title require registration as chattel mortgages. *Observer Co. v. Little*, 42.

1042. Notice of sale should be posted under this section as well as advertised in newspaper. *Jenkins v. Griffin*, 184.

1044. Mortgage sale of land subject to ten-year statute of limitations. *Ibid.*

1045. A conveyance of lands to persons not *in esse* prior to 1893 may not be revoked. *Roe v. Journegan*, 261.

1224. Title of property of insolvent corporation vests in receiver upon his appointment free from liens of unrecorded mortgages. *Observer Co. v. Little*, 42.

1264. The question of whether the plaintiff is entitled to costs in an action to recover lands applies to that of title alone. *Swain v. Clemmons*, 240.

1275. Sheriff may demand his fee before laying off defendant's personal property, exempt from execution, except *in forma pauperis*. *Whitmore v. Hyatt*, 117.

1510. Absent judge may order adjournment of term to later day in the term. *S. v. Wood*, 808.

REVISAL—*Continued.*

SEC.

1545. Supreme Court may appoint guardian *ad litem* in certain instances. *Perry v. Perry*, 141.

1562. Judgment as to alimony given the wife for being maliciously turned out of doors concludes the parties in another suit. *Medlin v. Medlin*, 529.

1567. A denial of alimony will conclude the cross-bill asking it in her husband's suit for divorce, but court may allow her counsel fees, etc. *Ibid.*

1567. Granting alimony without divorce now regulated by statute, with right of trial by jury upon issues raised thereunder, the question of waiver to be determined by the judge, and independent support for wife not being required when she has wrongfully left home. *Crews v. Crews*, 168.

1283-9-96-1303. To tax attendance of witness as costs he must have been legally subpoenaed or recognized to appear. *S. v. Means*, 820.

1581. The rule that the "'death without issue" fixes the time the contingency affects the first taker, unless contrary intent appears, is not affected by the existence of pre-existing life estate without more. *Kirkman v. Smith*, 579.

1581. Section was to make good contingent limitations upon a person's dying without heirs or issue by fixing a definite time and establish a rule by which the first taker shall be affected by the contingency. *Bell v. Keesler*, 525.

1589. Interference by a rival water-power corporation of rights perfected by another water-power corporation in acquiring lands is cloud on title to lands. *Power Co. v. Power Co.*, 669.

1590. An attempted sale of contingent interests in land before the enactment of this statute does not affect a subsequent sale thereunder; the statute is constitutional; the purchaser acquires fee-simple title; preservation of proceeds is within sound legal discretion of court. *Pendleton v. Williams*, 248.

1631. Erroneous admission of evidence immaterial when answers to issues show it was disregarded. *Ray v. Ray*, 290.

1631. Witnesses may not testify to transactions or conversations with deceased upon which they based his mental capacity to make the will. *In re Will of Stocks*, 224.

1631. Testimony of party interested as to transactions or communications with deceased properly excluded. *Quelch v. Futch*, 694.

1631. Sister, a grantee of lands, may not testify to transactions, etc., with deceased brother tending to show the deed was in fact a mortgage to secure money borrowed from her, and the administrator of deceased brother has antagonistic interests to a grantor in claim of title in creditor's bill to set aside the deeds for fraud. *Sutton v. Wells*, 1.

1675-85. Assessment on property by county to build fence to keep stock in antistock-law territory is unwarranted. *Hawes v. Comrs.*, 268.

REVISAL—*Continued.*

SEC.

1691. Defendant must show contract sued on was wagering or unlawful and establish his counterclaim he has pleaded. *Heath v. Heath*, 457.

1748. Where plaintiff's grant to State's lands is not attacked, but defendant claims it does not cover the *locus in quo*, the defendant has no interest in declaring the plaintiff's grant a cloud upon his title. *Wadsworth v. Cozard*, 15.

1870. Motion to quash, miscalled "'plea in abatement," will not affect movant's rights. *S. v. Wood*, 808.

1832. A conviction of an offense may not be collaterally attacked in *habeas corpus*. *In re Croom*, 455.

2088-90. Reasonableness of inquiry of register of deeds is question of law on undisputed facts, and inquiry held insufficient in this case. *Julian v. Daniels*, 549.

2239. Failure to notify endorser of dishonor of instrument discharges him. *Hicks v. Wooten*, 602.

2368. Officers holding until successors qualify are officers *de jure*. *Markham v. Simpson*, 135.

2508. This section does not apply against the exercise of a power to sell lands given in a will. *Makely v. Shore*, 122.

3239. Motion to quash miscalled "plea in abatement" will not affect movant's rights. *S. v. Wood*, 808.

3254-5. Motion to quash miscalled "'plea in abatement" will not affect movant's rights. *Ibid.*

3349. That the pathic be a youth of 9 years does not affect the criminality of the act prohibited. *S. v. Griffin*, 767.

3353a (Pell's). Reputation as to a bawdy house is competent evidence. *S. v. Price*, 804.

3355. Omission of the word "willful" in one part of the judge's charge as to husband's abandonment is harmless when repeatedly emphasized in other portions. *S. v. Taylor*, 833.

3361. As amended, chapter 26, Laws of 1913. It may be shown here that residence acquired in another State was not in good faith, but in fraud. *S. v. Herron*, 754.

3814. Where manufacturer cottonseed meal ships to user contrary to order of seller the seller is not liable for penalty. *S. v. Faulkner*, 787.

3945, etc. Repealed by chapter 143, Laws of 1917, and purchaser may agree demand for damages, except those specified by analysis provided by the statutes. *Fertilizer Works v. Aiken*, 398.

3958. Where manufacturer cottonseed meal ships to user contrary to seller's order the seller is not liable for penalty. *S. v. Faulkner*, 787.

4791. Fraternal insurance orders, without profit, may raise assessments if permitted by the State of its origin, etc. *Hollingsworth v. Supreme Council*, 615.

REVISAL—*Continued.*

SEC.

59-60. This section has no application to recovery under the Federal Employers' Liability Act. *Horton v. R. R.*, 472.

RIGHTS. See Trusts, 8.

RIGHTS OF WAY. See Railroads, 10.

RIPARIAN OWNER. See Statutes, 6.

ROADS AND HIGHWAYS.

1. *Roads and Highways— Counties— Assessment— Statutory Methods—* Courts.—Where a county has taken and continued to use a part of the lands of the owner in constructing its public road, and there is a special provision of a statute applicable as to the assessment of the owner's damages by a jury, upon petition to the board of county commissioners, which has not been followed, the owner may maintain an action in the Superior Coourt to recover his permanent damages and upon payment thereof the easement will pass to the county. *Mason v. Durham*, 638.

2. *Same—Permanent Damages—Easements.*—Where a method of assessing damages to the owner for the taking by the county of his lands for road purposes has been provided by statute, that it be upon petition to the board of county commissioners, etc., and the county has taken plaintiff's land without following this method: *Held*, at the election of either the owner or the board, an action lies for permanent damages in the Superior Court, and the application to the board was not essential to the right of the injured owner to sue and have his cause tried by the jury, as contemplated and conferred by the general laws. *Ibid.*

3. *Roads and Highways— Counties— Assessments— Statutes— Waiver.—* The county board of commissioners in acting upon a petition by the injured owner whose land had been taken for road purposes, under a statute providing for the assessment of damages by this method, does so in an administrative capacity; and where the board has taken and is using the land for such purpose, and the owner has not followed the special method provided, and brings his action in the Superior Court for his damages, the defendant's denial of plaintiff's ownership and its liability for the damages, waives its right to insist that the statutory method should have been pursued by the plaintiff. *Ibid.*

4. *Roads and Highways— Counties— Assessments— Statutes— Petition— Compliance—Courts.*—Chapter 463, Public-Local Laws of 1913, applying to Durham County, provided for assessment of damages to land of owner taken for road purposes by a jury, upon petition to the board of county commissioners, etc. The county took a part of plaintiff's land for this purpose without following this statute, and was using it therefor at the time plaintiff instituted his action in the Superior Court: *Held*, the action would lie; and, *Semble*, a letter written by plaintiff's attorney asking that the matter be settled by arbitration by three good men was a compliance with the statute providing that three disinterested freeholders assess the damages. *Ibid.*

ROBBERY. See Homicide, 12.

ROYAL ARCANUM. See Fraternal Orders, 1.

RULE OF PRUDENT MAN. See Negligence, 2, 7; Animals, 2; Instructions, 3.

RULE IN SHELLEY'S CASE. See Wills, 22.

RULES OF COURT. See Appeal and Error, 21.

SAFE PLACE TO WORK. See Master and Servant, 3.

SALES. See Mortgages, 3, 4, 5; Statutes, 4; Mortgagees, 10; Husband and Wife, 2; Criminal Law, 6.

SALESMAN. See Contracts, 4.

SAW MILLS. See Insurance, 5.

SCHOOLS. See Municipalities, 1; Constitutional Law, 1.

1. *Schools—Counties—Taxation—Statutes—Constitutional Law—Approval of Electors.*—The building and maintenance of its schools is not a necessary county expense, and an act which authorizes a tax levy for those purposes without provision requiring the submission of the question to the qualified voters of the territory or district is invalid. *Snider v. Jackson County*, 590.

2. *Same—Constitutional in Part—Indivisible Scheme.*—Where a statute provides for an annual appropriation by a county for the maintenance and support of a school, to be collected by a special tax levy, taking certain public buildings of the county for the purpose and referring to the provisions of a prior act for its government generally, it manifests one indivisible scheme for the purpose of establishing the school, and its several provisions must stand or fall together as to the constitutional requirements. *Ibid.*

3. *Same—Pleadings—Demurrer—Nominal Damages.*—Where the complaint in an action alleges damages for mental anguish arising from the negligence of a telegraph company in transmitting or delivering an interstate message, and also payment for the message in controversy, the toll paid for the message is at least recoverable, and a demurrer is bad. In this case the element of damages upon allegations of physical suffering are not passed upon on appeal from judgment erroneously sustaining demurrer to complaint. *Johnson v. Tel. Co.*, 588.

SCHOOL DISTRICTS.

1. *School Districts—Bonds—Municipal Limits—Election—Calls—Statutes.* Where a graded school district is established under chapter 96, Public Laws of 1899, with territory coterminous with the corporate limits of the town, and thereafter the territory is extended beyond such limits under a private law containing no authority to issue bonds, and there being no such authority conferred under the Laws of 1899, to issue them for the enlarged district, the board of aldermen of the town are without authority to call an election for the issuance of bonds by the enlarged district, by virtue of chapter 81, Public Laws of 1915, amend-

SCHOOL DISTRICTS—*Continued.*

ed by chapter 130, Laws of 1917, this act being confined to the municipal limits and taxes levied on property therein; and such would destroy the uniformity of taxation with regard to the outlying territory but within the school district. *Hood v. Sutton*, 98.

2. *Same—Antiquity.*—Antiquity, if any, in chapter 81, Public Laws of 1915, as to the calling of an election by the municipal authorities for a school district extending beyond the incorporate limits of the town, is resolved against the validity of such call by reference to other provisions therefor required by chapter 55 of the Public Laws, passed at the same session of the Legislature. *Ibid.*

SCOPE OF AMENDMENTS. See Pleadings, 14.

SECRET AGREEMENT. See Fraud, 1.

SECURITY. See Mortgages, 15.

SELF-DEFENSE. See Homicide, 4, 6.

SENILE DEMENTIA. See Deeds and Conveyances, 14.

SEVERANCE. See Actions, 4.

SEWERAGE. See Municipal Corporations, 4.

SHARES. See Vendor and Purchaser, 2; Corporations, 3.

SHARES OF STOCK. See Corporations, 6; Estoppel, 2.

SHERIFFS. See Courts, 7.

Sheriffs—Exemptions—Fees Demanded.—Where the judgment debtor claims his personal property from execution, the sheriff is justified in refusing to proceed further till such exemptions are properly set apart, and the payment of his fees for the purpose by the plaintiff in the action, except when the suit is brought *in forma pauperis*, Revisal, sec. 1275. *Whitmore v. Hyatt*, 117.

SHOOTING. See Negligence, 14.

SIGNATURE. See Instructions, 16.

SLAVES. See Limitation of Actions, 3.

SOLICITORS. See Constitutional Law, 13.

SPARKS. See Carriers of Goods, 4.

SPECIAL PRIVILEGES. See Constitutional Law, 11.

SPECULATIVE DAMAGES. See Contracts, 27.

SPIKES. See Evidence, 28.

SPIRITUOUS LIQUORS. See Husband and Wife, 2.

1. *Spirituous Liquors—Illegal Manufacture—Evidence—Trials—Questions for Jury.*—The evidence in this case that the component parts to make a complete still was found on defendant's premises, over his kitchen, with material in the progress of distilling, the odor of the liquor, etc.,

SPIRITUOUS LIQUORS—*Continued.*

is held sufficient for conviction of the manufacture of liquor contrary to the statute. *S. v. Jones*, 709.

2. *Spirituous Liquors—Use of Premises—Consent—Trials—Instructions.*—One who permits his premises to be used for the unlawful purpose of manufacturing spirituous liquor is a participant in the crime and as guilty of the offense as those who actually manufacture it; and where there is evidence that a still had been found on the defendant's premises, in a room over his kitchen, where spirituous liquor had been manufactured, a charge by the court that he would be guilty if he took part in the offense by giving permission that his premises be thus used, is not erroneous. *Ibid.*

3. *Evidence—Photographs—Explanatory.*—Where there is evidence of the accuracy of a photograph, a witness may use it for the restricted purpose of illustrating his testimony to the jury, relevant to the inquiry. *Ibid.*

STATE. See Limitation of Actions, 4.

STATE GRANTS. See Boundaries, 4.

STATE LANDS. See Evidence, 22.

1. *State's Lands—Invalid Grants—Cloud on Title—Admissions.*—Where the plaintiff claims title to lands under a State grant, which defendant admits, but denies that it covers the *locus in quo*, but assumes to attack the plaintiff's grant under Revisal, sec. 1748, as the party aggrieved and interested in the subject-matter of the obnoxious grant: *Held*, the defendant has no interest in having plaintiff's grant declared invalid, as a cloud upon his title, the plaintiff claiming nothing thereunder against the title of the defendant under the latter's grant. *Wadsworth v. Cozard*, 15.

2. *State's Lands—Stated Corners—Contemporaneous Survey—Evidence—Boundaries.*—Where lands are claimed under a grant from the State stating the beginning corner, and it is admitted that the *locus in quo* is covered by the description given in the grant unless the beginning corner is located differently, evidence of a cotemporaneous survey locating the corner otherwise, does not vary the rule that the beginning corner is a matter of law under the call in the grant, in the absence of evidence showing an actual location, and testimony tending to establish certain corners, but not under a cotemporaneous survey, is inadmissible. *Ibid.*

STATEMENTS. See Evidence, 24, 36.

STATUTE OF FRAUDS. See Contracts, 11, 14, 15, 16, 22.

Statute of Frauds—Debt of Another—Promise—Consideration—Fraud.—Where money and crop supplies are advanced to a father and son upon the promise of the father alone to pay for them, and accordingly the credit is extended at the time or thereafter, the transaction does not fall within the meaning of the statute of frauds requiring a writing, etc., for one to become bound for the debt, etc., of another; and when there is evidence of such transaction, a motion as of nonsuit should be denied. *Ford v. Moore*, 260.

STATUTES. See Removal of Causes, 1; Deeds and Conveyances, 2, 7, 11; Vendor and Purchaser, 1; Corporations, 1, 13, 14, 15; Fertilizers, 3; Railroads, 1; Costs, 3, 5, 7; Mortgages, 3, 4, 6; Constitutional Law, 2, 8, 9, 10, 11; Wills, 10, 24; Evidence, 10, 12, 13, 26; Alimony, 1, 4, 5, 6; Courts, 2; Assignment for Benefit of Creditors, 1; Limitation of Actions 1, 2, 7; Appeal and Error, 13; Trusts, 6; Stock Law, 1; Estates, 1, 2, 6, 10; Judgments, 6; Pleadings, 4, 7, 9, 13, 14; Public Officers, 1, 6, 7; Parties, 1; School Districts, 1; Master and Servant, 5, 6; Habeas Corpus, 2; Commerce, 1; Carriers of Goods, 2; Register of Deeds, 1; Divorce, 1, 2; Schools, 1; Homestead, 1; Bills and Notes, 7; Fraternal Orders, 1; Roads and Highways, 3, 4; Injunction, 2; Intoxicating Liquors, 1; Criminal Law, 2, 6, 11, 13; Homicide, 11; Courts, 5; Jurors, 1; Husband and Wife, 3.

1. *Statutes—In Pari Materia—Municipal Corporations—Bonds.*—Chapter 131, Laws of 1915, limiting a municipal bond issue to 10 per cent of the assessed value of its real and personal property, should be construed with the provisions of chapter 138, Laws of 1917, and the two acts being upon the same subject-matter and *in pari materia. Crayton v. Charlotte,* 17.

2. *Same—Property Values—Limitation—Issuance.*—Chapter 131, Laws of 1915, limits the issuance of municipal bonds to 10 per cent of its assessed real and personal property valuation, and chapter 138, Laws of 1917, to 10 per cent of the net valuation of the property, etc., the later act expressly not requiring the passage of an ordinance under the circumstances, for the submission of the question to the voters; and where a municipality has passed the ordinance required by the act of 1915, for an election to be held on the proposition, which is held and the bonds approved after the enactment of the later act, and it appears that the property valuation was sufficient thereunder, the further proceedings being under the Act of 1917, are valid, and the bonds are a valid municipal indebtedness. *Ibid.*

3. *Statutes—Vendor and Purchaser—Merchandise in Bulk—Police Powers—Constitutional Law.*—Statutes regulating the "sales of merchandise in bulk" are a valid exercise of the police power of the State. Pell's Revisal, 964a, as amended. *Whitmore v. Hyatt,* 117.

4. *Statutes—Vendor and Purchaser—Merchandise in Bulk—Void Sales.*—A "sale in bulk of a large part or the whole of merchandise" under the conditions set forth in our statute, without an inventory and proper notice to creditors, or without an adequate or proper bond to account for the proceeds, is absolutely void as to creditors and may be made available for their debts and claims. *Ibid.*

5. *Same—Exceptions and Executions.*—A vendor of merchandise in bulk which is void under our statute is not deprived of his right to his personal property exemption under execution of his judgment creditor. *Ibid.*

6. *Statutes— Condemnation— Corporations— Riparian Owner.*— A public-service corporations has no power to condemn lands by reason of its being a riparian proprietor, but only under the authority given by a valid statute to do so. *Power Co. v. Power Co.,* 669.

STIPULATION. See Insurance, 3.

STOCK LAW.

Stock Law—Taxes—Assessments—Real Property—Statutes—Injunction. Revisal, sec. 1675, authorizes, upon certain conditions, "a tax upon the property holders within the district," when withdrawing "from a stock-law district"; and section 1685 authorizes an "assessment" upon all real property, etc., for the purpose "of building stock-law fences" within counties "which may adopt the stock laws"; but an assessment by a county upon the real estate to build a fence for the purpose of keeping the stock in antistock-law territory from trespassing is unauthorized by law; and a restraining order should be continued and, under the facts of this case, made perpetual at the final hearing. *Hawes v. Comrs.*, 268.

STORMS. See Negligence, 4; Municipal Corporations, 10.

STREETS. See Street Railways, 1; Municipal Corporations, 8.

STREET RAILWAYS. See Negligence, 11.

1. *Street Railways—Negligence—Proximate Cause—Fire Engines—Municipal Corporations—Cities and Towns—Streets—Railroads.*—Where street cars, under a valid ordinance of a city, are required to stop for fire trucks, etc., going to a fire, and there is evidence that the motorman on one of them, on such occasion, could have heard the approach of a second fire truck after the passage of one of them, and also understood the signals given by the first of the approach of the second one and ran his car at a speed of 8 or 10 miles an hour into a street intersection where the second truck was to cross, running at 25 or 35 miles an hour, which could not have been stopped on seeing the street car in time to avoid the injury; in an action by an employee of the city on the second truck, driven by another employee in charge, to recover for a personal injury thus received: *Held*, defendants' request for instruction eliminating the element of proximate cause was properly refused. *Spittle v. R. R.*, 497.

2. *Same—Evidence.*—When it is material to the inquiry in a personal injury negligence suit, whether defendant's motorman on its street car should have heard the approach of a fire truck at a street crossing a block or two away, evidence is properly admitted tending to show the distance similar trucks could be heard by other motormen on similar cars under like conditions. *Ibid.*

3. *Street Railways—Municipal Corporations—Cities and Towns—Ordinances—Negligence—Question of Law.*—Where a personal injury is alleged to have been proximately caused by the negligence of the defendant street car company's motorman, and there is evidence, among other things, tending to show he was running the car, under the circumstances, at a speed greater than that allowed by a valid city ordinance, his thus running the car is negligence as a matter of law, if established, entitling the plaintiff to recover if it was the proximate cause of his injury. *Ibid.*

STREETS AND SIDEWALKS. See Municipal Corporations, 7.

SUBPOENA. See Costs, 8.

SUBSTITUTION. See Corporations, 12.

SUFFICIENCY. See Removal of Causes, 5.

SUMMONS. See Drainage Districts, 3.

SUPERIOR COURTS. See Courts, 1, 8.

SUPPORT. See Alimony, 4.

SUPREME. See Appeal and Error, 12.

SUPREME COURT. See Parties, 1.

SURVEY. See State Lands, 2; Evidence, 22; Boundaries, 10.

SURVIVORS. See Wills, 26.

TAXATION. See Municipalities, 1; Municipal Corporations, 2; Constitutional Law, 4, 5; Schools, 1.

TAX DEEDS. See Instructions, 5; Limitations of Actions, 11.

Tax Deeds—Deeds and Conveyances—Liens—Instructions—Appeal and Error.—Where the controversy over lands depends upon the validity of defendant's tax deed, it is not error for the court to charge the jury that if plaintiff recovered in the action he would have to repay the defendant the moneys he has expended; and where the verdict is in plaintiff's favor, a judgment is proper making the amount a lien upon the lands. *McLaurin v. Williams*, 292.

TAXES. See Stock Law, 1.

TAX LISTS. See Deeds and Conveyances, 12.

TECHNICALITIES. See Criminal Law, 15.

TELEGRAMS. See Contracts, 19.

TELEGRAPHS.

1. *Telegraphs—Interstate Messages—Mental Anguish—Federal Law — Federal Decisions—Commerce.*—A recovery from a telegraph company on an interstate message for mental anguish alone is governed by the Federal decisions and statutes, and thereunder is not allowed. *Johnson v. Tel. Co.*, 588.

2. *Same—Corporations—Resident Employees.*—The plaintiff joined a nonresident defendant corporation, its resident general manager and other employees in his action as parties defendant to recover damages for a personal injury, and alleged with particularly that the negligent act complained of arose from the dangerous condition of the track under the supervision and control of the general manager, on which, through the negligent running its train by another employee, a car had been derailed and thrown against a brick building within which he was engaged in the course of his duties to the nonresident corporation, causing the wall of the building to fall, to his injury: *Held*, a petition to remove the cause to the Federal court for the fraudulent misjoinder of the resident defendants with only general averments of their fraudulent joinder in the action, is insufficient to raise the issues of fact, and the cause is properly retained in the State court. *Rea v.*

TELEGRAPHS—*Continued.*

Mirror Co., 158 N.C. 24, cited and distinguished. *Fore v. Tanning Co.*, 584.

3. *Telegraphs—Money Orders—Stipulations—Principal and Agent—Banks—Negligence.*—A stipulation printed upon an application for the transmission of money by telegraph, and signed by the applicant, that if the place for the payment of the money was not a money order office, the company should be allowed to employ a bank to make ultimate payment, as the agent of the sender without liability for the neglect of the bank, is a valid and reasonable one. *Lehue v. Tel. Co.*, 561.

4. *Same—Contracts.*—Where the applicant for the transmission of a money order by telegraph has been correctly told by the agent of the company that it would be necessary for it to employ a bank for its ultimate payment, and he makes his application under the printed stipulations that the company would not be liable for the neglect of the bank which was made the agent of the sender for the purpose; and it appears that the company was not in default in performing its duties under the circumstances; *Held*, there has been no breach of contract by the telegraph company permitting a recovery against it for mental anguish. ***Ibid.***

5. *Telegraphs—Torts—Damages—Mental Anguish.*—In order to recover damages against a telegraph company for mental anguish for breach of a public duty in negligently failing to promptly transmit a money order by telegraph, the damages must reasonably and probably flow from the tort; and where the money is sent by the husband for the return home of his wife and another telegram is sent later to her announcing the death of her mother, which was unknown to the parties until then, mental anguish for her failing to receive the money in time to attend the funeral of her mother is not recoverable. *Ibid.*

TENANT BY COURTESY. See Evidence, 8.

TENANT FOR LIFE. See Betterment, 2.

TENANTS IN COMMON. See Deeds and Conveyances, 9; Mortgages, 9.

1. *Tenants in Common—Outstanding Title—Deeds and Conveyances—Mortgages.*—A tenant in common who buys the interest of another tenant in common sold under mortgage does not thus acquire an outstanding title, and the principle which prevents him from doing so has no application. *Hogan v. Utter*, 333.

2. *Tenants in Common—Severance of Title—Mortgages—Foreclosure—Purchaser.*—Where tenants in common mortgage lands and thereafter divide them among themselves, at a foreclosure sale thereafter made by the mortgagee, under the power contained in the instrument, either of them may bid in the property, the relationship of tenants in common having been severed, and hold for himself the title thus acquired; and the principle that a tenant in common holds an acquired title for the benefit of all has no application. *Everhart v. Adderton*, 403.

3. *Tenants in Common—Mortgages—Purchasers—Husband and Wife.*—*Semble*, a wife of a tenant in common who has joined in their mort-

TENANTS IN COMMON—*Continued.*

gage to convey her contingent right of dower may become the purchaser at the foreclosure sale under the power of sale therein contained. *Ibid.*

TERMS. See Public Officers, 1; Courts, 7, 10.

TERMS OF COURT. See Judgments, 9.

TIME TO PLEAD. See Removal of Causes, 1.

TITLE. See Boundaries, 1; Deeds and Conveyances, 1; Injunction, 1; Corporations, 1; Instructions, 1; Mortgages, 1, 15; Ejectment, 2, 4; Costs, 1, 2; Tenants in Common, 1, 2; Assignments for Benefit of Creditors, 3; Gifts, 1; Slaves, 3; Landlord and Tenant, 2; Trusts, 5; Evidence, 17, 18, 19, 20; Estates, 4; Public Officers, 5; Limitation of Actions, 4; Contracts, 22.

TORT. See Instructions, 2; Removal of Causes, 3; Telegraphs, 5.

1. *Torts—Joint Tort Feasors—Independent Tort—Payment—Release—Covenant Not to Sue.*—While a release of one joint tort feasor from liability from the same tort will release the other, a covenant not to sue one of them and a compromise and settlement with him of his liability for a separate tort will not have this effect. *Slade v. Sherrod,* 346.

2. *Same—Nonsuit.*—Where a passenger in an autoomobile has been sued for damages alleged to have been caused to the plaintiff's buggy by his negligence in driving the machine, and also for an assault upon him while taking its license number, and a compromise has been made as to the assault with the statement that the plaintiff did not consider him responsible for the damages to the buggy, and a voluntary nonsuit has consequently been taken, the plaintiff, in his action against the owner of the machine for the alleged negligence of his driver, is not barred by his compromise of the separate tort or his voluntary nonsuit in the former action. *Ibid.*

3. *Torts—Covenant Not to Sue—Payments—Credits.*—A covenant not to sue one of several joint *tort feasors* does not release the others, and any amount paid by him is only a credit to be entered in the final recovery. *Ibid.*

TOWNS. See Negligence, 14.

TOWNSHIPS. See Constitutional Law, 7, 9; Counties, 1.

TREES. See Contracts, 22.

TRESPASS. See Evidence, 25.

Trespass. Willful—Punitive Damages—Negligence.—Where punitive damages are sought for a willful and wanton trespass to the damage of plaintiff's land caused by the blasting operations of the defendant, the answer to this issue is dependent upon that of the issue as to the defendant's willfulness and wantonness in continuing to blast, and only actual damages may be awarded if the defendant had only negligently continued to do so. *Cobb v. R. R.,* 130.

TREPASSERS. See Master and Servant, 5.

TRIAL BY JURY. See Alimony, 2.

TRIALS. See Boundaries, 5; Nonsuit, 1; Contracts, 8, 20, 24; Ejectment, 3; Animals, 1; Evidence, 7, 11, 26; Railroads, 3, 4, 5, 12, 14; Principal and Agent, 2; Verdict, 1; Automobiles, 1, 3; Landlord and Tenant, 3; Instructions, 7, 8, 9, 13; Trusts and Trustees, 6; Contracts, 18; Corporations, 5; Damages, 2; Negligence, 6, 8, 10, 11, 13; Judgments, 8; Principal and Surety, 3; Carriers of Goods, 3; Carriers of Passengers, 1; Courts, 3, 4, 6; Master and Servant, 8; Spirituous Liquors, 1, 2; Vendor and Purchaser, 5; Physicians, 1; Homicide, 1, 5; Bigamy, 2; Appeal and Error, 46; Criminal Law, 3, 9; Larceny, 3, 4; Mistrial, 1.

1. *Trials—Nonsuit—Evidence.*—The courts in passing upon a motion to nonsuit upon the evidence, will consider the evidence in the light which tends to support the plaintiff's case and reject all that tends to disprove it. *Linch v. Dewey Bros.*, 152.

2. *Trials—Evidence—Negligence—Questions for Jury—Master and Servant.*—Where there is evidence tending to show that the defendant was injured while using a planing machine of an old type which he had negligently been permitted to use in the course of his employment, and that he could have accomplished the same purpose by hand, but not so quickly as in the other way, the question as to whether the plaintiff was negligent in making the choice is one for the jury, as under the facts of the case it was not negligence *per se* to use the machine. *Ibid.*

3. *Trials—Evidence—Questions for Jury.*—Where the controversy to recover rents for a leased premises depends upon whether they were rented by the year or month, an issue of fact is alone presented for the jury to determine. *Cronly v. Renneker*, 707.

TRUST FUNDS. See Appeal and Error, 6.

TRUSTS AND TRUSTEES. See Contracts, 13; Wills, 21; Corporations, 9.

1. *Trusts and Trustees—Parol Trusts—Degree of Proof.*—Evidence to engraft a parol trust on lands purporting in the deed to have been conveyed in fee simple absolute must be clear, strong and convincing, differing in degree from that required to set aside a deed for fraud; and a charge by the court that it may be established by the preponderance of the evidence is reversible error. *Boone v. Lee*, 383.

2. *Same—Fraud.*—The degree of proof to engraft a parol trust on land appearing from the deed to have been conveyed in fee simple absolute is not affected whether the trust sought to be established is a constructive trust arising out of fraud or to the contrary, or partakes of the nature of each. *Ibid.*

3. *Trusts and Trustees—Purchase Price—Assignor of Trusts—Trustee's Profits—Fraud.*—The assignee of lands held in trust to convey upon payment of the purchase price who takes "upon the same terms and conditions" as his assignor, stands in the same relation thereto as the former trustee, and may receive the payments provided for without thereby being deemed to act in fraud of the trust estate by making a personal profit therefrom. *Ibid.*

4. *Trusts and Trustees—Duration of Trusts—Courts—Extension of Time.* Where exigencies have arisen which makes it desirable and for the

TRUSTS AND TRUSTEES—*Continued.*

benefit of the *cestuis que trust* for a trustee to exceed the authority given him in making a lease of the trust estate beyond the time fixed in the deed for its termination, he may apply to the equity jurisdiction of the court for the authority to make it before executing the lease, which may be granted in proper instances. *Cox v. Lumber Co.*, 299.

5. *Trusts and Trustees—Termination of Trusts—Leases—Improvements—Estoppel—Equity.*—Where the lessee of a trust estate has put improvements on the leased premises, with notice that the lease would terminate upon the death of the trustee, the doctrine of equitable estoppel will not apply to the *cestuis que trust* upon the termination of the trust, especially when the lessee is permitted by the lease to remove the improvements from the land. *Ibid.*

6. *Trusts and Trustees—Termination of Trusts—Leases—Accepting Rent—Ratification—Knowledge—Trials—Evidence—Questions for Jury.*—Where the trust estate, by the terms of a recorded deed, expires at the death of the trustee, and he has leased the premises for a term of years, which extends beyond the time permitted, in order for the *cestuis que trust* to ratify the act by accepting the rent for the current year, it must be made to appear that they did so with knowledge of the facts necessary for them to understand the effect of receiving the rents from the lessor; and in this case, the evidence thereof being conflicting, it was properly left to the determination of the jury under a correct charge from the court. *Ibid.*

7. *Trusts and Trustees—Dower—Leases—Wife's Signature—Termination of Lease.*—Where a trustee holds an estate for the benefit of his children, with right of dower in his wife, and he has leased the premises for a term extending after his death, when the trust was to terminate, the fact that his widow has signed the lease and released her dower does not give the lessor the right to hold the lands against the children for the lifetime of the widow. *Ibid.*

TRUSTS. See Arrest and Bail, 1; Mortgages, 1; Trusts and Trustees, 5, 6; Limitation of Actions, 3.

1. *Trusts—Partnership—Misappropriation of Funds—Evidence—Prima Facie Case—Burden of Proof.*—A member of a partnership is presumed to have peculiar knowledge of the dealings of his firm, and upon the findings of the jury by the greater weight of the evidence that the defendant firm received goods as the plaintiff's agent in trust to hold the proceeds of resale to the payment of his debt, and that other of the firm's debts had been paid therewith, a *prima facie* case is made, and the burden of proof by the greater weight of the evidence is shifted to one of the firm claiming that this was done without his knowledge or consent to show it. *Guano Co. v. Southerland*, 228.

2. *Trusts—Trustees—Duration of Trusts—Leases.*—Where the donor of lands in an agricultural section of country has lived thereon and farmed the same and conveyed it to his son in trust for the children of the latter until the trustee's death, or the youngest child shall have become 21 years of age, with power to sell, reinvest, etc., and

TRUSTS—*Continued.*

hold for the purposes of the trust, and to use the same "as he may deem best for the interest of the said children, either renting it out or using and cultivating it himself, and using the rents and profits to support his family and to educate his children"; *Held*, a lease by the trustee, with the right of the lessee to renew within five-year periods, extending the lessee's right for twenty years, is inoperative beyond the death of the trustee, or at least beyond the current year in which he died, the youngest child having reached maturity and the children then being entitled to the distribution of the estate under the provisions of the deed. *Cox v. Lumber Co.*, 299.

3. *Same—Deeds and Conveyances—Registration—Notice.*—A lessee of lands held in trust takes with notice of the authority conferred upon the trustee, under a recorded deed to lease the premises, and where, thereunder, such authority ceases upon the death of the trustee, and a long-term lease has been made by him, in this case for five years, with renewal privileges extending it to twenty years, it is not required that the *cestuis que trust*, entitled to the distribution of the estate, at the death of the trustee, notify the lessee of their right, and the question of the reasonableness of the lease is immaterial. *Ibid.*

4. *Same—Adverse Possession.*—Where under the terms of a parol trust engrafted upon a deed the grantee should hold the legal title to the use of his wife for her life, then to himself; then to H. for life with remainder over to the plaintiffs, etc., who bring their suit to declare the trust and for possession soon after the death of H., and it appears that the defendants claim under *mesne* conveyances from the trustee, but are not purchasers for value; defendants do not hold adversely to plaintiff during the continuance of the particular estates, and the suit is not barred by the lapse of time. *Ibid.*

5. *Trusts, Parol—Deed of Trustee—Title—Original Uses.*—Where a trustee under a parol trust engrafted on his title holds to the use of his wife for her life and then affected by certain contingent uses, conveys the lands to his wife absolutely, his deed is a renunciation of the trust and his relation is adversary, but his wife, taking the title with notice, holds it subject to the trusts originally declared. *Ibid.*

6. *Trusts, Parol—Registration—Purchasers with Notice—Statutes.*—Our registration laws as to notice has no application to a parol trust engrafted on a conveyance of land where those claiming its benefits are found by the verdict of the jury, interpreted in the light of the charge, not to have been purchasers for value. *Pritchard v. Williams*, 319.

7. *Trusts, Parol—Remaindermen—Right of Action—Equity.*—Beneficiaries having vested or contingent interests in remainder under a parol trust engrafted upon a conveyance of lands, may maintain a suit to have such interest declared and established in the lifetime of the first taker, in the nature of a bill in equity to perpetuate testimony with the additional element of declaring the trusts, but no decree or order may be entered to disturb the possession of those entitled to it. *Ibid.*

8. *Same—Election—Conflicting Rights—Limitation of Actions.*—The right of the holder of an interest under a parol trust in remainder to maintain his suit to have the trust declared in the lifetime of the first taker, is not inconsistent with his right to have the trust declared

TRUSTS—*Continued.*

and for possession after the particular estate has fallen in, for the one includes the other; and his failure to have exercised the one does not bar his cause of action as to the other. *Ibid.*

TRUSTEES. See Trusts, 2.

USE OF PREMISES. See Spirituous Liquors, 2.

USES. See Trusts, 5.

USURY.

Usury—Executors and Administrators.—No action for usury will lie against the estate of a deceased person unless such has been received by the deceased in his lifetime; and the penalty is not enforcible against it for such as may only have been received by his personal representative in administering his affairs after his death, but only against the administrator in his personal character. *Whisnant v. Price*, 612.

VAGRANCY. See Criminal Law, 11, 12.

VARIANCE OF MORTGAGES. See Mortgages, 14.

VENDOR AND PURCHASER. See Contracts, 5; Fertilizers, 1; Estates, 4; Fraud, 1; Statutes, 3, 4; Corporations, 11; Carriers of Goods, 1; Evidence, 32; Limitation of Actions, 12.

1. *Vendor and Purchaser—Contracts—Interest—Payment — Damages—* Statutes.—Where the contract of sale of merchandise provides for the payment of interest on past due bills, the interest is regarded as the same as the principal debt, and a payment of the principal alone will not discharge the claim unless accepted in satisfaction of the entire debt (Revisal, sec. 859), there being a distinction between this and the principle applicable where an interest charge is imposed by way of damages for failure to pay the principal sum when due, and the payment of the principal "will bar an action for the interest." *King v. Phillips*, 95 N.C. 245, cited as controlling. *Grocery Co. v. Taylor*, 37.

2. *Vendor and Purchaser—Corporations—Shares — Offer to Sell—Withdrawal of Offer—Contracts—Consideration—Agreement.*—Where the bare offer to sell certificates of stock in a corporation is withdrawn before acceptance, there is no binding contract to sell, owing to the lack of consideration and agreement of the parties, and no obligation is imposed upon the owner of the shares. *Insurance Co. v. Moize*, 344.

3. *Vendor and Purchaser—Warranty—Breach—Voluntary Rebate — Instructions—Appeal and Error—Harmless Error.*—Where defendant sets up breach of warranty as a counterclaim in an action on notes he had given for fertilizers, which he had sold to others, he may not recover for a voluntary rebate he had made, which he was not compelled to give; and were it otherwise, a charge to that effect is harmless when there is no evidence that such rebate was actually allowed his customer by him. *Hubbard v. Goodwin*, 174.

4. *Vendor and Purchaser—Warranty—Breach—Fertilizer—Damages—Instructions.*—Where a vendor of fertilizer allows a customer a reduc-

VENDOR AND PURCHASER—*Continued.*

tion in price on account of grade inferior to that of warranty to himself by his vendor, an instruction is not erroneous that, to establish such as a counterclaim in the manufacturer's action for the purchase price, the jury should "find by clear and satisfactory evidence," that the warranty of the plaintiff was identical with that made by the defendant as to quality and results, of the adaptability of the land to the crops, proper tillage, and propitious seasons, etc., and the use of the words "clear and satisfactory evidence" was not an expression of opinion forbidden by the statute. *Ibid.*

5. *Vendor and Purchaser—Consignment—Evidence—Prima Facie Case—Trials.*—Evidence that the purchaser of goods on consignment refused an accounting after demand made by the vendor, makes out a prima facie case in the latter's action to recover the price, the defense being put upon the ground that the goods were unsatisfactory and that plaintiff had been notified they were held subject to his order. *Boone v. Tel. Co.* 718.

VERDICT. See Appeal and Error, 6, 13, 31; Pleadings 5; Courts, 3.

Verdict—Pleadings—Trials.—The verdict of the jury should be construed on appeal from a judgment rendered thereon with reference to the trial and issuable facts raised by the pleadings. *Taylor v. Stewart,* 199.

VERDICT DIRECTING. See Instructions, 2; Criminal Law, 9.

VESTED INTERESTS. See Wills, 23.

VESTED RIGHTS. See Estates, 3.

VESTING OF ESTATES. See Estates, 7.

VOTE. See Public Officers, 6.

VOTING PLACES. See Municipal Corporations, 1.

WAGERING CONTRACTS. See Evidence, 26.

WAIVER. See Removal of Causes, 1, 2; Fertilizers, 3; Actions, 3; Roads and Highways, 3; Contracts, 30.

WAR.

1. *War— Citizens— Residents— Aliens— Enemy— Actions— Courts.*— The right of one whose country is at war with the United States to sue in our State courts depends rather upon the place and character of his residence rather than upon his citizenship, and under the common law and the definition of his status as given by the declaration of war against Austria-Hungary by the President, and the "Trading with the Enemy Act," a citizen of that country residing here when the war was declared and since then may thereafter maintain his action in our courts, there being nothing to show he has done any unfriendly act or made any unfriendly utterance. *Krachanake v. Mfg. Co.,* 435.

2. *Same—Infants—Citizens—Residents—Next Friend.*—A father bringing suit in our courts as the next friend of his seven-year-old child is not a party thereto in a legal sense; and when the parent of the child is

WAR—*Continued.*

an alien enemy, or a citizen of a country at war with the United States and residing here, the citizenship of the child will be presumed to be that of the country of his birth, and the father may maintain in action in our courts as such next friend; and in case of recovery a guardian may be appointed and its use controlled in such manner as not to strengthen the hands of the enemy. *Semble*, the congressional registration act of alien enemies does not include those under 14 years of age. *Ibid.*

WARRANTY. See Contracts, 5; Fertilizers, 1; Vendor and Purchaser, 3, 4.

WATERS. See Railroads, 8; Municipal Corporations, 7, 10, 11, 12.

WATERWORKS. See Municipal Corporations, 4.

WIFE. See Estates, 8.

WILLS. See Gifts, 1; Estates, 8.

1. *Wills—Interpretation—Intent—Vesting of Estates.*—Subject to the provision that the intent and purpose of the testator, as expressed in his will, shall always prevail except when the same is in violation of law, the rule is that when the will is sufficiently ambiguous to permit of construction, the courts will lean to that interpretation which favors the early vesting of estates, and that the first taker of an estate by will is ordinarily to be considered as the primary object of the testator's bounty. *Whitfield v. Douglas*, 46.

2. *Same—Contingent Remainders.*—Upon a devise of lands to one with a limitation over on the death of the first taker without issue, these words will be given their natural meaning and effect the estate with the contingency until such death without issue, unless it appears from the terms of the will that an earlier time was intended when the estate of the first taker should become absolute. *Ibid.*

3. *Same—"Children Then Living."*—A devise of lands to testator's children "to have and to hold to them and their heirs in fee simple forever," but upon condition that "no part of said property is to be disposed of until my youngest child then living shall arrive at the age of 21 and until after the death of my husband," with provision for a home for the husband; that when the youngest child shall become 21 and upon the death of the husband, all of the testator's estate be equally divided between the testator's named children, "share and share alike; and should either of them die without issue, then their share shall be equally divided between my other children then living, or should either or any of them die leaving issue, then shall such distributive share go to such issue left": *Held*, construing the will to ascertain the intent, the devise became absolute at the time designated for the division, the expression "then living" referring to that of the arrival of the youngest child of age and the death of the husband. *Ibid.*

4. *Wills—Execution—Burden of Proof.*—Upon the issue of *devisavit vel non* raised by caveat and tried in Superior Court, the burden of proof is on the propounder to establish the formal execution of the will. *In re Will of Chisman*, 420.

WILLS—*Continued.*

5. *Wills— Affidavits— Solemn Form— Evidence, Corrobative— Evidence, Substantive.*—The affidavits of witnesses to a will probated in common form before the clerk may not be used as substantive evidence on the trial of the issue of *devisavit vel non* in the Superior Court, and is only admitted therein in corrobation of the testimony of such witnesses; and where it is not in corroboration, but such witnesses have testified that they did not know the mental capacity of the testator at the time, the affidavits to the contrary are inadmissible. *Ibid.*

6. *Wills—Evidence—Deceased Persons—Conversations—Witnesses—Interest.*—Testimony of a principal beneficiary under a will being tried in solemn form, upon caveat filed, that the testator told her she was "willing" her her property, and she, the testatrix, had changed a former will, etc., is incompetent as a conversion with a deceased person, under Revisal, sec. 1631, by one interested in the result of the action, and directly tending to establish mental capacity and lack of undue influence. *Rakestraw v. Pratt*, 160 N.C. 437, cited and distinguished. *Ibid.*

7. *Wills—Devise—Lands—Vague Description—Descent and Distribution—Intestacy.*—A devise in this case of "forty acres of land to include the dwelling and the old filed" is *Held* sufficient description to identify the lands; but if otherwise, the plaintiffs woud take an undivided interest as heirs at law of the deceased, as in case of intestacy. *Blanton v. Boney*, 211.

8. *Wills—Probate—Evidence.*—Evidence that a witness wrote the paper-writing offered for probate as a will, saw the testator sign it, held his hand when he made his mark, that the other witness signed it, that it was signed by the testator in the presence of both on a table by his bedside in his room, and that the writing was witnessed by both at the testator's request, is sufficient to justify the jury in drawing the inference that the writing was executed according to law. *In re Will of Stocks*, 224.

9. *Wills—Probate—Mental Capacity—Opinion—Evidence.*—Witnesses are competent to testify to the mental capacity of a testator to make a will, if they knew the testator well, had conversations or business transactions with him, and testify that in their opinion, based thereon, he knew what he was doing, what property he had, and to whom he wished to give it. *Ibid.*

10. *Wills—Evidence—Deceased Persons—Statutes.*—Transactions or conversations with a deceased person upon which witnesses have based their opinion as to his mental capacity to make a will, testified to in proceedings of caveat, are not incompetent under Revisal, sec. 1631. *Ibid.*

11. *Wills—Evidence—Probate— Affidavits— Corroborations.*— Affidavits of witnesses attesting a will on the probate before the clerk are competent in corroboration of the testimony of these witnesses at the trial. *Ibid.*

12. *Wills—Mental Capacity Before and After—Evidence.*—Where the issue is the mental capacity of the testator at the time of making a will, evidence of his capacity within a reasonable time before and after is competent. *Ibid.*

WILLS—*Continued.*

13. *Wills—Estates—Contingent Remainders—Intent.*—Where an estate by will is limited over on a contingency and no time is fixed for the contingency to occur, the time of the testator's death will be adopted unless a contrary intent appears from the terms of the will, etc. *Bank v. Murray,* 62.

14. *Same—Event—First Taker.*—Where an estate by will is limited over on the "death of the first taker without issue," these words, without more, will be given their primary and natural significance and effect the estate with a contingency during the entire life of the first taker, unless there be a contrary intent appearing from a proper interpretation of the instrument. *Ibid.*

15. *Same—Interpretation.*—Both of the positions are subject to the controlling principle that the intent of the testator, as expressed by the terms of the willl, must be given effect unless in violation of law; and when it appears from a perusal of the will and the circumstances relevant to its proper interpretation that a different time was intended, such time must always prevail. *Ibid.*

16. *Wills—Ambiguity—Interpretation—Intent—Estates—Early Vesting—Object of Testator's Bounty.*—Where ambiguity occurs in the terms of a will, permitting construction, the courts in its interpretation will favor that which makes for the early vesting of estates, and the first taker is ordinarily to be considered as the primary object of the testator's bounty. *Ibid.*

17. *Same—Contingent Remainders.*—A testator leaving a will disposing of a large estate in real and personal property, chiefly the latter, and with large lumber interests, after bequeathing certain legacies to others, enjoined upon his son, his only child, to help his executor in the management of the property, and stated that he, to whom the rest of the property was devised and bequeathed, would "naturally fall heir to everything outside of the annuities, and should he not marry, or even marry and have no issue, then one-half of what he is worth goes to the three children of M. in fee": *Held,* the son was the primary object of the testator's bounty, and, under the circumstances, the event to determine his absolute ownership of the property was that of his marriage and having living child or children thereof. *Buchanan v. Buchanan,* 99 N.C. 308, cited and distinguished. *Ibid.*

18. *Wills—Devise—Ademption.*—A direction by the testator that his real and personal property not otherwise disposed of be sold and the proceeds divided among certain living grandchildren refers to such as may be living at the time of his death; and when he has sold in his lifetime a part of his realty, such sale is an ademption, and the proceeds will pass under another clause of the will particularly relating to the testator's property of this character. *Perry v. Perry,* 141.

19. *Same—Consistent Clauses.*—Where the testator directs the sale of his land and the proceeds to be distributed among five children, and in his own lifetime has sold a part of the land, the fact that in a subsequent item he directs that his moneys on hand, etc., shall be divided among the children of only four of these children does not indicate that the children of one had been inadvertently omitted by him from the latter item. *Ibid.*

WILLS—*Continued.*

20. *Wills—Interpretation—Attempt to Defeat.*—A party to an action to obtain a construction of a will to ascertain the testator's intent, and who consented thereto for that purpose, will not be defeated of his rights thereunder by a clause providing that an attempt to defeat the will or any item thereof shall bar a recovery of any interest in the estate. *Ibid.*

21. *Wills—Devise—Powers of Sales—Purchaser—Application of Funds—Trusts and Trustees.*—A devise of land to the wife to have "complete control" for her life to sell to pay debts of testator, who was her husband, and for division among their children, with power to give any share to testator's grandchildren, subject to the support of their parents for life, "and to sell and make deed for said property as if it were her own, and without being required to give bond," and expressing anxiety as to two of the testator's children, with "hope that they will come around all right": *Held*, the will conferred the power upon the wife to sell the land in her discretion and make a valid deed, not requiring the purchaser to see to the application of the purchase money. *Markley v. Land Co.*, 101.

22. *Wills—Estates—Bodily Heirs—Rule in Shelley's Case.*—The donor in a conveyance of land reserved a life estate in himself, then to D. "during his natural life and then to the lawfully begotten heirs of said D.'s body, and to F. (wife of D.) during her widowhood": *Held*, the use of the words heirs of D.'s body were not *descriptio personarium* so as to indicate his children, and D. takes the fee simple, under the rule in *Shelley's* case, after the falling in of the preceding particular estates. *Daniel v. Harrison*, 120.

23. *Wills—Lands—Powers of Disposition—Vested Interests—Division.*—A devise of lands to testator's wife, with complete control during her life, with power to sell for division among their named children, with discretionary power in the wife to give any child's share to the children of such child, reserving a support for such child for life, expressing a doubt as to the future of two of them; that she may sell and convey such lands as she needs for her own support; and with the testator's preference that most of the land be sold for a fair price with certain reservation of a small tract under certain conditions: *Held*, in an action for partition by two of the children against the others and their mother, the plaintiffs have no vested interest in the land. *Makely v. Shore*, 121.

24. *Same—Contingent Interest—Statutes.*—Where lands are devised to the wife for life, giving her control thereof, with the power to sell, pay testator's debts, use such as she may require, divide the proceeds among the children, with further power of appointment. Revisal, sec. 2508, allowing an interest in reversion to be sold during the life of the first taker, has no application, for such would defeat the intention of the testator as to the powers expressly conferred upon the wife by his will. *Ibid.*

25. *Wills—Devise—Estates—Contingent Limitations.*—A devise of lands to testator's wife for life, and upon her death to H., his nephew, and W., her nephew, equally, and should W. "die without a lawful heir of his body," then to H. Upon the falling in of the life estate to the wife

WILLS—*Continued.*

and after the death of H., W. purchased from the sole heirs at law of H., and contracted to convey the entire estate: *Held,* the purchaser would acquire good title under the decision of *Hobgood v. Hobgood,* 169 N.C. 485. *Burden v. Lipsitz,* 168 N.C. 523, cited and distinguished. *Whichard v. Craft,* 128.

26. *Wills—Devise—Survivors of a Class—Intent—Die Without Children—Ultimate Devisee.*—A devise of land to the named children of the testator, providing that if any of them die without leaving child or children, such portion to be divided among the survivors; and upon the death of any of such children leaving a child or children surviving, this portion to be divided among his or her children: *Held,* the intent of the testator was that the share of his estate derived by each of his children under his will should go to the ultimate survivor, as between themselves, in case any of them died without surviving children; and the portion so going over vested absolutely in him freed from the original limitation. *Robertson v. Andrews,* 492.

WITNESSES. See Wills, 6; Contempt, 2; Evidence, 35, 36; Homicide, 11; Husband and Wife, 1; Costs, 8.

WOODWORKING ENTERPRISES. See Insurance, 5.

WORDS AND PHRASES. See Estates, 9.

WRITING. See Contracts, 11; Instructions, 16.