NORTH CAROLINA REPORTS

Vol. 182

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FALL TERM, 1921

REPORTED BY

ROBERT C. STRONG

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OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1921

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ASSOCIATE JUSTICES:

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WILLIAM A. HOKE,
W. P. STACY,
W. J. ADAMS.

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SUPREME COURT REPORTER:

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

W. M. Bond	First	Chowan.
George W. Connor	Second	Wilson.
John H. Kerr	Third	Warren.
F. A. Daniels	Fourth	Wayne.
J. Lloyd Horton	Fifth	Pitt.
O. H. Allen	Sixth	Lenoir.
T. H. Calvert	Seventh	Wake.
E. H. Cranmer	Eighth	Brunswick.
C. C. Lyon	Ninth	Bladen.
W. A. Devin	Tenth	Granville.

WESTERN DIVISION

H. P. Lane	Eleventh	Rockingham.
Thomas J. Shaw	Twelfth	Guilford.
W. E. Brock	Thirteenth	Anson.
W. F. Harding	Fourteenth	Mecklenburg.
B. F. Long	Fifteenth	Iredell.
J. L. Webb	Sixteenth	Cleveland.
T. B. Finley	Seventeenth	Wilkes.
J. Bis Ray	Eighteenth	Yancey.
P. A. McElroy	Nineteenth	Madison.
T. D. Bryson	Twentieth	Swain.

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EASTERN DIVISION

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Garland E. Midyette	Third	Northampton.
Walter D. Siler	Fourth	Chatham.
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H. E. Norris	Seventh	Wake.
Woodus Kellam	Eighth	New Hanover.
S. B. McLean	Ninth	Robeson.
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WESTERN DIVISION

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G. W. Wilson	Fourteenth	Gaston.
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R. L. Huffman	Sixteenth	Burke.
J. J. Hayes	Seventeenth	Wilkes.
G. D. Bailey	Eighteenth	Yancey.
Geo. M. Pritchard	Nineteenth	Madison.
Gilmer A. Jones	Twentieth	Macon.

LICENSED ATTORNEYS

SPRING TERM, 1922

The following were licensed to practice law by the Supreme Court, Spring Term, 1922:

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BASS, NATHAN ROSCOE.....Lucama
BLACKWELDER, BUFORD WILLIAM.....Concord
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CARROLL, ADRIAN MEREDITH.....Burlington
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HARRIS, JOSEPH JOHNSON.....Bunn
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HAWORTH, HORACE STARBUCK.....High Point
HIGGINS, ROBERT OLIN.....Charlotte
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HOLDER, BRANTSON BEESON.....Pink Hill
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SHANK, MARIE.....Asheville
SHAW, WILLIAM TOLMAN.....Raleigh
SLEDGE, WILLIAM WHITFIELD.....Weldon
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WILKINS, JOHN ALLEN.....Raeford
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WORTHINGTON, SAMUEL OTIS.....Winterville

The following were granted license under the provisions of Chapter 44, Public Laws of the Extra Session of 1920:

DEADWYLER, JOE LUMPKIN.....Asheville
GRANTHAM, CHARLES PINCKNEY.....Raleigh
WILLIAMS, CHARLES GILBERT.....Raleigh

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE SPRING OF 1922

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, 1922
First District	February 7
Second District	February 14
Third and Fourth Districts	February 21
Fifth District	February 28
Sixth District	March 7
Seventh District	March 14
Eighth and Ninth Districts	March 21
Tenth District	March 28
Eleventh District	April 4
Twelfth District	April 11
Thirteenth District	April 18
Fourteenth District	April 25
Fifteenth and Sixteenth Districts	May 2
Seventeenth and Eighteenth Districts	May 9
Nineteenth District	May 16
Twentieth District	May 23

SUPERIOR COURTS, SPRING TERM, 1922

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

In many instances the statutes apparently create conflicts in the terms of court.

THIS CALENDAR IS UNOFFICIAL.

EASTERN DIVISION

First Judicial District

SPRING TERM, 1922—*Judge Daniels.*

Camden—Mar. 13(1).

Beaufort—Jan. 16*(1); Feb. 20†(2); April 10†(1); May 8(1); May 15†(1).

Gates—Mar. 27(1).

Tyrrell—Jan. 30(1); April 24(1).

Currituck—Mar. 6(1); May 1†(1).

Chowan—April 3(1).

Pasquotank—Jan. 2†(2); Feb. 13†(1); Mar. 20(1).

Hyde—May 22(1).

Dare—May 29(1).

Perquimans—Jan. 23(1); April 17(1).

Second Judicial District

SPRING TERM, 1922—*Judge Horton.*

Washington—Jan. 9(2); April 17†(2).

Nash—Jan. 23(1); Feb. 27†(1); Mar. 13(1); May 1*(1); May 28†(1).

Wilson—Feb. 6*(1); Feb. 13†(1); May 15*(1); May 22†(1); June 26†(1).

Edgecombe—Mar. 6(1); April 3†(2); June 5(2).

Martin—Mar. 20(2); June 19(1).

Third Judicial District

SPRING TERM, 1922—*Judge Allen.*

Northampton—April 3(2).

Hertford—Feb. 27(1); April 17(2).

Halifax—Jan. 30(2); Mar. 20(2); June 5(2).

Bertie—Feb. 13(1); May 8(2).

Warren—Jan. 16(2); May 22(2).

Vance—Mar. 6(2); June 19(2).

Fourth Judicial District

SPRING TERM, 1922—*Judge Calvert.*

Lee—Mar. 27(2); May 8(1).

Chatham—Jan. 16(1); Mar. 20†(1); May 15(1).

Johnston—Feb. 20†(2); Mar. 13(1); April 24†(2).

Wayne—Jan. 23(2); April 10†(2); May 29(2).

Harnett—Jan. 9(1); Feb. 6†(2); May 21(1).

Fifth Judicial District

SPRING TERM, 1922—*Judge Cranmer.*

Pitt—Jan. 16(2); Jan. 23(1); Feb. 20(1); Mar. 20(2); April 17(2); May 22(2).

Craven—Jan. 9*(1); Feb. 6†(2); April 10‡(1); May 15†(1); June 5*(1).

Carteret—Jan. 30(1); Mar. 13†(1); June 12(2).

Pamlico—May 1(2).

Jones—April 3(1).

Greene—Feb. 27(2); June 26(1).

Sixth Judicial District

SPRING TERM, 1922—*Judge Lyon.*

Onslow—Mar. 6(1); April 17†(2).

Duplin—Jan. 9†(2); Jan. 30*(1); Mar. 27†(2).

Sampson—Feb. 6(2); Mar. 13†(2); May 1(2).

Lenoir—Jan. 23*(1); Feb. 20†(2); April 10(1); May 22*(1); June 12†(2).

Seventh Judicial District

SPRING TERM, 1922—*Judge Devin.*

Wake—Jan. 9*(1); Jan. 30†(1); Feb. 6*(1); Feb. 13†(1); Mar. 6†(1); Mar. 13†(2); Mar. 27†(2); April 10*(1); April 17†(2); May 1†(1); May 8*(1); May 22†(2); June 5*(1); June 12†(2).

Franklin—Jan. 16(2); Feb. 20†(2); May 15(1).

Eighth Judicial District

SPRING TERM, 1922—*Judge Bond.*

New Hanover—Jan. 15*(1); Feb. 6†(2); Mar. 6†(2); Mar. 20*(1); April 17†(2); May 15*(1); May 29†(2); June 12*(1).

Pender—Jan. 23(1); Mar. 27†(2); May 22(1).

Columbus—Jan. 30(1); Feb. 20†(2); May 1(2).

Brunswick—Jan. 9†(1); April 10(1); June 19†(1).

Ninth Judicial District

SPRING TERM, 1922—*Judge Connor.*

Robeson—Jan. 30*(1); Feb. 6†(1); Feb. 27†(2); April 3(2); May 15†(2).

Bladen—Jan. 9‡(1); Mar. 13*(1); April 24†(1).

Hoke—Jan. 23(1); April 17(1).

Cumberland—Jan. 16*(1); Feb. 13(2); Mar. 20†(2); May 1†(2); May 29*(1).

Tenth Judicial District

SPRING TERM, 1922—*Judge Kerr.*

Granville—Feb. 13(2); April 10(2).

Person—Feb. 6(1); April 24(1).

Alamance—Mar. 6*(1); Mar. 27†(1); May 15†(1); May 29†(2).

Durham—Jan. 9†(2); Feb. 27*(1); Mar. 13†(2); May 1†(1); June 19†(1).

Orange—April 3(1); May 8†(1).

WESTERN DIVISION

Eleventh Judicial District

SPRING TERM, 1922—*Judge Harding.*

Ashe—April 10(2).
Forsyth—Jan. 9(2); Feb. 13†(2); Mar. 13†(2); Mar. 27*(1); May 22†(3).
Rockingham—Jan. 23*(1); Feb. 27†(2); May 15(1); June 19†(2).
Caswell—April 3(1).
Surry—Feb. 6(1); April 24(2).
Alleghany—May 8(1).

Twelfth Judicial District

SPRING TERM, 1922—*Judge Long.*

Davidson—Feb. 27(2); May 8(1); May 29(2).
Guilford—Jan. 16*(1); Jan. 23†(2); Feb. 13†(2); Mar. 13*(1); Mar. 20†(2); April 17†(2); May 1*(1); May 15†(2); June 12†(1); June 19*(1).
Hoke—April 3*(1); April 10†(1).

Thirteenth Judicial District

SPRING TERM, 1922—*Judge Webb.*

Stanly—Feb. 6†(1); April 3(1); May 15†(1).
Richmond—Jan. 9*(1); Mar. 20†(1); April 10*(1); May 29†(1); June 19†(1).
Union—Jan. 30*(1); Feb. 20†(2); Mar. 27(1); May 7†(1).
Anson—Jan. 16*(1); Mar. 6†(1); April 17(2); June 12†(1).
Moore—Jan. 23*(1); Feb. 13†(1); May 22†(1).
Scotland—Mar. 13†(1); May 1(1); June 5(1).

Fourteenth Judicial District

SPRING TERM, 1922—*Judge Finley.*

Mecklenburg—Jan. 9*(1); Feb. 6†(3); Feb. 27*(1); Mar. 6†(2); April 3†(2); May 1†(2); May 15*(1); May 22†(2); June 12*(1); June 19†(1).
Gaston—Jan. *(1); Jan. 22†(2); Mar. 20†(2); April 17*(1); June 5*(1).

Fifteenth Judicial District

SPRING TERM, 1922—*Judge Ray.*

Montgomery—Jan. 23*(1); April 10†(2).
Randolph—Mar. 20†(2); April 3*(1).
Iredell—Jan. 30(2); May 15(2).
Cabarrus—Jan. 9(2); Feb. 27†(1); April 24(2).
Rowan—Feb. 13(2); Mar. 6†(2); May 8(2).

Sixteenth Judicial District

SPRING TERM, 1922—*Judge McElroy.*

Lincoln—Jan. 30(1).
Cleveland—Mar. 27(2).
Burke—Mar. 13(2).
Caldwell—Feb. 27(2); May 22†(2).
Polk—April 17(2).

Seventeenth Judicial District

SPRING TERM, 1922—*Judge Bryson.*

Catawba—Feb. 6(2); May 8†(2).
Alexander—Feb. 20(1).
Yadkin—Mar. 6(1).
Wilkes—Mar. 13(2); May 29(1).
Davie—Mar. 20(1); May 22(1).
Watauga—Mar. 27(2).
Mitchell—April 10(2).
Avery—April 24(2).

Eighteenth Judicial District

SPRING TERM, 1922—*Judge Lane.*

McDowell—Jan. 23†(2); Feb. 20(2).
Rutherford—Feb. 6†(2); May 1(2).
Henderson—Mar. 6(2); May 29†(2).
Yancey—Mar. 27(2).
Transylvania—April 17(2).

Nineteenth Judicial District

SPRING TERM, 1922—*Judge Shaw.*

Buncombe—Jan. 9(3); Feb. 6†(2); Mar. 6(3); April 3†(3); May 1(2); June 5†(3).
Madison—Feb. 27(1); Mar. 27(1); April 24(1); May 22(1).

Twentieth Judicial District

SPRING TERM, 1922—*Judge*————.

Haywood—Jan. 9*(2); Feb. 6(2); May 8†(2).
Cherokee—Jan. 23(2); April 3(2).
Jackson—Feb. 20(2); May 22†(2).
Swain—Mar. 6(2)
Graham—Mar. 20(2); June 5†(2).
Clay—April 17(1).
Macon—April 24(2).

*Criminal cases. †Civil cases. ‡Civil and jail cases.
Compiled from the Court Calendar of A. B. Andrews of the Raleigh Bar.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—HENRY G. CONNOR, *Judge*, Wilson.
Western District—JAMES E. BOYD, *Judge*, Greensboro.
Western District—EDWIN YATES WEBB, *Judge*, Shelby.

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. ALBERT T. WILLIS, Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. C. M. SYMMES, Deputy Clerk, Wilmington.

Laurinburg, Monday before the last Monday in March and September.

Wilson, first Monday in April and October.

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.

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1921

JESSE ARMSTRONG v. C. T. SPRUILL ET AL.

(Filed 14 September, 1921.)

1. Waters—Surface Waters—Drainage—Canals — Prescriptive Rights — Damages.

Where the users of a canal by prescriptive right enlarge the same, and thereby place water upon the lower proprietor to his damage, they are liable therefor, and, upon conflicting evidence, the issue should be submitted to the jury.

2. Waters—Surface Waters—Enlargement of Canal—Costs—Statutes.

The method by which the users of a canal by prescriptive right may enlarge or deepen it with an apportionment of the costs, is provided by our statute, C.S. 5274.

APPEAL by plaintiff from *Allen, J.*, at April Term, 1921, of TYRRELL.

W. L. Whitley and Meekins & McMullan for plaintiff.
T. H. Woodley and Aydlett & Simpson for defendants.

CLARK, C.J. It appears by the uncontradicted testimony that more than 60 years ago the canal was cut which drained the lands now owned by plaintiff and defendants and all other parties along its line; that they all drained into this canal and helped maintain it until 1915.

The plaintiff alleges that the defendants, finding the old canal, to use which they have shown a prescriptive right, had become insufficient, enlarged the same and placed water upon plaintiff to his damage. If the defendants, upper proprietors, desire to enlarge the canal, their remedy was under C.S. 5260 *et seq.* Under C.S.

5274, they could, in a proper proceeding, have had said canal enlarged or deepened with a just apportionment of the costs. (2) Instead of pursuing this remedy, there is evidence that the defendants enlarged the canal according to their own views, and increased the flow of water upon the land of plaintiff, he being the lower proprietor.

There is a clear conflict of evidence as to whether, as a matter of fact, the enlargement of the canal by the defendant has caused damage to the plaintiff.

The case, therefore, should have been submitted to the jury upon the evidence, and the judgment of nonsuit is

Reversed.

Cited: Armstrong v. Spruill, 186 N.C. 20.

ELIZABETH CITY MILLING COMPANY v. PHILLIPS AND COMPANY.

(Filed 14 September, 1921.)

Contracts—Breach—Actions—Damages.

The plaintiff bought from the defendant 1,000 bags of seed potatoes for delivery upon his order during specified months of that year, and thereafter, owing to weather conditions and war-traffic congestions, entered into a new contract, in substitution of the old, whereby the defendant was to ship, when ordered out, one-fourth of the potatoes during other stated intervals. The plaintiff did not order out the first shipment, and thereafter ordered out the shipments in one-half the quantity he had bought, and at different periods from those stated in his contract, and declared the contract at an end before the last shipment was thereunder due. In his action to recover damages for loss of profits: *Held*, he had breached his own contract and could not recover; and the verdict allowing defendant's counterclaim for damages for loss by reason of the sale of the potatoes under the contract price, will not be disturbed.

APPEAL by plaintiff from *Allen, J.,* at January Term, 1921, of PASQUOTANK.

This was an action upon a contract, made by correspondence, for the delivery by defendant to the plaintiff at Elizabeth City of 1,000 sacks of seed Irish potatoes to be shipped subject to weather hazards, and upon receipt of written order from the plaintiff for shipment. The plaintiff deposited with the defendant the sum of 50 cents per sack in advance. The defendant agreed to refund to plaintiff the purchase price per sack for all potatoes frozen before de-

livery. The defendant actually delivered only 440 sacks, of which 12 sacks were frozen, and the liability therefor acknowledged.

The plaintiff brings this action for $280, being the refund of 50 cents per sack deposited for the 560 sacks not delivered; for $52.80, being the purchase price for the 12 sacks of frozen potatoes, and $896, alleged profit which plaintiff would have made if potatoes had been delivered according to contract. The first two items were not disputed, but the defendant contended that (3) it was relieved of shipping the potatoes on account of weather conditions, and also by reason of the congestion of traffic caused by the war, and also pleaded as a counterclaim that by reason of the failure of plaintiff to take the potatoes when offered within the time specified, it was forced to sell the same at a price below the contract. The jury found all issues in favor of the defendant and assessed the sum due the defendant at $288.75, and from the judgment plaintiff appealed.

Meekins & McMullan and Thompson & Wilson for plaintiff.
Ehringhaus & Small for the defendant.

CLARK, C.J. By the contract which was made 7 September, 1917, it was provided that the potatoes should be shipped "between 1 January and 1 February, 1918." Owing to congestion in freight shipments caused by the war the contract was changed, as appears by the correspondence, to provide that the potatoes should be shipped, "25 per cent last of November, 25 per cent in December, 25 per cent in January and February, and 25 per cent in March."

The plaintiff failed to order any shipment in November, but demanded 50 per cent to be shipped in December and the remaining 50 per cent also in December, or half in December and half in January. These demands were not assented to by the defendant, and were contrary to the amended contract as above set out. On 13 March the plaintiff canceled the order and refused to take the remainder of the potatoes, though the defendant had under the terms of the contract all the month of March to complete delivery. The plaintiff received about 25 per cent of the potatoes during December, and in January another shipment covering the deliveries agreed on for February. No written orders were given for November, and the contract was canceled by plaintiff March 13, before the time for the final deliveries had expired.

The plaintiff had no right to recover, upon his own showing, according to which he had breached the contract in four particulars. He was entitled to recover nothing, and the defendant was properly permitted to recover for its damages by reason of the cancellation

of its order after deducting the amount in hand, *i. e.*, 50 cents per barrel for the potatoes not delivered and for the frozen potatoes. That is, the defendant recovered the difference between the contract price and the price realized by the sale of the potatoes whose delivery was improperly refused, less the amount of the deposit of 50 cents per barrel for the potatoes not delivered, and proper credit was also given to the plaintiff for the frozen potatoes.

No error.

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(4)

C. W. OVERTON v. S. M. COMBS.

(Filed 14 September, 1921.)

1. Malicious Prosecution—Actions—Judgments.

In order to sustain an action for malicious prosecution it must be shown that an action has been instituted by the defendant without probable cause and from malice, causing wrongful interference with the person or property of the complainant, and that the former action has terminated in complainant's favor, before suit brought.

2. Same—Malice—Probable Cause—Evidence—Questions of Law—Questions for Jury—Trials.

While in an action for malicious prosecution the existence or non-existence of defendant's malice in the former action is a question of fact for the jury upon competent evidence, it is a question of law for the court to determine, on the issue as to probable cause, and on the facts admitted or as found by the jury, whether its existence or nonexistence has been sufficiently established.

3. Malicious Prosecution—Judgments—Estoppel—Actions.

Where it appears, in an action for malicious prosecution, that a trial court having jurisdiction has decided the essential features of the former action in favor of the plaintiff therein, on proper proof or admission, that finding is conclusive in his favor on this question of probable cause, and he may not be held liable in a subsequent action for malicious prosecution.

4. Same—Arrest—Execution Against the Person—Statutes—Judgment—Reversal—Appeal.

Where a trial court of competent jurisdiction has regularly determined that the plaintiff in the action had the right to arrest the defendant on personal execution, and accordingly the defendant has been taken into custody, C.S. 673, the plaintiff in said action is not liable in damages in defendant's subsequent action for malicious prosecution, though the verdict and finding of the jury or finding for plaintiff in the former suit is thereafter set aside or reversed on appeal or other ruling in the orderly progress of the cause.

5. Same—Evidence.

The complaint in an action in a court of competent jurisdiction alleged an indebtedness of defendant to the plaintiff; and that defendant had disposed of an amount of personal property embraced in a mortgage securing the debt, with the purpose of hindering, delaying, and defrauding the plaintiff in the collection of the debt, and the action proceeded to judgment upon competent evidence as to each allegation in the plaintiff's favor, under which the defendant was taken into custody under personal execution after execution against his property had been returned unsatisfied, C.S. 673: *Held*, to establish existence of probable cause and to conclude the defendant's subsequent action to recover damages for malicious prosecution against the plaintiff in the former action.

6. Judgments—Irregular Judgments — Judgments Set Aside — Malicious Prosecution.

Where a court of competent jurisdiction has, upon orderly procedure and sufficient evidence, entered judgment against the defendant in the action and ordered execution against his person, as provided in C.S. 673, and accordingly the defendant has been arrested, the subsequent recalling the execution or setting aside of the judgment in the course and practice of the courts, for irregularity, do not of themselves so disturb the facts established or the judgment rendered thereon as to permit the defendant thereafter to maintain his action for malicious prosecution against the plaintiff in the former one.

CIVIL action, tried before *Calvert, J.*, and a jury, at January Term, 1921, of WASHINGTON. (5)

The action is one for malicious prosecution, involving the arrest of present plaintiff, and was determined for plaintiff on the following issues and verdict:

"1. Did defendant, S. M. Combs, cause the plaintiff, C. W. Overton, to be arrested under process in the nature of an execution against the person in a suit brought by S. M. Combs against C. W. Overton in Tyrrell County, as alleged in the complaint? Answer: 'Yes.'

"2. Was such a process of execution against the person duly vacated and set aside upon motion of the plaintiff, C. W. Overton, as alleged in the complaint? Answer: 'Yes.'

"3. If so, was said action instituted and such process issued wrongfully, maliciously and without probable cause? Answer: 'Yes.'

"4. What damage, if any, is the plaintiff Overton entitled to recover of the defendant Combs? Answer: '$250.'"

Judgment on the verdict for plaintiff, and defendant excepted and appealed, assigning errors, chiefly refusal of defendant's motion for nonsuit.

W. L. Whitley for plaintiff.

Meekins & McMullan for defendant.

HOKE, J. On the present trial there was evidence tending to show that the present defendant had a note against plaintiff for $250, secured by chattel mortgage on an automobile and other articles of personal property, to wit, a cow and a mare and plaintiff's crops for the then current year, consisting of cotton, corn, potatoes, etc. That defendant instituted said former action and filed his verified complaint alleging indebtedness; that said Overton had disposed of all the personal property included in the mortgage other than the Ford car, with the fraudulent intent to hinder and delay plaintiff in collection of his debt, etc.; that at, or just before suit entered, Overton had delivered the car to Combs, and same, having been very much damaged in use by said Overton, was sold on due advertisement for $70 and amount credited on the note; that Overton, defendant in the former suit, failed to answer or resist recovery, although he was notified that there were allegations of fraud made against him in the case, and he should appear and defend himself; that on the hearing, the allegations presented by the pleadings were submitted to the jury, who rendered the following verdict:

(6)

"1. Is the defendant indebted to the plaintiff? If so, in what amount? Answer: '$250 and interest, subject to credit of $70.'

"2. Did the defendant execute to the plaintiff a chattel mortgage as alleged, conveying the property therein set out? Answer: 'Yes.'

"3. Did the defendant sell and dispose of the chattel property conveyed in the said mortgage without the consent and for the purpose of hindering and delaying the plaintiff in collecting the said mortgage and notes secured thereby? Answer: 'Yes.'"

On which said verdict there was judgment in favor of Combs for the debt, less the $70.

That if execution against property was returned unsatisfied, execution should be issued against the person of the judgment debtor. Execution having issued against property and returned unsatisfied, there was execution against the person as directed, under which process the arrest and detention of plaintiff complained of in present suit, was had. The return of sheriff on this process, 23 May, 1919, was: "Executed by arresting C. W. Overton, defendant herein named, and he having given a good and sufficient bond was released and not imprisoned as ordered." It further appeared that after this release, on notice and motion the execution against the person was recalled as having been improvidently issued, and later, at August Term, 1919, on notice and motion, the portion of the judgment directing that execution issue against the person was set aside as being irregular. Thereupon the present suit was entered to re-

cover damages for malicious prosecution and for the arrest and detention of plaintiff wrongfully caused therein.

It is the accepted law here and elsewhere that in order to a recovery in an action for malicious prosecution, it must be made to appear that an action has been instituted by the defendant without probable cause and from malice, causing damage by wrongful interference with the person or property of complainant, and that said former action has terminated in complainant's favor before suit brought. *Carpenter v. Hanes*, 167 N.C. 551; *Humphries v. Edwards*, 164 N.C. 154; *Downing v. Stone*, 152 N.C. 525; *Stanford v. Grocery Co.*, 143 N.C. 419; *R. R. v. Hardware Co.*, 143 N.C. 54.

And these, and authority generally is to the effect that while on the issue as to malice, its existence or nonexist- (7) ence must be determined by the jury, on the issue as to probable cause and on the facts admitted or as they may be accepted by the jury, its existence or nonexistence must be decided as a question of law by the Court. And in this State the cases on the subject hold uniformly, so far as noted, that where, in a former suit, a trial court having jurisdiction has decided the essential issues in favor of the plaintiff on proper proof or admission, that finding is conclusive in plaintiff's favor on this question of probable cause, and he may not be held liable in a subsequent action for malicious prosecution. And the principle holds though the verdict or finding for plaintiff in the former suit is thereafter set aside or reversed on appeal or other ruling in the orderly progress of the cause. Thus, in *Smith v. Thomas*, 149 N.C. 100, action for malicious prosecution against the private prosecutor in a criminal charge before a justice of the peace, defendant plead guilty, and on appeal was acquitted of the offense in the appellate court. Held, action would not lie for that, though the innocence of the appellant had been established by the final judgment, the plea of guilty was conclusive against him on the issue as to probable cause.

A like decision was made in *Price v. Stanley*, 128 N.C. 38, where the defendant having been convicted in the justice's court, on appeal the solicitor of the appellate court finding that there was not sufficient evidence to sustain the prosecution, entered a *nol. pros.* Held, the conviction before the justice conclusively established the existence of probable cause.

And in *Griffis v. Sellars*, 20 N.C. 315, it was determined that "In an action for a malicious prosecution, a verdict and judgment of conviction in a court of competent jurisdiction, although the party convicted was afterwards acquitted upon an appeal to a superior tribunal, is conclusive evidence of probable cause, and precludes

the plaintiff in the action for the malicious prosecution from showing the contrary."

Speaking more elaborately to the principle, Chief Justice Ruffin, delivering the opinion, said: "This case differs from that which was before the Court a year ago between the plaintiff's brother and the same defendant (*ante* 2, vol. 492), only in showing more explicitly the innocence of the plaintiff, and the malignant motive of the defendant. But the same principle governs both, notwithstanding that difference in the detail of the circumstances. The principle is, that probable cause is judicially ascertained by the verdict of the jury and judgment of the Court thereon, although upon an appeal a contrary verdict and judgment be given in a higher court. Our opinion being that probable cause is judicially established by those means, it follows that no evidence is competent to disprove it."

(8) And further in the same opinion: "So, in the present state of the case, another ingredient of the action, namely, the want of probable cause, which is as essential to the plaintiff's action as is his innocence, is completely negatived, because the proof that satisfied the jury and court then trying the plaintiff that he was guilty, must, upon the ground already adverted to, be deemed by another court to establish that there was then probable cause."

This being the doctrine as it prevails under our decisions, we are all of opinion that it must apply in protection of defendant on the facts of the present record, it appearing that in action in the Superior Court, plaintiff had filed his complaint alleging an indebtedness of $250, and further that defendant had disposed of an amount of personal property embraced in a mortgage held by plaintiff to secure the debt, with the view and purpose of hindering and delaying and defrauding plaintiff in the collection of same.

Under the supervision of a capable and learned judge, issues as to the debt and the fraud are submitted to the jury, verdict rendered on both in plaintiff's favor, and judgment on the verdict for the debt and for execution against the person in case of execution against property is returned unsatisfied. C.S. 673. This was the condition of the record at the time execution was issued against person of defendant after one against his property returned unsatisfied, and the arrest made of which he now complains.

True that later, and before another judge, an order was entered that the execution against the person be recalled, and still later, a year or more, the portion of the judgment directing execution against the person was set aside. This, however, was done because of alleged irregularity, and in neither of these subsequent orders, nor in other portions of the record is there an entry or ruling that

challenges or purports to challenge the facts established by the verdict or which militates or weakens its force and effect on the question of probable cause. There are courts of the highest respectability and learning which hold that where a verdict and judgment has been set aside for fraud, collateral to the principal cause of action, and more especially where it is of such a nature as to have deprived the original defendant of his opportunity to disclose his case, such action will prevent the operation of the principle to which we have adverted. See a learned discussion of this subject in *Crescent City Livestock v. Butcher's Union,* 120 U.S. 141-149 *et seq.;* 18 R.C.L., title, Malicious Prosecutions, secs. 21 and 27.

Others, going further, have held that the position may be made available on allegations of such fraud with adequate proof to support them. But neither of these positions are open to plaintiff on the present record where, as stated, the former (9) judgment was disturbed on the ground of irregularity only.

On the record, and for the reasons stated, we are of opinion that defendant's motion for nonsuit should have been sustained, and it is so ordered.

Reversed.

Cited: Moore v. Winfield, 207 N.C. 769; *Miller v. Greenwood,* 218 N.C. 151.

MRS. W. B. HIPP v. E. L. DUPONT DE NEMOURS AND COMPANY ET AL.

(Filed 14 September, 1921.)

1. Judgments—Estoppel—Parties—Privies—Actions.

A judgment in an action is not effective as a bar or estoppel in any other action unless between the same parties or privies, for the same cause of action.

2. Same—Married Women—Husband and Wife—Statutes—Negligence—Torts.

Under the married woman's act, the wife is not a necessary party or privy to her husband's action to recover damages for a personal injury negligently inflicted on him by a third person, and an adverse judgment rendered in the court of another state, wherein she was not a party, does not bar her recovery in her action brought in the courts of this State for the damage she has independently and individually sustained, which was proximately caused by the same injury alleged to have been negligently inflicted on her husband.

3. Married Women—Husband and Wife—Actions—Negligence—Torts—Measure of Damages—Mental Anguish.

Under the married woman's act, the wife may recover such damages as she has proximately sustained independently of those caused alone to her husband in tort or by the negligence of a third person, including expenses paid by her made necessary by her husband's injuries, services she has performed in nursing and caring for him, loss of support and maintenance, and of *consortium*, and for mental anguish in proper instances.

4. Decisions of Sister States—Dissenting Opinion—Authority.

The decisions of the courts of other states are entitled only to the persuasive weight given on account of the force or correctness of their reasoning, and this may be accorded to the force or correctness of the reasoning of a dissenting opinion therein filed.

5. Actions—Marriage—Married Women—Husband and Wife—Dependents—Statutes—Constitutional Law.

The cause of action for damages separately and independently and proximately caused the wife arising from the injury inflicted on her husband by the negligent act of a third person, arises from the relationship created by the contract of marriage as now recognized by our Constitution and statutes, and does not extend to the children of the marriage or other dependent relatives.

ALLEN and STACY, JJ., concur in result.

APPEAL from *Harding, J.*, at April Term, 1921, of MECK-
(10) LENBURG.

The plaintiff, who is the wife of W. B. Hipp, brings this action alleging that her husband, while working as an employee of the defendant company in Hopewell, Virginia, was "seriously, painfully and permanently injured as a proximate result of the carelessness and negligence of the defendants," setting out the manner in which he was injured and the extent of such injuries and the expense, and that under the law of Virginia, which is set out, the plaintiff was entitled as a married woman to sue and be sued as if she were unmarried, and to own and control her property as fully as if she had remained single, and that neither she nor her husband have received anything whatever from the defendants in the way of damages for the serious injuries inflicted on him; and that her husband brought action in Virginia, but notwithstanding three separate jury verdicts afforded him the Court of Appeals of that State rendered judgment against him upon demurrer to the evidence; that the plaintiff is entitled, notwithstanding, to recover in this jurisdiction, she having obtained service upon the defendants for the personal injuries inflicted on her by the injury to her husband. The defendants demur from the ground that it appears upon the face of the complaint that judgment has been rendered in Virginia that

her husband was not entitled to recover, and that it appears inferentially therefore that under the law of the State of Virginia she has no action for the loss of her husband's company, for damages to her consequent upon injury sustained by him caused by the negligence of a third person, where the husband's right of action, if any, is barred. The judge overruled the demurrer and the defendants appealed.

John M. Robinson and Hamilton C. Jones for plaintiff.

W. S. Beam, C. A. Cochran, and V. S. Thomas for Dupont de Nemours & Company.

Clarkson, Taliaferro & Clarkson and H. A. Stillwell for defendants.

CLARK, C.J. The demurrer admits all facts sufficiently pleaded, and therefore we must take it that the plaintiff's husband was "seriously, painfully and permanently injured as the proximate result of the carelessness and negligence of the defendants," and that by reason thereof the plaintiff has suffered shock which has impaired her nervous system, impaired and permanently injured and weakened her physical and mental condition, and that she has suffered greatly from loss of sleep, worry and anxiety on (11) account of the condition of her husband in watching over and caring for him, causing her to devote her entire time to nursing and caring for him, while at the same time the burden of maintaining the family fell upon her, entailing heavy cost and expense, and that she has been forced to pay out large sums of money to hospitals, doctors, nurses and medical expenses, and that by reason of said injuries she has been deprived of the support and maintenance which her husband would have given her, and has suffered mental anguish by being forced to witness the suffering endured by her husband whereby her own nerves and health have been seriously and permanently shocked, weakened and impaired, and that by reason of the physical and mental condition of her husband she still continues to suffer in mind and body, and has been denied the care, protection, consideration, companionship, aid and society of her said husband and the pleasure and assistance of her husband in escorting her to visit friends and relatives, and has been required to remain at home for long periods of time denying herself to friends and relatives, and besides has had entailed upon her the fatigue of nursing and caring for him and incurred expenses, and has paid large sums on that account. These matters are set out more at length in the complaint, but this is a summary of the grounds of her action, all of which allegations of facts are admitted

as pleaded by the demurrer. The demurrer in effect presents two questions of law upon these facts:

1. The first is that the judgment against her husband in Virginia, *Dupont v. Hipp,* 123 Va. 42, bars any right of action which she might have for damages for grief, mental anguish, labor and expense devolving upon her by the disability of her husband and the loss and comfort of his society.

2. The second is that upon the facts admitted the wife is not entitled to maintain this action.

As to the first ground of demurrer, if the wife has a cause of action we do not think the demurrer can be sustained. She was not a party to the action brought by her husband, and she is not estopped by the judgment as to any relief she might be entitled to. It may be that upon the trial of this action an entirely different state of facts as to the manner in which the husband was injured might be developed, either by additional evidence or by the estimate placed upon the evidence by the jury. She was neither a party nor a privy to that action.

In *Laskowski v. People's Ice Co.* (Mich.), 2 A.L.R. 586, it was held that "A judgment in favor of a wife in an action to recover damages for injuries to her person is not conclusive upon the question of defendant's negligence and absence of her contributory negligence, in an action by her husband for the damages re-
(12) sulting to him from such injuries." Of course the reverse must be true since, as held in that case, under the Married Woman's Act he was not a necessary or proper party to the action by his wife to recover damages for injuries to her person, and was not in fact a party. See note to that case (2 A.L.R. 592), citing many cases that neither the judgment in such case, nor a settlement by compromise on the part of the wife would affect the husband's right to recover for the damages sustained by him, quoting among others *R. R. v. Kinman,* 182 Ky. 597.

But the second ground of demurrer presents an entirely different question. At common law the husband could maintain an action for the injuries sustained by his wife for the same reason that he could maintain an action for injuries to his horse, his slave or any other property; that is to say by reason of the fact that the wife was his chattel. This was usually presented in the euphemism that "by reason of the unity of marriage" such actions could be maintained by the husband. But singularly enough this was not correlative and the wife could not maintain an action for injuries sustained by her husband.

The reason is thus frankly stated by Blackstone: "We may observe that in these relative injuries, notice is only taken of the

wrong done to the *superior* of the parties (husband) injured by the breach and dissolution of either the relation itself, or at least the advantage accruing therefrom; while the loss of the *inferior* (the wife) by such injuries is totally unregarded. One reason for this may be this: that the *inferior* hath no kind of property in the company, care or assistance of the *superior* as the *superior* is held to have in those of the *inferior;* and therefore the *inferior* can suffer no loss or injury." 3 Blackstone's Commentaries, 143.

By the married women's provision in the Constitution of 1868, Art. X, sec. 6, this conception of ownership by the husband whereby upon marriage all the personal property of the wife became the property of the husband and he became the owner of her realty during his lifetime, was abolished. The courts in this State continued for a long while, notwithstanding, to hold that the husband could recover his wife's earnings and the damages for injuries done her; but by the act of 1913, now C.S. 2513, it was provided that her earnings and damages for torts inflicted upon her were her sole and separate property for which she could sue alone.

It follows therefore that the husband cannot sue to recover his wife's earnings, or damages for torts committed on her, and there is no reason why she can sue for torts or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband. We agree with the learned counsel for the plaintiff that if the husband could maintain an action to recover damages for torts on the wife she (13) should be able to maintain an action on account of torts sustained by the husband. Such right of action if it existed in favor of the husband should exist in favor of the wife. It should be in favor of both, or neither, but in view of the Constitution of 1868 and our statute on the subject, we think that such action cannot be maintained by either on account of the injury to the other.

So far as injuries to the husband are concerned and the damages he has sustained, whether the plaintiff recovers or fails to do so the verdict and judgment are conclusive. The wife certainly cannot recover a second time for the injuries of the husband, who alone can sue for them (or in case of wrongful death, his personal representative), but the action of the wife is not for the injuries to the husband, though formerly the husband was allowed to recover damages for the injuries sustained by the wife because they were his property. *Price v. Electric Co.,* 160 N.C. 450. That is now swept away.

The cause of action for the wife in this case is not for the injuries to the husband, but for the injuries to herself which are thus summed up in the brief for the plaintiff in this action:

1. Expenses paid by her, made necessary by her husband's injuries.
2. Services performed in nursing and caring for him.
3. Loss of support and maintenance.
4. Loss of *consortium.*
5. Mental anguish.

Though the husband can no longer recover for the damages which his wife has sustained as property belonging to himself, he may still recover for the damages sustained by him by reason thereof which have been held to include expenses incurred, deprivation of society and loss of aid and comfort.

In *Kimberly v. Howland,* 143 N.C. 398, the plaintiff's wife received a serious injury by reason of the defendant's negligence. The Court (page 405) said: "It is contended that the husband has sustained no injury, and as to him the motion to nonsuit should have been allowed. It seems to be well settled that where the injury to the wife is such that the husband receives a separate loss or damage, as where he is put to expense, or is deprived of the society or the services of his wife, he is entitled to recover therefor, and he may sue in his own name."

In *Bailey v. Long,* 172 N.C. 661, decided since chapter 13, Laws 1913, the plaintiff had taken his wife to the defendant's hospital. By reason of the defective condition and construction of said hospital, his wife contracted pneumonia and died. The plaintiff brought the action for damages suffered by him. Mr. Justice Walker, for a unanimous Court, held that the plaintiff could recover for expenses which accrued to him for nursing and otherwise, and said:
(14) "In addition, we think plaintiff can recover damages for the mental sufferings and injury to his feelings in witnessing the agony and suffering of his said wife, while lingering with such cold and pneumonia, and in the act and article of death resulting therefrom."

We do not think that the husband could now recover compensatory damages for her physical and mental anguish nor for the value of her services, which are matters purely personal to her, and for which she alone can recover, though formerly these were the basis for an action by the husband. As he can no longer sue for earnings, of course he is not entitled to recover the value of her services. But the great weight of authority sustains the proposition that under the modern statutes enlarging the rights of married women, the husband is not deprived of his right to recover the damages which he himself sustains and which are the direct consequences of the injury to the wife. He cannot sue for the injuries she sustained, but for those which accrued to himself as the direct and not the remote

consequences of such wrongful act of the defendant. 13 R.C.L., sec. 642; 21 Cyc. 1527.

In *Holleman v. Harward,* 119 N.C. 150, where the defendant had sold the plaintiff's wife laudanum or similar drugs despite the plaintiff's protests, the Court held that the husband could recover for loss of companionship and loss of services resulting therefrom. While the statute now does not permit the husband to recover for loss of services, which must be recovered solely by the wife, the loss of the companionship of his wife is a loss purely personal to him and the direct consequence of the wrong of the defendant. For this the wife could not recover, and being the direct and not remote consequence of the wrongful act, the husband is entitled to his action.

In *Flandermeyer v. Cooper,* 85 Ohio State 327, where the defendant had sold drugs to the husband over the wife's protest, it was held in exact analogy to the above case from this Court, that she could recover for the damages thus resulting to her. The Court said: "A statutory right cannot change except by action of the lawmaking power of a State. But it is the boast of the common law that: 'Its flexibility permits its ready adaptability to the changing nature of human affairs.' So that, whenever, either by the growth or development of society, or by the statutory change of the legal status of any individual, he is brought within the principles of the common law, then it will afford to him the same relief that it has heretofore afforded to others coming within the reason of its rules. If the wrongs of the wife are the same in principle as the wrongs of the husband, there is now no reason why the common law should withhold from her the remedies it affords the husband."

The Court in that case aptly cited from Cooley on Torts (3 ed.), 477: "Upon principle, this right in the wife is (15) equally valuable to her as property, as is that of the husband to him. Her right being the same as his in kind, degree, and value, there would seem to be no valid reason why the law should deny her the redress which it affords to him. . . . The gist of the action is the loss of *consortium,* which includes the husband's society, affection, and aid."

And also uses this language: "There can be no reasonable contention but that the wife suffers the same injury from the loss of consortium as the husband suffers from that cause. His right is not greater than hers. Each is entitled to the society and affection of the other. The rights of both spring from the marriage contract, and in the very nature of things must be mutual, and while this was always true of the marriage relation, yet there was a time in the history of our jurisprudence when the legal status of the wife was

such that she could not, at common law, maintain an action of this character. Now her legal status is the same as that of her husband. She has the same right to the control of her separate property, the same right to sue in her own name, and, in a word, is in the full enjoyment of every right that her husband enjoys, so that she has come clearly within the principles of the common law that allow a right of action by the husband for damages for the loss of the *consortium* of his wife. Either we must hold that the common law is fixed, unchangeable, and immutable, that it possesses no such flexibility as will permit its ready adaptability to changing conditions of human affairs, or that when every reason and every theory for denying the wife the same rights as the husband has entirely disappeared from our jurisprudence, that she is now equally entitled with her husband to every remedy that the common law affords, and we have no hesitation in adopting the latter view."

To the same purport is *Jaynes v. Jaynes,* 39 Hun. (N.Y.) 40. The plaintiff's counsel adds: "Why should the husband be allowed a recovery in cases of this character and the wife, who suffers in the identical same way, be denied a recovery? They stand before the same altar; they enter into the same contract." Necessarily their rights are the same at the bar of justice.

In *Bernhardt v. Perry,* 276 Mo. 612, in discussing this identical question, it was said by the able Chief Justice Bond of that Court as follows in speaking of the rights of the wife: "She could have had no recovery when she occupied the status of a married woman at common law; for then her legal existence was merged in that of her husband. But under the Married Woman's Acts in this State, beginning in 1875, and culminating in 1889, with slight amendments thereafter, a wife is to all intents and purposes a legal
(16) entity distinct from her husband, and capable of contracting and being contracted with and suing and being sued, as fully as if she were an unmarried woman and *sui juris.* While the principles of the common law previous to her statutory emancipation debarred the wife from any legal redress in cases like the present, they nevertheless recognized fully the injury to her personal rights caused by the acts set forth in the petition, and they affirmed such rights to be the same as those which the husband would have been deprived of had the injury in question been inflicted upon the wife *(Flandermeyer v. Cooper,* 85 Ohio St. 327; *Holleman v. Harward,* 119 N.C. 150); and, though sanctioning a full right to recover in such cases on the part of the husband, they denied it to the wife, although an equal sufferer, because feudalism had decreed that she was a legal nonentity and incapable of main-

taining any action for the violation of her rights as a wife caused by wrongful injuries inflicted upon her husband."

Further he says: "The injury suffered by a husband from the loss of the consortium of his wife is no more direct or immediate than that sustained by her from the loss of his society, aid, and affection. Hence, there is no logical basis for the reason upon which some of the adverse rulings are based, that in such cases the injury sustained by the wife is not directly and proximately caused by the wrongful act preventing her husband from giving her the means of a livelihood, which it is his duty to provide, and from performing his conjugal duties."

And again: "The reasons given in the decisions against the right of a wife to recover from the material injury inflicted on her by a negligent act destroying the power of her husband to labor for her support, and thereby imposing upon her the task of supporting him, and which renders him unable to perform the duties of a consort. are utterly inadequate to support the conclusions reached. It will be noted in all of these cases that they are rested upon the lack of suable capacity of the wife, or upon the rules of the common law disabling her as against her husband to acquire title to the money awarded as damages for wrongful injury to him, wherefore the hobgoblin of a foolish consistency impelled the common law to adjudge she could not recover for an injury to her personal rights so caused, since the instant a recovery was had it would belong to the husband. Neither of these reasons can exist under the specific provisions of the law governing married women; for, as has been shown, the wife may now sue as a *feme sole*, and the awards of any violation of her personal rights belong to her, and not to the husband."

It is true that these citations from the distinguished Chief Justice are in a dissenting opinion (in which Judge Williams concurred), but the decisions in other Courts than ours are not authority and are entitled only to the persuasive weight given them on account of the force and correctness of the reasoning (17) therein, and therefore if there is correct and forceful reason in a dissenting opinion from another state it should command exactly the same consideration as if it were made in the majority opinion.

One of the chief grounds for the plaintiff's recovery is the loss of consortium which was formerly pleaded by the phrase, *"per quod consortium amisit."* This formerly lay only in behalf of the husband, but now the term has been extended to give the wife, and with more reason, the same ground of action. The present state of the law is thus fully stated under the heading of Consortium, 12 Corpus Juris 532, with full citations in the notes.

"In its original application the term was used to designate a right which the law recognized in a husband, growing out of the marital union, to have performance by the wife of all those duties and obligations in respect to him which she took upon herself when she entered into it; the right to the conjugal fellowship of the wife, to her company, coöperation, and aid in every conjugal relation; fellowship and assistance of the wife; comfort in her society in that respect in which a husband's right is peculiar and exclusive; conjugal society, affection and assistance of the wife. The term, however, has developed to include the right of the wife to the society and comfort of the husband, and is now used interchangeably to denote the affection, aid, assistance, companionship and society of either spouse; and as thus employed the term has been defined as those duties and obligations which by marriage both husband and wife take upon themselves toward each other in sickness and health, conjugal affection; conjugal fellowship; conjugal society and assistance; the conjugal society arising by virtue of the marriage contract; the consort's affection, society, or aid; the person, affection, assistance and aid of the spouse. Loss of services as well as society and affection is included in the legal meaning of the loss of *consortium.*"

There are decisions from other courts denying the relief to the wife in cases of this character. Such decisions are necessarily dependent upon two factors: (1) The legislation in reference to the rights of married women in the particular jurisdiction; (2) the attitude of the court in giving either a liberal or restricted construction to new legislation of the nature of that in this State. As was well said by Chief Justice Bond in the above case, "So prone are the courts to cling to consuetudinary law, even after the reason for the custom has ceased or become a mere memory, that it has required hundreds of years to obtain the meed of justice for married women."

(18) The reasons formerly advanced for a denial to the wife of a recovery for damages sustained by her as a direct result of the injury to him and which are over and above and distinct from the damages which could be recovered by the husband in an action by himself were threefold:

1. The merger of her identity into that of her husband.
2. Her incapacity to sue.
3. The right of her husband to recover full damages for his diminished earning capacity, with no corresponding right possessed by her.

Neither of the first two grounds are now valid in this State. It is urged, however, that the plaintiff after he had obtained a recov-

ery is presumed to have obtained full pecuniary compensation for all the injuries sustained by him, and of course if he failed to recover, no action can be maintained by the wife. This proposition is correct if the action of the wife is for the damages for which the husband could maintain an action, but the facts as admitted by this demurrer are that he was injured by the negligence of the defendants and that the wife sustained damages which, though flowing from the injuries to her husband, are purely injuries to herself and for which the husband could not have maintained an action. She is therefore not barred by the judgment, favorable or unfavorable, in the action brought by her husband. A judgment in an action is not effective as a bar or estoppel in any other action unless between the same parties and for the same cause of action. The present action is not between the same parties nor for the same cause of action as in the litigation between the husband and the defendants.

It has always been held that the husband's action for damages sustained by him on account of injuries to her is not barred by judgment in favor of the same defendant in an action brought by the wife. See cases cited in the notes to 2 A.L.R. 592. Of course the reverse of the proposition is true; 13 R.C.L. 461.

As already stated, the rights which the wife is asserting in this action are entirely separate and distinct from the grounds of recovery asserted by the husband in his action. In paragraph 12 of the complaint is the following allegation which is admitted by the demurrer to be true, "That by reason of the sudden and fearful injury of her husband, as above stated, and by reason of being forced to look upon him in his horribly mutilated condition, she was shocked and frightened to such an extent that her entire nervous system was impaired and undermined and left permanently injured and weakened, and her physical and mental condition was permanently injured and impaired."

In *Kimberly v. Howland*, 143 N.C. 398, the Court said: "We think the general principles of the law of torts support a right of action, for physical injuries resulting from negligence, whether willful or otherwise, none the less strongly because (19) the physical injury consists of a wrecked nervous system instead of lacerated limbs." This was cited and approved by Walker, J., in *May v. Tel. Co.*, 157 N.C. 422.

While the wife cannot recover for any damages for which the husband might have recovered (or his personal representative in the case of a wrongful death), we think that she could recover for those injuries which were sustained by her and which being personal to her for which the husband could not have recovered in

his action. 15 A. & E. (2 ed.) 861, which is cited *May v. Tel. Co.*, 157 N.C. 423.

We will not go more fully into the elements of damages which can be considered by the jury when the action goes back for a new trial.

It is objected by the defendant in this case that if such action can be maintained by the wife that it can be sustained on the part of the children or other dependent relatives. That plea has never been found good when the action has been brought by the husband, and of course it cannot avail when the action is by the wife upon the same state of facts. The wife's cause of action arises from the nature of the relationship created by the contract of marriage as now recognized by our Constitution and the laws replacing the former status under which, by the common law, the husband was the sole personage. Such plea has not been held valid in an action for *crim con*, or for alienation of affections or in any other case in which an action by either husband or wife has been brought for injury to the plaintiff (whether husband or wife) which were personal to the plaintiff therein and for which the other party could not maintain an action. It does not depend upon the fiction of loss of services of the other party to the marriage, but is based upon the ground that the party bringing the action (whether husband or wife) has been directly injured by the wrongful conduct of the defendant.

It is sufficient to say that the plaintiff has a cause of action for those injuries which were sustained by her and which are personal to herself and the direct and not the remote consequences of the negligence of the defendants, which is admitted by the demurrer in this case and the judgment overruling the demurrer must therefore be

Affirmed.

ALLEN and STACY, JJ., concur in result.

Cited: *Manning v. R. R.*, 188 N.C. 663; *Hinnant v. Power Co.*, 189 N.C. 127; *Eaton v. Doub*, 190 N.C. 16; *McDaniel v. Trent Mills*, 197 N.C. 343; *Meacham v. Lanus & Bros.*, 212 N.C. 648.

(20)

M. V. BLANCHARD v. THE EDENTON PEANUT COMPANY.

(Filed 14 September, 1921.)

1. Accord and Satisfaction—Compromise—Offer—Acceptance — Evidence —Questions for Jury.

The principle upon which the debtor is discharged of his obligation when the amount is in dispute, by the creditor's accepting a less sum with knowledge that it was intended to be received in full payment, may not be determined as a matter of law when, from the evidence, a reasonable inference may be drawn that it was not accepted with knowledge of the debtor's intent, that it was to be in full of account, and when the evidence is conflicting and in parol it raises a question for the jury.

2. Same—Evidence.

Where the evidence tends to show that the amount of a debt was in dispute between the debtor and the creditor, and the former sent the latter a check for a less amount than claimed by him, together with his statement, without anything written as to its being received in full or definitely understood that it was to be so received, the mere fact that the creditor knew that the check was for the full amount claimed by the debtor to be due, does not alone amount to a discharge; and where the evidence is conflicting as to whether it was so received, or as to the intent of its acceptance, it raises a question for the determination of the jury.

APPEAL by plaintiff from *Allen, J.*, at March Term, 1921, of GATES.

Civil action to recover damages for an alleged breach of contract and loss of commissions growing out of the purchase and sale of certain peanuts during the year 1920. Plaintiff contends that by agreement he purchased said peanuts as agent for defendant. There was ample evidence tending to show the existence of a contract between the parties and a breach thereof, but defendant pleads in bar a settlement by way of accord and satisfaction.

Plaintiff received from the defendant a statement of his account accompanied by a check to cover the balance as shown upon said statement. This was not posted or mailed, but sent by one L. M. Blanchard, plaintiff's partner in the guano business.

Touching the receipt and acceptance of said check the plaintiff testified as follows: "I did not accept this check in full settlement of the accounts due me. The statement shown me is the one I received along with the check. (Statement was offered in evidence and bears the notation: 'We enclose check to cover.') Mr. L. M. Blanchard handed it to me and said: 'Here is what they sent you. I don't know what it is; take it.' I did not know they claimed it to be in full at that time. There is nothing on the face of the check showing or saying that it is in full."

"Q. You know that they claimed it was in full of the
(21) balance that they claimed was due you? A. That is what they claimed.

"Q. You knew that they claimed this check was to cover all that they owed you up to that date? A. Yes, that is what they claimed; that was all they claimed to owe me.

"Court: What do you mean by saying they claimed? A. No, I didn't know that was all they claimed then.

"Court: You didn't admit that the check was all, but you knew that was what they claimed it was? A. Yes, but I didn't think that was all they were going to pay me. I was satisfied they would pay me the remainder of it. I knew it was not my fees.

"Court: Did you know that they claimed that was in full at that time? No, I did not.

"Court: You knew that was what they claimed when L. M. Blanchard brought it to you? A. He handed it to me and said: 'Here is what they sent you.' I looked it over, and I think I remarked to him: 'This is not all they owe me.' I thought maybe they would send me some more.

"Court: You knew at the time that they claimed that was all that was due you and you claimed it was not? A. Yes, sir."

At the close of plaintiff's evidence defendant moved for judgment as of nonsuit, which motion was allowed, and plaintiff appealed.

A. P. Godwin and Ehringhaus & Small for plaintiff.
Meekins & McMullan for defendant.

STACY, J. Considering the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, we think the question of settlement by way of accord and satisfaction sufficiently ambiguous to require the aid and verdict of a jury.

Under a uniform construction of our statute, C.S. 895, as announced in a long line of decisions, it is held with us that where two parties are in dispute as to the correct amount of an account, and one sends the other a check, or makes a payment, clearly purporting to be in full settlement of the claim, and the other knowingly accepts it upon such condition, this will amount to a full and complete discharge of the debt. *Mercer v. Lumber Co.*, 173 N.C. 49; *Aydlett v. Brown*, 153 N.C. 334; *Kerr v. Sanders*, 122 N.C. 635, and numerous cases of like import. The law as it prevails in this jurisdiction is succinctly stated by Mr. Justice Hoke in *Rosser v. Bynum*, 168 N.C. 340, as follows:

"It is well recognized that when, in case of a disputed account

between parties, a check is given and received clearly purporting to be in full or when such a check is given and from the facts and attendant circumstances it clearly appears that it is to be received in full of all indebtedness of a given character or all indebtedness to date, the courts will allow to such a payment the (22) effect contended for," citing a number of authorities, and this has been approved in the recent case of *Supply Co. v. Watt*, 181 N.C. 432.

The case of *Ore Co. v. Powers*, 130 N.C. 152, chiefly relied on by defendant, is not at variance with the rule above stated, nor is it more favorable to defendant's contention, for, as appears from the last paragraph of the opinion in that case, the check in question was sent in full settlement of account, and this condition was annexed to its acceptance. An examination of the original papers discloses this fact more clearly than is shown by the report as published.

But it is equally well established that unless the intention of the parties, as gathered from the facts in evidence, is so clearly apparent as to admit of no doubtful inference or uncertain conclusion, among men of fair, disinterested and unbiased minds, the issue must be referred to a jury. This position is well stated in *Mercer v. Lumber Co., supra,* as follows:

"It is a well recognized principle here and elsewhere that when a dispute exists between two parties as to the amount of an account, and one sends another a check or makes a payment clearly purporting to be in full settlement of the claim, and the other knowingly accepts it, this will amount to an adjustment, and further action thereon is precluded. It is a question, however, of the intent of the parties, as expressed in their acts and statements at the time, and unless, on the facts in evidence, this intent is so clear that there could be no disagreement about it among men of fair minds, the issue must be decided by the jury."

In the case at bar, we do not think it appears unequivocally that the check was sent on condition that its acceptance should amount to a settlement in full, or as a complete discharge of the debt. This may be a permissible view to take of the evidence, but not necessarily the only one. The sending of the check to cover what the defendant claimed was the balance due on the account does not *ipso facto* show conclusively that an accord and satisfaction was the condition annexed to its acceptance. The ultimate fact can only be determined by a jury under proper instructions from the court.

The contention that the plaintiff's testimony is self-contradictory and that he should be held to his admissions, or bound by the hurtful parts thereof, cannot avail the defendant on the present

record; for, conceding without deciding that such a conflict exists, still, under our decisions, this does not perforce destroy his favorable testimony, but only affects its credibility, which the jury alone may pass upon. *Loggins v. Utilities Co.*, 181 N.C. 221; *Christman v. Hilliard*, 167 N.C. 4, and *Shell v. Roseman*, 155 N.C. 90.

The judgment of nonsuit will be set aside and the cause
(23) remanded for trial upon appropriate issues.

Reversed.

CLARK, C.J., concurring: Concurring in all that Mr. Justice Stacy has so clearly stated, the very great importance of the principle at issue, especially to farmers and all other shippers of produce, may justify some additional reasons being given. The mere sending of the statement of an account with check for the balance set out therein, accompanied by a statement, more or less explicit, that such sum is all that is due will not of itself bind the sendee. There must be an explicit acceptance or agreement by the receiver that the account is assented to and that the check is accepted in full. It is not the assertion of the sender, but the assent of the sendee, which makes the settlement. When the check on its face states that it is "in full," its use with the endorsement of the receiver is such acceptance in the absence of fraud or misrepresentation.

But the mere receipt of the statement of an account and the use of the check sent with it for the amount of the balance the sender alleges to be due is not an estoppel. This can be effected only by an acceptance of the check, or of the amount paid with a knowledge of the facts and an agreement that it is received in full, or by the retention of the account stated, and check without objection for such length of time that the jury may infer as a fact that it was accepted as correct. *Hawkins v. Long*, 74 N.C. 781.

Indeed, at common law and up to ch. 178, Laws 1874-5, now C.S. 895, the acceptance of a lesser amount in payment with full acknowledgement that it is in payment of a larger amount was not valid. *Fickey v. Merrimon*, 79 N.C. 585. Since that statute a full and voluntary acceptance of a smaller amount in payment of a larger sum, voluntarily and with full knowledge of the facts, is binding as a settlement in the absence of fraud.

It would be a serious inconvenience and injustice, to the farmers and the like especially, if the mere receipt of the account sales of produce stating that the balance therein set out was all that was due and the use of the checks sent therewith should prevent the creditor from making claim thereafter that the statement was incorrect or that the amount sent was less than it should have been when there is no express acknowledgment by the recipient that the

check was accepted in full payment. If this were not so, the factor or commission merchant could force the consignor of produce to accept a lesser sum than was really due by compelling him to lay out of the use of the entire sum due him from the sales of his crop until the matter was litigated, or otherwise ad- (24) justed.

Few commission merchants or other factors would attempt to force their consignors to accept their statements as true by sending checks stating on their face that they are "in full settlement," and certainly the law does not require that checks not so stating shall be accepted "in full settlement." Those words must be written in the face of the check or there must be an express agreement that the check is accepted in full settlement with full knowledge that it is a release of liability or such lapse of time after receipt of the statement and check, without any objection that the jury may infer acceptance of the balance as stated by the account as correct.

Cited: Refining Corp. v. Sanders, 190 N.C. 209; *Dredging Co. v. State,* 191 N.C. 253; *Hardware Co. v. Farmers Fed.,* 195 N.C. 704; *Alligood v. Shelton,* 224 N.C. 756; *Hege v. Sellers,* 241 N.C. 248; *Allgood v. Trust Co.,* 242 N.C. 515.

F. F. GUTHRIE v. D. O. MOORE ET AL.

(Filed 14 September, 1921.)

1. Bills and Notes—Mortgages—Trusts—Maturity—Purchasers—Notice.

A purchaser of a note secured by mortgage or deed in trust, after maturity takes subject to outstanding equities.

2. Same—Public Sale—Injunction—Equity—Courts.

The owner of land gave two mortgages or deeds of trust thereon, and afterwards sold the land to the plaintiff by deed to be held in escrow with notes secured by mortgage for the balance of the purchase price, and to be turned over to him when the prior mortgages should have been paid. The notes secured by the third mortgage were bought after maturity by one of the prior mortgagees, and sales under the powers thereof in all three of the mortgages are sought to be enjoined: *Held,* the purchaser of the third mortgage notes after maturity took with notice of plaintiff's equity; and as the question as to the distribution of the proceeds of the sale of the land affected them all, and a serious question has arisen, the injunction as to all was properly continued to the hearing to await the result on the suit. *Mosby v. Hodge,* 76 N.C. 387, cited and applied.

APPEAL by defendant from restraining order granted by *Allen, J.*, at chambers, Washington, N. C., 4 March, 1921, from BEAUFORT.

This is an appeal from an order restraining the defendants from selling certain lands under powers contained in two deeds of trust.

On 12 December, 1919, the defendant, Fenner B. Godley and wife, executed a deed of trust to E. A. Daniel, trustee for J. B. Patrick, upon a tract of land securing an indebtedness of $1,275, and on 5 December, 1919, the said Godley executed a deed of trust to H. C. Carter, trustee for D. O. Moore, securing an indebtedness of $1,950.

On 12 December, 1919, the defendant, Fenner B. Godley, and wife, executed to the plaintiff a deed for the consideration of the sum of $10,000, $4,000 of which was to be paid in cash and
(25) the balance of $6,000 to be secured by deed of trust, and twelve notes of $500 each were executed to represent said $6,000 balance. When the parties closed the said deal, the plaintiff had only $2,700 in cash and executed a note due on 1 January, 1920 (about two weeks later), for the sum of $1,300, representing the balance of the cash payment. Said note of $1,300, together with four or five of the notes for $500 each, were deposited with J. D. Grimes in escrow, and were to be turned over to said Godley when the notes secured by the two deeds of trust to E. A. Daniel and H. G. Carter, above set out, were paid. This agreement was in writing. The said $1,300 note was not paid when it was due.

That during the fall of 1920 the defendant Moore purchased from the defendant Godley twelve of the notes of $500 each, and the note of $1,300, which said notes were secured by a deed of trust upon all of the property described in the two deeds of trust to Daniel and Carter, which deeds of trust provided that upon default in payment of any note or the interest on any note, that the whole debt should become due and payable.

On 18 December, 1920, H. C. Carter, trustee for D. O. Moore, advertised under the deed of trust to him the lands therein described, and on 11 January, 1921, E. A. Daniel advertised under the deed of trust from F. F. Guthrie, the plaintiff, to him; that at the time of the advertisements no part of either the principal or interest on any of the notes had been paid, and the whole, under the terms of the deed of trust, was then due. On 21 January, 1921, the plaintiff secured a restraining order, and said restraining order was continued to the hearing at the February Term, 1921, of the Superior Court of Beaufort County, and the defendants appealed.

Ward & Grimes for plaintiff.
Daniel & Carter for defendants.

ALLEN, J. It is admitted in the brief of the defendants that the notes purchased by the defendant Moore and secured by one of the deeds of trust under which the defendants proposed to sell the lands in controversy, were past due at the time of the purchase, and this being true, the defendant took the notes subject to and with notice of any equities and defenses existing in favor of the plaintiff against Godley, who sold the notes to the defendant Moore. (C.S. 446; *Capell v. Long,* 84 N.C. 17), and as against Godley, the plaintiff has the right to rely upon the agreement that the prior liens created by the deed of trust to secure the notes to Patrick and Moore should be paid off and discharged before all of the notes secured in the last deed of trust should be valid obligations against the plaintiff.

It is also well settled that powers of sale "are looked upon by the courts with extreme jealousy, because the (26) mortgagor is thereby put entirely in the power of the mortgagee.

The exercise of the power is only allowed in plain cases when there is no complication and no controversy as to the amount due upon the mortgage debt, and the power is given merely to avoid the expense of foreclosing the mortgage by action; but that where there is such complication and controversy the Court will interfere and require the foreclosure to be made under the direction of the Court, after all the controverted matters have been adjusted and the balance due is fixed, so that the property may be brought to sale when purchasers will be assured of a title and not be deterred by the idea that they are 'buying a lawsuit.'" *Mosby v. Hodge,* 76 N.C. 388.

It follows therefore as there was a real dispute between the parties as to the amount for which the plaintiff was liable, that the restraining order was properly continued until the final hearing.

Affirmed.

NOTE. This opinion was written in accordance with the Court's decision and filed, by order of the Court, after Justice Allen's death.

14 September, 1921. STACY, J.

Cited: Barnes v. Crawford, 201 N.C. 439; *Pickett v. Fulford,* 211 N.C. 164.

C. C. JENNINGS v. W. H. JENNINGS ET AL.

(Filed 14 September, 1921.)

1. Public Sales—Increase of Bid — Suppression of Bidding — Tenants in Common.

Where tenants in common of lands sold for a division contract with a third person to raise the bid on the land in consideration that he is to receive a certain amount of the profits arising from an advanced price the lands should bring at the resale, their purpose was to increase and enhance the bids at the resale, and does not fall within the principle that contracts which stifle competition and chill bidding are void.

2. Public Sales—By-bidders—Purchasers.

There is an implied guaranty that all bids at a public sale of lands are genuine, and where by-bidders thereat are obtained, the purchaser who acts promptly may be relieved of his bid.

3. Same—Increase of Bids—Tenants in Common.

Where the plaintiff has entered into a valid agreement with tenants in common to raise the bid on the land sold for division, upon a mutual consideration arising from the contemplated profits of a resale: *Semble*, it is a violation of an implied guaranty that all bids at public sales should be genuine; but in this case, there being no fraud and the parties having received a direct benefit from the contract, and there being no complaint from other bidders, it is assumed to be valid between them.

4. Contracts—Breach—Performance—Evidence—Burden of Proof.

A party to a contract must show performance on his part to recover from the other party under its provisions.

5. Public Sales—Assignment of Bid—Contracts—Breach—Suppression of Bids—Tenants in Common.

Where the plaintiff has entered into a valid agreement with the defendants, tenants in common, whereby, for mutual consideration, he has raised the bid at a sale of lands for division among tenants in common, he and the tenants in common to share the profits of a resale; and without the knowledge of the defendants assigns his bid for a personal consideration to a third person, who otherwise would have paid a greater price, the effect of his so assigning his bid would be a breach of his contract sued on, and a violation of the principle as to the suppression of bids at a public sale, which he will not be permitted to do.

APPEAL by defendants from *Allen, J.*, at February Term,
(27) 1921, of PASQUOTANK.

This is an action to recover an amount alleged to be due by contract in connection with a sale of certain lands in a partition proceeding.

The lands belonged to the wife of the defendant A. C. Bell and to a minor son of the defendant W. H. Jennings, in equal parts, and was sold for division in said proceeding on 11 October, 1919, R. G. Sawyer being the highest bidder in the sum of $10,250.

On 31 October, 1919, it being the last day on which an increased bid on said land could be made, the plaintiff and defendant entered into the following agreement:

I hereby agree with G. C. Jennings that if he will raise the bid of $10,250 made on the R. Nixon Morgan farm 10 per cent, making his bid $11,275, that in the event other *bona fide* bidders should run the price up to $12,050 to refund to him the $725 raise, so as to make the property cost him only $11,275; in consideration of getting him to raise the bid.

Should said *bona fide* bidders run the price above $12,050, and it is knocked off to a responsible bidder other than the said G. C. Jennings, then he, the said G. C. Jennings, is to have one-half of such raise above his bid of $11,275 when the sale is confirmed and the purchase money paid over in full.

Should a bidder run up the price on said G. C. Jennings to $13,000 or $13,050, and it is knocked off to the said G. C. Jennings, then he is only to pay $11,775 for the property.

(Signed) W. H. JENNINGS,
G. C. JENNINGS.

The plaintiff raised the bid as above stated and the agreement made on 31 October, 1919, Exhibit A, was abrogated and a new alleged agreement entered into between plaintiff and both defendants, reading as follows: (28)

NOVEMBER 11, 1919.

Whereas, G. C. Jennings raised the bid on the R. Nixon Morgan farm from $10,250 to $11,275 on 31 October, 1919, and is now desirous of being protected in further bids for the property.

We hereby agree with him that he is to have one-half of the raised bids from his present bid of $11,275 up to $12,075, and one-third of the raise of bids from $12,075 up to the highest bid at the sale to be made at 12 o'clock noon on Monday, 17 November, 1919. The agreement made on 31 October, 1919, is hereby declared null and void insofar as it refers to the bidding.

This agreement is strictly a private memorandum, nonnegotiable, and is to be kept strictly confidential by all the signers hereto, so as to protect the said G. C. Jennings in his future bids at the sale.

(Signed) W. H. JENNINGS,
A. C. BELL,
G. C. JENNINGS.

At the resale on 17 November, 1919, the plaintiff was the last and highest bidder at the price of $11,830, and he is now seeking to recover in this action under the last agreement one-half of the

difference between the first bid by him of $11,275 and the last bid of $11,830, or $277.50.

Thereafter the plaintiff sold his bid to H. C. Ferrell for $650 without giving any information to the defendants of any offer to buy the bid or that the said Ferrell intended to increase the bid.

F. C. Ferrell testified: "I am the present owner of the property called the Nixon Morgan property, and mentioned in the papers which have been offered in evidence, having bought the bid made by plaintiff for the land. I was not present at the first sale. I wanted the property, and after the second sale employed a lawyer, Mr. P. G. Sawyer, to endeavor to purchase from G. C. Jennings, the bid he had offered at the second sale. Mr. Sawyer and I tried to buy the bid from him and finally I did buy it and got him to assign his bid to me by paying him $650 for it. I did not know he had any agreements with defendants about the matter. He did not tell me so. I had made arrangements to raise the bid, had arranged to get the money, and was able and prepared to do so. If he had not sold his bid I would have raised it, and told him I was going to do so."

P. G. Sawyer testified: "After the second sale, Mr. H. C. Ferrell employed me as attorney to try to buy Jennings' bid for him.

(29) We arranged for Ferrell to get the money and he was able and prepared to buy. I saw the plaintiff and tried to buy his bid, and told him if he did not sell Mr. Ferrell was going to raise the bid on him. He sold to Ferrell."

The following issues were submitted to the jury:

"1. Are the defendants indebted to the plaintiff, and if so, in what sum? Answer: '$277.50.'

"2. Is the plaintiff indebted to the defendants, and if so, in what sum? Answer: 'Nothing.'"

His Honor instructed the jury that if they found the facts to be as testified by the witnesses they would answer the first issue "$277.50," and the second issue "Nothing," and the defendants excepted.

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

Ehringhaus & Small for plaintiff.
Thompson & Wilson for defendants.

ALLEN, J. The contract on which the action is founded is of doubtful wisdom and propriety.

It does not, however, fall under the principle that contracts which stifle competition and chill bidding, so that property may be bought for less than its true value, are void *(Nash v. Hospital Co.,*

180 N.C. 63), because the whole purpose and tendency of the contract was to increase and enhance the bids at the sale, but it is close akin to the employment of by-bidders, which is violative of the implied guaranty that all bids at public sales are genuine, and which may enable the purchaser, who acts promptly, to be relieved from his bid. 16 R.C.L. 71; Corpus Juris, 830 *et seq.*

No other bidder is, however, complaining, and, therefore, assuming the contract to be valid as between the parties, who have not been moved by any fraudulent purpose and have received direct benefits from the contract, there is still a view presented by the evidence which in our opinion ought to be submitted to a jury.

The contract was made for the purpose of securing the highest price for the land obtainable at a public sale, and the plaintiff was required to perform his obligations in good faith and would not be permitted to prevent a sale at which a higher sum would be bid, which is the very object the contract had in view, and then claim benefits under the contract.

He acquired the position of advantage as a bidder and the right to sell his bid under the contract, and he could not defeat the only purpose which caused its execution and then seek to recover on it, as no principle is better settled than that a party (30) suing upon a contract must show performance.

If the evidence of the defendant is to be believed, the plaintiff knew that if he did not sell his bid that there would be an increased bid on the property by one who was ready, able, and willing to pay the advanced bid, and that this would inure to the benefit of the defendants under the contract and instead of informing the defendants he made a private arrangement to sell his bid, and the sale was confirmed without knowledge on the part of the defendants of the agreement between the plaintiff and Ferrell.

There was therefore error in the peremptory instructions given to the jury, and there must be a

New trial.

NOTE. This opinion was written in accordance with the Court's decision and filed by order of Court, after Justice Allen's death.

14 September, 1921. STACY, J.

W. H. JENETTE ET AL., V. HOVEY AND COMPANY ET AL.

(Filed 14 September, 1921.)

1. Attachment—Nonresident—Notice—Service — Publication — Summons —Statutes.

In proper instances, where civil actions are commenced and service is obtained by attachment of defendant's property and publication of a notice based upon the jurisdiction thus acquired, the issuance of a summons at the commencement of the action is unnecessary. C.S. 802.

2. Same—Special Appearance—Motions—Court's Discretion.

Where an affidavit, filed in an action wherein attachment is sought against the property of a nonresident within the jurisdiction of the court, is sufficient for the clerk to order service of the summons by publication, but service has not been ordered or made, and the cause has come up on defendant's special appearance and motion to dismiss on that ground, and pending the motion the plaintiff, upon an additional affidavit, without the knowledge of the judge, has obtained an order of publication from the clerk, it is within the sound discretion of the judge to permit the publication of the summons to be proceeded with, and deny the defendant's motion. C.S. 802, 806.

APPEAL by defendant from *Allen, J.*, at January Term, 1921, of PASQUOTANK.

Plaintiffs, citizens of this State, having a cause of action against Hovey & Company, a foreign-resident corporation, for an alleged breach of contract, instituted this suit in the Superior Court
(31) of Pasquotank County and sought to obtain service upon the defendant by attaching the proceeds of a certain draft in the hands of the First and Citizens National Bank of Elizabeth City, N. C., said funds presumably belonging to the defendant. Summons was issued 28 January, 1920, and duly served on the garnishee bank, but returned, on the day of its issuance, as to Hovey & Company, "not to be found in North Carolina." On the same day plaintiffs secured from the clerk of the Superior Court a warrant of attachment, after filing proper affidavit and giving bond as required by statute, and the sheriff duly levied upon the above mentioned funds, said to be the property of the defendant. The warrant of attachment was served immediately, and made returnable 17 February, 1920.

Thereafter, on 30 December, 1920, the Mars Hill Trust Company, a Maine corporation, was allowed to intervene and set up its claim of title to the proceeds of said draft. The funds were turned over to the intervener by order of court, upon the execution and filing of a good and sufficient bond "for the protection of all parties to this cause."

The plaintiffs' complaint and answer of the intervener, Mars

Hill Trust Company, were filed on 27 December, 1920. The defendant, Hovey & Company, has not answered.

At the January Term, 1921, this cause being on the docket for trial, Hovey & Company, through its attorney, entered a special appearance and moved to dismiss the action and to vacate the attachment, alleging that no valid service of the summons or warrant of attachment had been made, by publication or otherwise, as required by law. While this motion was being heard before his Honor in the Superior Court, plaintiffs filed with the clerk an affidavit and obtained from him an order of publication, to which reference is made in the judgment of the court, as follows:

"Pending the determination of the motion of Hovey & Company on its special appearance, said motion not being determined the day it was made, an affidavit for publication was filed by plaintiffs and an order of publication was signed by the clerk of the Superior Court — said affidavit being also filed before the clerk — which affidavit and order appear in the record, to which reference is made, and publication was commenced as set forth in copy of notice appearing in the record.

"The said affidavit and order of the clerk and publication were made without the knowledge or approval of any parties to the action, other than plaintiff, and without the knowledge of the judge before whom the motion to dismiss was pending.

"It appearing to the court that at the time of the institution of the action an affidavit as set out in the record was filed in this cause, though no order of publication was actually signed, the court, in its discretion, orders and permits the plaintiff (32) to proceed with the publication pending the determination of this motion, in accordance with the order of the clerk made herein.

"It is further ordered that the motion of the defendant, Hovey & Company, upon its special appearance, to dismiss the action and vacate the attachment be and the same is hereby overruled."

The defendant, Hovey & Company, noted an exception and appealed.

Ehringhaus & Small for plaintiffs.
W. A. Worth for defendant.

STACY, J., after stating the case: This action was brought to recover damages for an alleged breach of contract growing out of an agreement on the part of the defendant, Hovey & Company, to deliver a certain quantity of seed Irish potatoes to the plaintiffs at Elizabeth City, N. C., during the month of January, 1920. The defendant, being a nonresident corporation and having no process

agent in this State, could not be served personally with summons; hence, service was sought to be obtained by issuing a warrant of attachment and levying upon the proceeds of a draft in the hands of the First and Citizens National Bank of Elizabeth City, N. C., it being alleged that said funds belonged to Hovey & Company. The defendant, through its counsel, entered a special appearance, and, upon the facts as above stated, moved to dismiss the attachment for want of any service of process, alleging that none had been made, either personally or by publication.

From an adverse ruling on this motion, the defendant, Hovey & Company, excepted and immediately appealed, which it had a right to do under a number of decisions of this Court. *Finch v. Slater,* 152 N.C. 155, and *Warlick v. Reynolds,* 151 N.C. 606. The motion to dismiss the attachment affects a substantial right, and from the court's refusal to grant the same, a present appeal will lie. *Sheldon v. Kivett,* 110 N.C. 408; *Roulhac v. Brown,* 87 N.C. 1; *Judd v. Mining Co.,* 120 N.C. 397.

The appellant rests its case upon the ground that plaintiffs have failed to meet the requirements of the statute with respect to service of process as asked for and issued in this case.

In the first place, it should be noted that, in proper instances, where civil actions are commenced and service is obtained by attachment of defendant's property and publication of a notice based upon the jurisdiction thus acquired, the issuance of a summons is unnecessary. *Mills v. Hansel,* 168 N.C. 651; *Armstrong v. Kinsell,* 164 N.C. 125; *Currie v. Mining Co.,* 157 N.C. 217; *Grocery Co. v. Bag Co.,* 142 N.C. 174, and *Best v. Mortgage Co.,* 128 N.C. 351.

(33)

But it is urged that the law in this respect was declared to be otherwise in *Ditmore v. Goins,* 128 N.C. 325, and *McClure v. Fellows,* 131 N.C. 509, and so it was. It may be observed, however, that these cases were in direct conflict with the decision of the Court in *Best v. Mortgage Co.,* 128 N.C. 351; and, besides, *McClure's* case was expressly overruled in *Grocery Co. v. Bag Co.,* 142 N.C. 174, which of necessity overruled *Ditmore's* case, though not specifically mentioned therein. Therefore, both of these cases must now be considered or understood as having been overruled, and no longer are precedents. They have never been approved in any subsequent opinion; but, on the contrary, a different ruling has been announced and consistently followed.

We then come to consider whether plaintiffs have brought themselves within the statute providing for service by attachment and publication.

The affidavit filed at the institution of the action would have

justified the clerk in signing an order of publication (*Luttrell v. Martin,* 112 N.C. 593, and *Branch v. Frank,* 81 N.C. 180), and his failure to do so at the time doubtless was due to an oversight or inadvertence on the part of plaintiffs. Nevertheless, the necessary order was not made until an additional affidavit was filed, nearly a year later, and after the defendant had entered a special appearance and moved to dismiss for want of publication, etc. The defendant contends that under C.S. 802, and the decision of this Court in *Bowman v. Ward,* 152 N.C. 602, the warrant of attachment in the instant case should have been vacated. While it is true the delay in obtaining the order of publication might well be characterized as unusual, and his Honor probably would have been justified in so holding, yet we think it was within his discretion to permit the publication to continue. The rights of all parties have been preserved, and none destroyed, by this ruling. A similar question was presented in the case of *Mills v. Hansel, supra,* where the present Chief Justice, speaking for a unanimous Court, said: "The court acquired jurisdiction of the action by the service of the attachment upon the property of the defendant. If the notice was not duly served by the publication, it was 'error to discharge an attachment granted as ancillary to an action because of the insufficiency of the affidavit to obtain service of the summons by publication, for it is possible that the defect may be cured by amendments.' *Branch v. Frank,* 81 N.C. 180. The remedy is not to dismiss the attachment, but by ordering a republication, for as the defendant is a nonresident, to dismiss the attachment may deprive the plaintiff of all remedy by the removal of the property before a new proceeding and attachment can be had," citing *Price v. Cox,* 83 N.C. 261; *Penniman v. Daniel,* 90 N.C. 159; *S. c.,* 93 N.C. 332.

C.S. 806, which bears more directly upon the question at issue, requires publication of the issuance of the attach- (34) ment, unless the defendant can personally be served with process, and it has been held with us that a failure to make such service, either personally or by publication, entitles the defendant to have the attachment dismissed. But it has also been decided that the court, in its discretion, may extend the time for ordering publication and service of such process. *Finch v. Slater, supra; Mills v. Hansel, supra,* and *Price v. Cox,* 83 N.C. 261.

Hence, upon authority, we think the ruling of his Honor, made in the exercise of his discretion, must be upheld. It is so ordered.

Affirmed.

Cited: R. R. v. Cobb, 190 N.C. 376; *Mohn v. Creasey,* 193 N.C. 571; *Casualty Co. v. Green,* 200 N.C. 538; *Bethel v. Lee,* 200

N.C. 571; *Denton v. Vassiliades,* 212 N.C. 515; *Suskin v. Trust Co.,* 213 N.C. 389; *Voehringer v. Pollock,* 224 N.C. 411; *Perkins v. Perkins,* 232 N.C. 95; *Thrush v. Thrush,* 245 N.C. 117.

W. G. NEWBY AND F. M. WEEKS, v. ATLANTIC COAST REALTY COMPANY ET AL.

(Filed 14 September, 1921.)

1. Statute of Frauds—Actions—Contracts—Parol Agreements—Lands—Profits.

A contract between the plaintiff and defendant that certain land was to be bid in at a sale, paid for by the defendant, and resold in lots for a division of profits, is not such an interest in the lands that will require a writing, etc., under our statute of frauds, C.S. 988, but relates only to the profits upon the lands, and may be enforced as a valid agreement by parol.

2. Same—Trusts—Parol Trusts.

The English statute of frauds, requiring a written contract to establish a trust in lands, was never adopted in this State, and a parol agreement that one of the parties should pay for certain lands, to be bid in at a sale, and held for a resale and a division of the profits between both of the parties, is valid, and is enforceable where one of them has accordingly bid in the land, but has taken title to himself.

3. Same—Written Memoranda—Statutes.

Our statute, Rev. 976, providing that contracts to sell or convey lands shall be void unless some sufficient memorandum thereof be reduced to writing, applies to those cases alone in which, as a result of sale, exchange or some other form of bargaining, a conveyance of land is contemplated from one of the contracting parties to the other; and not to contracts whereby two persons agree to purchase lands, whether generally or as a single venture, for the purpose of reselling it for the division of the profits.

4. Same.

Where a defendant, without plaintiff's knowledge, has breached his valid parol agreement to purchase land for the use and benefit of the plaintiff and himself, to be afterwards sold for a division of the profits, and has taken title to himself alone, and has associated other and innocent purchasers to forestall the plaintiff in the enforcement of the trust, the plaintiff may assert his right to recover damages for a breach of the trust or contract, or in equity to follow any fund received by the defendant for the land.

5. Same — Election — Damages — Specific Performance — Innocent Purchaser.

Where the defendant has breached his valid parol agreement for the

purchase of land and a division of the profits upon a resale, and has associated others with him, the plaintiff may elect to sue for specific performance, making the new associates parties, if they were not *bona fide* purchasers for value, without notice, and if they were, so that he cannot compel performance by them, he may recover damages for a breach of the contract, or a violation of the trust.

6. Evidence—Trusts—Parol Trusts—Contracts—Parol Evidence.

Held, in this case, the evidence was sufficient to establish a valid parol agreement, or parol trust in the purchase of land for resale for a division of profits between the parties.

7. Evidence—Demurrer—Nonsuit.

Upon appeal from the granting of defendant's motion to nonsuit or his demurrer to the evidence, the latter must be construed most favorably to the plaintiff, rejecting that to the contrary, and every fact essential to the cause of action which it tends to prove, must be taken as established.

APPEAL from *Allen, J.*, at Spring Term, 1921, of PERQUIMANS. (35)

This case was here at a former term, and is reported in 180 N.C., at p. 51, to which we refer for a statement of the facts other than those to be found herein. The land was purchased at the sale thereof at public auction, and was bought in for the joint and equal benefit of the plaintiffs and the defendants, and under the new or substitute contract, which was in parol, previously made, the land was to be sold under an option and trust deed, plaintiffs to receive one-half of the net proceeds of the sale of real and personal property, and defendants the other half, and the property was to be held by the parties for resale; and, it was further provided that the farm should be cultivated during the year 1919, all of which was to be done at the sole expense of the defendants and without any personal obligation on the part of the plaintiffs, the land and crops, and other property, to stand as security to the defendants for any money so advanced or expended by them for the joint benefit of the parties, and in furtherance of their agreement. The profits from the whole transaction to be equally divided between the parties. It is alleged that defendants failed to perform the contract on their part and, instead thereof, that they entered into an agreement with other parties for the purpose of enabling them to relieve themselves of the burden of paying all the expenses, as they had contracted to do. Instead of paying the money due on the sale and to close the option for the purchase of the land, which was held by plaintiffs, defendants united with other parties, whom they (36) thought could assist them in raising the funds to pay for the land and to defray the other expenses, and took the title to

them jointly, the purpose being to break their contract with plaintiffs and to defeat or disregard their rights thereunder.

The judge nonsuited the plaintiffs, and they appealed.

J. S. McNider, Ehringhaus & Small, and Meekins & McMullan for plaintiffs.

Aydlett & Sawyer, Small, MacLean, Bragaw & Rodman, Charles Whedbee, and Thompson & Wilson for defendants.

WALKER, J., after stating the case: When the case was here before, we did not consider the question as to the statute of frauds, because there was no exception requiring us to do so. But in this appeal there was a nonsuit, which may have been granted upon the ground that if there was a contract, as alleged, it was not in writing, and therefore defendants were not bound by it, although the plaintiffs may have established it by their evidence. We will, therefore, pass upon it, as the question is presented and may arise again unless disposed of by us now. In order to decide this question we must have a clear conception or understanding of the terms of the contract, and as there were tersely and lucidly stated by Judge Cranmer at the first trial of the case, we adopt what he said about them, though not literally. Plaintiffs contend, said he, that they made a contract with defendants on 6 December, 1918, under which it was agreed that the property be bought by them and held for resale for the joint account of both plaintiffs and defendants, they to share equally in all the profits, and that the farm was to be operated for their joint account, and that the profits from the farming were also to be divided equally; further, that all money necessary for the purchase of the land and the operation of the farm was to be furnished by the defendants, and that plaintiffs were not to furnish any money whatever or to become in any way liable for any money for the purchase of the land or the farming operations.

With this understanding of the salient features of the contract, we are of the opinion that it is not within the language or spirit of the statute of frauds, which provides that all contracts to sell or convey lands, or any interest in or concerning them, shall be void, unless the contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized. Rev. 976 (C.S. 988). There is no such contract in this case as is described in the statute. The plaintiffs have not contracted to sell or convey any land to the defendants, nor have the defendants agreed to
(37) buy and pay for the same, nor *vice versa*. While the question was not considered in the opinion of this Court by

Justice Allen in the first appeal, the learned Justice thus referred to it when deciding as to the measure of damages: "In the first place, the plaintiffs are not asking to recover damages for breach of contract to convey land. If they had done so, and the contract had been in writing, the rule laid down by his Honor would have been the true measure of damages, being one-half of the difference between the option price and the market value of the land at the time of the breach, but being by parol, if one to convey the land, the statute of frauds would be a complete defense." *Newby v. Realty Co.*, 180 N.C. 51, at p. 53. He then continues, and states the terms of the contract very succinctly and clearly, as follows: "The plaintiffs are asking to recover damages for breach of a contract, by the terms of which, as they allege, the defendants agreed to furnish the money to take up the option, which expired on 1 January, 1919, and to sell the land and pay the plaintiffs one-half the profits, less one-half the expenses of sale, and to furnish the money for the cultivation of the lands for the year 1919, under the management of one of the plaintiffs, and to pay the plaintiffs one-half the profits from the crops." The parties contracted with reference to the profits to be realized upon a resale of the land, and not with the view of acquiring title to any part of the land. They already had the title, and the land itself was to be held in trust, for the purpose of realizing the profits by another sale of it.

The section of the English statute of frauds relating to declarations of trust was never adopted in this State, though enacted in the same or similar form in some other states of the Union. And in this distinction will be found the explanation of the minority decisions in such other states holding, in an action to raise and declare a trust, that the statute of frauds was applicable in those cases where, upon an agreement similar to this, title to the lands had been taken in the name of one party who wrongfully refused to execute the agreement. The majority view in all the states, however, is that to an agreement of this kind the statute of frauds has no application. 25 R.C.L., pp. 595-6-7; *Morgart v. Smouse*, 7 Ann. Cases, 1140. In the majority view of the courts such an agreement for the purchase of land for the purpose of resale is regarded, not as a contract to sell or convey lands, but as a contract of partnership or a joint venture, as the case may be, which contemplates, not the transfer of any interest in lands from one party to the contract to the other, but only a division of profits upon a resale of the lands.

In *Morgart v. Smouse, supra*, p. 1141, the Court said: "It has been repeatedly held in different jurisdictions that an agreement by two or more persons to buy land and sell it and share either the profits or the profits and losses constitutes them partners

(38) for that venture, and entitles either of them to an accounting in equity from the others of the joint transactions, . . . a verbal agreement being sufficient to constitute a partnership to deal in lands, the statute of frauds not being applicable to such a contract." Parsons on Partnership (4 ed.), sec. 6; Lindley on Partnerships, 88, 89, and other cases cited. In the note in *Morgart v. Smouse, supra,* p. 1142, it is said: "The widely accepted rule is that a partnership agreement between two or more persons that they will become jointly interested in a speculation for buying and selling lands is not within the section of the statute of frauds providing that no estate or interest in lands shall be created, assigned, or declared unless by acts or operation of law, or by a deed of conveyance in writing."

In this State, as stated above, and in effect, the only statute requiring consideration is Rev. 976, providing that contracts to sell or convey lands shall be void unless some sufficient memorandum thereof be reduced to writing. The uniform construction of this statute is that it has reference to those cases alone in which, as the result of sale, exchange or other form of bargaining, a conveyance of land is contemplated from one of the contracting parties to the other. By the uniform decisions of this Court, the statute has no application to those contracts whereby two persons agreed to purchase land, either generally or as a single venture, for the purpose of reselling the same at a profit and sharing the same between them. The reason for this is obviously that by such a contract no conveyance of land is intended between the parties to the contract forming the basis of the dispute. And where, consequently, such a contract has been entered into, and where one of the parties has thereafter taken the title to the lands in his own name and wrongfully refuses to execute the agreement, this Court has consistently held that he holds the land as a trustee for the purposes of the joint agreement, and that an action to declare and enforce the trust will lie, as will appear by the case of *Brogden v. Gibson,* 165 N.C. 16, where the action was to declare and enforce a parol trust, upon facts practically identical with those in this case. The Court held that the action would lie, and that the statute of frauds had no application, citing ample authority in this State to support the ruling. Because of its close likeness to this case is excuse for quoting liberally from it.

In that case the Court said, at pp. 19 and 20: "While the defendant has not sold the land, so as to bring this case within the operation of the principle just stated, he has, by his agreement, charged it with a trust which equity will enforce, and the statute, fortunately for fair and honest dealing, is no protection to him. That he

is morally bound to its performance will not be questioned, and he is legally required to fulfill his promise. The law, upon this phase of the matter, is equally well established. We cannot doubt for a moment that the agreement was that the title to the (39) land should be taken in the name of the plaintiff, or, at least, in the joint names of the parties, as the plaintiff was authorized to sell as well as to buy the lots, and everything necessary to carry out this purpose is implied. It surely was not intended that defendant should be able to block the execution of the agreement by taking the title to himself and refusing to convey. But even if it was the purpose that he should have the title to it, the agreement was that he should hold it for the joint benefit of himself and the plaintiff, and upon the faith of this promise he acquired the title, and will not be permitted to hold it discharged of this obligation, but only in trust for the uses declared in the agreement. The further consideration for the promise was that the plaintiffs should contribute their skill and labor in securing the property for the purpose of the joint enterprise. This they have done fully and faithfully, and equity will not disappoint their reasonable expectation that defendant would not take the benefit of this skill and labor and refuse to execute the trust and confidence reposed in him." In the same case, p. 22, the Court said: "If we should permit defendant to profit by any such betrayal of the trust so implicitly and innocently reposed in him, it would be not only inequitable, but a reproach to the administration of justice." *Anderson v. Harrington,* 163 N.C. 140.

A comparison of the cited case, *Brogden v. Gibson, supra,* with the instant case will show a strong similarity of facts, and certainly a substantial one. In both cases there was an agreement that defendant furnish the money to purchase the land — the title to be taken, in the cited case, either in the plaintiff's name or the names of both parties — and in both cases again the original owner of the property conveyed the same, not according to the terms of the agreement, but in the cited case, by the wrongful inducement of the defendant, to the defendant alone, and in the instant case, by the wrongful inducements of the defendants, to the defendants and other, perhaps, innocent, parties, so as practically to preclude an enforcement of the trust. In neither case was there such an execution of the agreement as to remove the bar of the statute of frauds if otherwise applicable. So that here the defendants' contention, based upon the imaginary distinction, that in the cited case the contract was executed, so far as it contemplated a conveyance of land, is untenable. The only conveyance of land contemplated by the contract sued on was the conveyance from Fleetwood to the corpora-

tion, which plaintiffs and defendants agreed to form, and of which the defendants were to hold all the stock as security until their scheme or project was fully consummated. Fleetwood's contract with the plaintiffs to convey the land was evidenced by a written option,

and Fleetwood, furthermore, is not a party to this suit. By
(40) the wrongful inducement of the defendants, Fleetwood has, as did the vendor in *Brogden v. Gibson, supra,* conveyed the lands to the defendants and their associates, in violation of the agreement and plaintiffs' equitable rights thereunder. It cannot be contended that the defendants, who, if they had taken title to the lands in themselves alone, would have been charged with a trust in plaintiffs' favor, can, by the ingenious and wrongful method of associating other, perhaps innocent, parties in the acquisition of the title, bar the plaintiffs of all relief. If the lands in defendants' hands, as is well established, would be chargeable with a trust in plaintiffs' favor, it is because the agreement between plaintiffs and defendants was a valid agreement, unaffected by the statute of frauds.

That this contract is not within the statute of frauds is strikingly illustrated by *Michael v. Foil,* 100 N.C. 178, where it was held by this Court that an agreement, made at the time of the sale of land, and as an inducement thereto, that if a certain mineral interest thereon was sold in the grantor's lifetime he was to have one-half of the price, is not a contract for an interest in land. See, also, *Houston v. Sledge,* 101 N.C. 640; *Ambrose v. Ambrose,* 19 S.E. Rep. (Ga.) 980. And still more to the point is *Trowbridge v. Wetherbee,* 11 Allen (Mass.) 361, cited and approved in *Michael v. Foil, supra,* where it was held that a parol promise to pay to another a portion of the profits made by a promisor on the purchase and sale of real estate, is not within the statute of frauds, and may be proved by parol. See, also, *Sherrill v. Hagan,* 92 N.C. 345.

If the agreement was a valid one, and the defendants have not only wrongfully breached it, but sought to thwart or forestall the plaintiffs in the enforcement of the trust by the association with them of other innocent and *bona fide* purchasers for value, and without notice of the trust, then it follows, both in reason and upon authority, that the plaintiffs may properly assert their right through the medium of this action to recover damages for a breach of the trust or the contract, or to follow the fund they have received for the land. *Ledford v. Emerson,* 140 N.C. 288; 6 Anno. Cas., p. 107, and cases cited; *Owen v. Meroney,* 136 N.C. 475; 1 Ann. Cas. 834; *Newby v. Harrell,* 99 N.C. 149, and especially *Campbell v. Everhart,* 139 N.C. 503; *May v. LeClaire,* 11 Wallace (U.S.) 217 (20 L. Ed. 50).

Plaintiffs have an election of remedies. They may sue for specific

performance, which would require that the new associates of Ferrell be made parties, so that it might be determined whether they are purchasers *bona fide* and for value, and without notice of plaintiffs' equity. If they were not, they would be bound by the original contract between plaintiffs and defendants, and if they were, defendants would be liable to a money judgment in lieu of plaintiffs' right to specific performance which they had lost (41) by defendants' wrongful act; and, second, plaintiffs could waive their right to specific performance and recover damages for a breach of the contract, or a violation of the trust, which they have chosen to do in this action. 39 Cyc. 572; *Seymour v. Freer*, 8 Wallace (U.S.) 202 (19 L. Ed. 306); *Taylor v. Benham*, 5 Howard (U.S.) 233 (12 L. Ed. 130). But there is no contention about plaintiffs' right to recover, as we understand it, if the contract is valid, and there was evidence to show that it was made between the parties as alleged. There was clearly a consideration to support it.

This brings us to the second proposition, as to the sufficiency of the evidence to show the contract. We have examined the same carefully, and conclude that there was, at least, some evidence which should have been submitted to the jury. The testimony of the witnesses, Newby and Weeks, corresponds with the allegations of the complaint, and, if accepted by the jury as true, entitled plaintiffs to their verdict. It would be of little value in the discussion to recite their testimony here, the only question being whether there was any evidence as to the contract alleged in the complaint. Both Newby and Weeks gave testimony to the effect that the contract, as alleged, was entered into and that defendants had failed to comply with it. The plaintiffs, in their brief, insist that the learned judge, who presided at the trial, decided the case and ordered the nonsuit upon the ground that a recovery was barred by the statute of frauds. We have disposed of this plea.

On a motion by the defendant for a nonsuit under the statute, or on a demurrer to the evidence, the latter must be construed most favorably to the plaintiff, and every fact essential to the cause of action, which it tends to prove, must be taken as established, and plaintiff also is entitled to the most favorable inferences deducible therefrom, considering only so much of the evidence as is favorable to the plaintiff and rejecting that which is unfavorable. *Sikes v. Life Ins. Co.*, 144 N.C. 626; *McCaskill v. Walker*, 145 N.C. 252; *Cotton v. R. R.*, 149 N.C. 227; *Thompson v. R. R., ib.*, 155; *Morton v. Lumber Co.*, 152 N.C. 54; *West v. Tanning Co.*, 154 N.C. 44. This rule prevails generally in other jurisdictions. *Pinson v. Railway Co.*, 85 S.C. 355. Applied to this case the evidence is, in law, fully sufficient to establish plaintiffs' cause of action if taken to be

true, as it should be. It makes no difference if there are discrepancies in it, or inconsistencies, or even contradictions, as the jury must determine which part is true and not the court.

But, whichever way we take it, there was error in nonsuiting the plaintiffs, and there must be a new trial so that the jury may pass upon the facts.

New trial.

Cited: Improvement Co. v. Brewer, 183 N.C. 249; *May v. Menzies,* 184 N.C. 153; *Newby v. Realty Co.,* 184 N.C. 617; *Smith v. Coach Line,* 191 N.C. 591; *S. v. Gibson,* 193 N.C. 489; *Leftwich v. Franks,* 198 N.C. 292; *Baucom v. Bank,* 203 N.C. 828; *Lincoln v. R. R.,* 207 N.C. 788; *Dozier v. Wood,* 208 N.C. 416; *Fox v. Army Store,* 215 N.C. 191; *Peele v. LeRoy,* 222 N.C. 126; *Creech v. Creech,* 222 N.C. 663; *Gregory v. Ins. Co.,* 223 N.C. 128; *Pappas v. Crist,* 223 N.C. 267; *Embler v. Embler,* 224 N.C. 815.

(42)

MRS. EVA BROWN v. HENRY WARD BROWN.

(Filed 14 September, 1921.)

1. **Appeal and Error — Objections and Exceptions — Assignment of Error —Record.**

An exception taken for the first time in the appellant's assignment of error will not be considered on appeal, except as to the charge of the court, etc., C.S. 590(2), it being required that it appear in the record that it had been duly and properly taken.

2. **Same—Motions—Nonsuit—Evidence—Divorce.**

Where the husband appeals from a judgment in favor of his wife, in her action for an absolute divorce, because of his separation from her for five years, under C.S. 1659(4), amended by Public Laws of 1921, ch. 63, and assigns error only in the court's refusing his motion to nonsuit upon the evidence on the ground that he was insane for a part of the time, it is necessary, so that we may pass upon its sufficiency, that the evidence should appear in the record and not in the assignment merely.

APPEAL by defendant from *Allen, J.,* at the July Term, 1921, of WASHINGTON.

This is an action for divorce *a vinculo,* upon the ground that the parties have lived separate and apart from each other for five years before the commencement of this action, and was brought under the provisions of Public Laws of 1921, ch. 63. Plaintiff had previously obtained a decree for divorce from bed and board. Upon the find-

ings of the jury, judgment was entered for the plaintiff granting her an absolute divorce. The defendant being insane, appeared by guardian *ad litem,* who appealed from the judgment, and the only exception is that the court refused to nonsuit the plaintiff, it being stated in the exception that it appeared from the evidence that defendant had been an inmate of the State Hospital a part of the statutory period of five years.

W. L. Whitley for plaintiff.
No brief filed by defendant.

WALKER, J., after stating the case: The evidence is not in the record, and therefore we are unable to determine whether the insanity so appeared or not, and besides we should know at least the substance of the evidence in order to pass upon its legal sufficiency. We have often held that the ground of exception must appear in the record, and not only in the exception or assignment of error itself, which is the case here. *S. v. Jones* (at this term), citing *Wilson v. Wilson,* 174 N.C. 755; *In re Smith's Will,* 163 N.C. 466; *Todd v. Mackie,* 160 N.C. 352; *Allred v. Kirkman, ib.,* 392; *Worley v. Logging Co.,* 157 N.C. 490. Those cases apply directly to (43) the exception taken in this case, for upon such a motion as one for a nonsuit we must see what appears in the evidence so that we may adjudge for ourselves whether the motion was well based. Besides, even the exception does not state from whose evidence the alleged fact appeared, and if from the defendant's alone, the motion was properly overruled. We accept the evidence as true, upon such a motion, and view it in the light most favorable to the plaintiff, rejecting so much as is unfavorable to her, because the jury might do that very thing if the case were submitted to them. *Morton v. Lumber Co.,* 152 N.C. 54; *West v. Tanning Co.,* 154 N.C. 44. The court on a motion for nonsuit can only consider the plaintiff's evidence and so much of the defendant's as is favorable to him or supports his case. *Shives v. Eno Cotton Mills,* 151 N.C. 290; *Brittain v. Westhall,* 135 N.C. 492; *Daniel v. R. R.,* 136 N.C. 517; *Biles v. R. R.,* 139 N.C. 528. Defendant, as is attempted here, cannot state evidence in his exception, not appearing in the case, and then demur to it or ask for a nonsuit, or a dismissal of the case.

But if we should consider the verdict, though this is not permissible, the same result would follow. We get no more definite information from it than we do from the motion for a nonsuit or from the other parts of the record. It finds that the defendant is *now* (at the time of the trial) an inmate of the asylum, but there is nothing in the verdict to show how long he has been there or when he first

became insane, or whether he has been continuously insane, and, if so, during what length of time. The record is entirely devoid of such information as we should have to decide the question intended to be presented, but which is not properly raised. We must, therefore, refuse to reverse the judgment and grant a new trial.

If the plaintiff had asked us to do so, we would have dismissed the appeal for want of a brief for the defendant (174 N.C. 837, Rule 34), but she did not do so, and we have considered the case on its legal merits.

No error.

Cited: *Woodruff v. Woodruff*, 215 N.C. 688.

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(44)

IN RE ROSA GRAY HAMILTON.

(Filed 21 September, 1921.)

1. Habeas Corpus — Parent and Child — Courts — Juvenile Courts—Superior Courts—Jurisdiction.

The Juvenile Court act, C.S. 5039 *et seq.*, gives exclusive original jurisdiction to the Superior Court where the custody of a child less than sixteen years of age is in question, and establishes the juvenile courts as separate, though not necessarily independent parts of the Superior Courts for the administration of the act, and makes the clerks of the Superior Courts judges of the juvenile courts.

2. Same—Appeal.

The Juvenile Court Act, C.S. 5039 *et seq.*, provides in a later section that the term "court," when used without modification, shall refer to the juvenile court, and provides for an appeal from any judgment of that court to the Superior Court.

3. Same—Review—Superior Court.

Where the Superior Court judge has referred a proceeding brought by a husband in that court for the custody of his child, less than sixteen years of age, and the matter comes on appeal to the Superior Court again, the validity of the order sending or transferring the petition to the juvenile court for original investigation does not present a controlling question, or affect the jurisdiction of the Superior Court on the appeal, for thereon the judge thereof has ample authority to hear the case, either because it was properly instituted in the first instance or by virtue of the appeal. C.S. 5039 *et seq.*

4. Habeas Corpus—Appeal and Error—Findings—Evidence.

Where the proceedings for the custody of a child under sixteen years has been transferred to the juvenile court, and comes again to the Superior Court judge on appeal, the judge of the latter court has authority

to review the findings of fact and the judgment of the former court, under the supervision and control given him by the statute, C.S. 5039 *et seq.*, and his findings upon competent evidence are conclusive on appeal to the Supreme Court.

5. Same—Interest of Child—Grandparents.

While *prima facie* the parent has the right to the custody of his child in preference to others, this right is not an absolute one and must yield when the best interest of the child requires it; and when the father has filed his petition in *habeas corpus* proceeding for the custody of his child in the possession of his deceased wife's parents, the award of the Superior Court judge for the respondents upon findings, sustained by the evidence, that the father was an unsuitable person, and that the best interest of the child required that she should remain with her grandparents, will not be disturbed in the Supreme Court on appeal.

WALKER, J., dissenting.

APPEAL by petitioner from *Allen, J.*, at chambers, 4 March, 1921, from BEAUFORT.

This is a petition for a writ of *habeas corpus* to determine the right to the custody of a child fifteen months of (45) age.

The petition was filed before one of the judges of the Superior Court, who transferred the same to the juvenile court. The judge of the juvenile court heard the affidavits and evidence, and made his findings of fact and adjudged that the petitioner, who is the father of the child, was entitled to her custody.

The respondents, who are the maternal grandparents of the child, appealed to the judge of the Superior Court, who heard the evidence and affidavits and reversed the findings and order of the clerk, and adjudged that the respondents were entitled to the custody of the child.

The following are the facts found by his Honor, and his order thereon:

"1. That the petitioner, R. H. Hamilton, in November, 1917, married Aleen Davis, daughter of respondents, George D. Davis and Bettie Davis, against the will of her parents, and that in the fall of 1918 the infant, Rosa Gray Hamilton, was born. That in January, 1919, the said Aleen Hamilton contracted influenza and in February, 1919, was carried, at her request, by the said R. H. Hamilton, her husband, to the home of respondents, the father and mother of Aleen Hamilton, where she and her child, Rosa Gray Hamilton, then four months of age, remained, the said Aleen Hamilton continuing in poor health and requiring care and medical attention. That following influenza, and as a consequence thereof, the said

Aleen Hamilton developed tuberculosis, and on 26 December, 1919, died at the home of her parents.

"2. That during the time the said Aleen Hamilton and her infant child, Rosa Gray Hamilton, were at the home of her parents, the respondents herein, the said R. H. Hamilton, petitioner, furnished nothing for the support and maintenance, medicine, or medical attention of said Aleen Hamilton or the infant child, with the exception of one bottle of Wampoles Cod Liver Oil and a small quantity of fresh meat, both of which were furnished in February, 1919, notwithstanding the request of said Aleen Hamilton of her husband, the said R. H. Hamilton, that he contribute to the support of her and their child, nor did he visit them after February, nor show the personal attention which indicated any interest in them and their welfare, living at the time not more than one mile away, and that his conduct and attitude during the year 1919 constituted an abandonment of his wife and child.

"3. That on 6 August, 1919, the said Aleen Hamilton, wife of petitioner, realizing that she could not live, made her last will and testament, which was prepared by her, in her own handwriting and without suggestion or influence from others, wherein she directed that her child, Rosa Gray Hamilton, be left in the care, custody, and jurisdiction of George Davis and Bettie Davis, the
(46) respondents, during their lifetime, and at their death to her sister, Ina Davis, which is set out in the record.

"4. That during the entire time from February, 1919, until the death of Aleen Hamilton, respondents George D. Davis and Bettie Davis provided for and supported the said Aleen Hamilton, providing for her medical attention and medicine, and paying all of her funeral expenses, except $25 on a coffin, upon which the respondents paid $75 and the petitioner paid $25.

"5. That the respondents rent a comfortable home in the town of Pantego, have educated all of their children in the Pantego High School, their two daughters having held certificates as teachers; that respondents are members of the Christian Church and are people of good character and able to provide for the tuition and education of the said infant child, Rosa Gray Hamilton.

"6. That the said Rosa Gray Hamilton is afflicted with spinal trouble, requiring the treatment of a specialist, and respondents are ready, able and willing to provide this treatment for the child, and have frequently offered and endeavored to do so since this cause has been pending.

"7. That the petitioner, R. H. Hamilton, is thirty-five years of age, has no property and is unthrifty, and should said infant child be awarded to him it will be in effect awarding her to the custody

of his father and mother, at whose home he lives, while if the custody of the child is left with George D. Davis and Bettie Davis, the parents of the dead mother, she would have the advantage not only of the care of her maternal grandmother and grandfather, but also of the sister of the dead mother, Ina Davis, whom the court finds to be a young woman of character, refinement and education, and whose influence will be an advantage to said infant in her upbringing.

"8. That the petitioner, R. H. Hamilton, is not a fit, suitable or proper person to have the care and custody of this infant girl child, not a little more than two years of age, and that the best interest and welfare of the said child will be subserved by leaving her in the custody and care of respondents, and it is so ordered. The order of the clerk is reversed."

From this judgment, awarding the custody of the child to the respondents, the petitioner appealed.

Ward & Grimes, and Small, MacLean, Bragaw & Rodman for respondents.

Tooly & McMullan for petitioner.

STACY, J. The Juvenile Court Act (C.S. 5039 *et seq.*) provides that the Superior Courts shall have exclusive original jurisdiction of any case of a child less than sixteen years of age "whose custody is subject to controversy." By this same law ju- (47) venile courts are established as separate parts of the Superior Courts for the administration of the act, and the clerk of the Superior Court of each county is made the judge of the Juvenile Court.

It is also provided in a later section that the term "Court," when used without modification, shall refer to the Juvenile Court, and that an appeal may be taken from any judgment or order of the Juvenile Court to the Superior Court.

It thus appears that the act confers jurisdiction upon the Superior Courts, and that the Juvenile Courts, as separate parts (but not necessarily as independent parts) of the Superior Courts of the district, have been created and organized for the administration of the law and for the hearing of matters and causes arising thereunder. *S. v. Coble*, 181 N.C. 554.

Again, in *S. v. Burnett*, 179 N.C. 740, it was held that the act "creates no limitations on the jurisdiction of the Superior Courts in these cases which, under the first sections of the act and by virtue of its powers, as a court of general jurisdiction administering both law and equity, may always, on proper application and appropriate

writ, make inquiry and investigations into the status and conditions of children disposed of under the statute, and make such orders and decrees therein as the right and justice of the case may require." This supervision and oversight of the Superior Courts, of course, should be exercised in an orderly way by appeal from the Juvenile Court, where such is provided by the statute, and otherwise by appropriate writ, where no appeal is available.

Assuming this to be the proper interpretation of the law, we need not consider the regularity of the order transferring or sending the petition to the Juvenile Court for original investigation. This could have no effect upon the jurisdiction of the Superior Court, nor would it make any material difference, for when the matter again reached the judge of the Superior Court he had ample authority to hear the case, either because it was properly instituted in the first instance, or by virtue of the appeal from the Juvenile Court. Therefore, viewing it in any light, the case was competently before the Superior Court in the last instance for final adjudication.

His Honor also had authority to review the findings of fact and judgment of the clerk, which were under the supervision and control of the Superior Court. *Mills v. McDaniel,* 161 N.C. 112.

The findings of fact made by the judge of the Superior Court, found as they are upon competent evidence, are also conclusive on us *(Stokes v. Cogdell,* 153 N.C. 181), and we must there-
(48) fore base our judgment upon his findings, which amply sustain his order.

We recognize fully the principle that *prima facie* the parent has the right to the custody of his child in preference to others, but that this right is not an absolute one and must yield when the best interest of the child requires it *(In re Warren,* 178 N.C. 43), and his Honor has found as a fact that the petitioner "is not a fit, suitable or proper person to have the care and custody of this infant girl, and that the best interest and welfare of the child will be subserved by leaving her in the custody and care of the respondents." He also finds that the child is afflicted in an unusual way by spinal trouble, requiring the treatment of a specialist, and that the respondents are ready, able and willing to provide this treatment for the child, and have frequently offered and endeavored to do so, and that the petitioner has practically abandoned his family prior to the death of his wife.

Upon the record the judgment of the Superior Court must be sustained.

Affirmed.

WALKER, J., dissents because the court did not have the requisite jurisdiction under the Juvenile Court statute, and further because if it had such jurisdiction there was not any evidence that justified the findings as to fact and law, or which should deprive the father of, or impair his preferential right to, the custody of his child. One of the most important and essential facts was not found by the court below, and the failure of the father to visit his wife and child, if there was such a failure, is fully explained by the testimony, which shows that it was not the father's fault, but the fault of those who now seek to retain the custody of the child. The right of the father, in my opinion, should be upheld upon the principle so often applied by us in such cases, when the father's natural right was recognized and enforced. *Newsome v. Bunch*, 144 N.C. 15. In that case, at page 18, this Court said, and it is strikingly applicable to the facts in this appeal: "While the Court, in the exercise of a sound discretion, may order the child into the custody of some other person other than the father, when the facts and circumstances justify such a disposition of the child, we do not think that any such case is presented in this record as should induce us to adopt that course and except this case from the general rule. The father has done nothing by which he has incurred a forfeiture of his right to the custody of his offspring. There is no room for the exercise even of a sound discretion in favor of the grandparents who have possession of the child. Speaking for himself, and not committing the Court to his view, the writer of this opinion would hesitate to remove the child from its present custody, if the law were more elastic and we were vested with a larger discretion (49) than is given by the law; but we must follow the precedents and the general principles of justice established by them, though the result may be contrary to what we may consider as the real merits of the particular case, and though by the facts, even as found by the court, our sympathies may be enlisted in behalf of the grandparents. The insistence upon his strict right under the circumstances may not be very creditable to the petitioner, yet the law is inexorable in such a case, and cannot be made to yield in deference to a mere sentiment or to a tender regard for the feeling of one of the parties; nor are we permitted to exercise an arbitrary discretion." The *Newsome* case has been frequently approved and affirmed. *In re Jones*, 153 N.C. 312; *In re Turner*, 151 N.C. 474; *In re Fain*, 172 N.C. 790; *Howell v. Solomon*, 167 N.C. 588; *Brickell v. Hines*, 179 N.C. 254, where the cases are collected. See, also, *Latham v. Ellis*, 116 N.C. 30.

The mother of this child is dead. The father is able to take care of the child, and if the evidence is at all credible, is better able to

do so than those to whom its custody has been awarded. It has been said by this Court in the cases above cited, that the parent has the preferred right of custody and for cogent reasons, and in *Brickell v. Hines, supra,* by Justice Hoke, that "this right, being a natural and substantive one, may not be lightly denied or interfered with by action of the courts." It is true, as we have often held, that the welfare of the child deserves and should have consideration, but the Court should proceed cautiously and not deprive the father of his right, except upon clear and strong evidence, which is not present in this case.

Cited: In re Blake, 184 N.C. 281; *In re Martin,* 185 N.C. 475; *Clegg v. Clegg,* 186 N.C. 34; *In re Coston,* 187 N.C. 511; *In re Ten-Hoopen,* 202 N.C. 225; *In re Bailey,* 203 N.C. 368; *Tyner v. Tyner,* 206 N.C. 779; *Winner v. Brice,* 212 N.C. 299; *Bradfield v. Bradfield,* 222 N.C. 750; *In re Prevatt,* 223 N.C. 835; *In re McGraw,* 228 N.C. 47; *Lightner v. Boone,* 228 N.C. 201; *S. v. Hedgebeth,* 228 N.C. 268; *Bryant v. Bryant,* 228 N.C. 290; *Phipps v. Vannoy,* 229 N.C. 633; *In re Blalock,* 233 N.C. 506.

IN RE L. E. FOUNTAIN, CONTEMPT PROCEEDINGS.

(Filed 21 September, 1921.)

1. Appeal and Error—Contempt of Court—Findings.

Where the appellant has been adjudged guilty of contempt in the proceedings before the judge in the Superior Court, upon proper findings supported by evidence, the findings are not reviewable in the Supreme Court on appeal.

2. Same—Jurors—Abusive Language—Evidence—Statutes.

Upon appeal to the Supreme Court from an adjudication of guilty in proceedings "as for contempt," C.S. 984, evidence that the appellant had approached a juror on the streets, not in the immediate presence of the court, after the jury in the case had been discharged but during the term, and had abused the juror and the others who had rendered a verdict against him, cursing them, and using threatening gestures to the juror, and putting him in fear, is sufficient to sustain the findings of the trial judge that such conduct tended to impede and hinder the proceedings of the court, and impair the respect due thereto and the authority thereof, and the conviction based thereon.

3. Contempt of Court—Acts and Conduct—Intent as to Effect—Purging from Contempt.

Where the conduct of the respondent, proven or admitted, is in itself a

contempt of court, he may not purge himself of the contempt, by denying his intention to show it.

4. Contempt of Court—Threats—Assaults—Evidence.

Where, in proceedings as for contempt of court, there is relevant and pertinent evidence that the respondent had put a juror in fear by his acts and conduct, it is sufficient on appeal to sustain a finding of assault by the Superior Court judge.

5. Appeal and Error—Contempt of Court—Habeas Corpus—Certiorari.

Held, in this case, the respondent, found guilty of contempt of court, was entitled to appeal; but if it were otherwise, and if his sentence were excessive or the jurisdiction doubtful, his remedy was by *habeas corpus* proceedings and a *certiorari*, if necessary.

APPEAL from *Calvert, J.*, at April Term, 1921, from EDGECOMBE, in proceedings for indirect contempt under (50)
C.S. 984, *i. e.*, conduct tending to impede and impair the respect and authority of the court, but not committed in its immediate presence.

The judge finds as facts that at November Term, 1921, of said county the case of "L. E. Fountain against Calvin Jones" was called for trial on Thursday of the first week (it being a two weeks term), and the verdict was rendered on the following day that Raeford Liles was a talis juror, and after the verdict had been returned he was discharged from further service as a juror; that about an hour or two after the return of the verdict in said cause and after said talis juror had been discharged from further service, he was met on the street by the plaintiff in the action, L. E. Fountain, "who accosted him, using abusive and insulting language towards him, and the other jurors in the case because of the verdict they had rendered, and committed an assault upon the said Liles." The matter was brought to the attention of the court during that term, who thereupon issued a rule against the said Fountain, which was not served because of his absence from town until after the said court had adjourned for the term, and was continued by reason of such failure. The March Term was a criminal term and this matter was not reached, but at the April Term it was called up and a new rule to show cause was issued by the judge holding that term, requiring the respondent to appear to answer the rule, which he did in person and by counsel, and "Upon the hearing then had the court makes these further findings of fact: About an hour or (51)
two after court adjourned for the day on which a verdict was rendered the respondent (L. E. Fountain) accosted the said Raeford Liles, using abusive and insulting language towards him, and of and concerning him and the other jurors in the case, and committed an assault upon him, the said Liles, and that this talis

juror, Liles, that same afternoon informed one Daniel Harris, who was then a regular juror, and served as such the following day that the acts and conduct of the said respondent L. E. Fountain did tend to impede and impair the respect and authority for the proceedings of the court, and the court finds that the respondent has been guilty of contempt of the court, and so adjudges L. E. Fountain, respondent, to be in contempt of court, and adjudges that he pay a fine of $100 and the costs of this proceeding. "THOMAS H. CALVERT,
"Judge Presiding."

The respondent excepted to the foregoing findings of fact and the judgment of the court.

Attorney-General and Frank Nash, Assistant Attorney-General, for the State.

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

CLARK, C.J. This is a proceeding for *indirect contempt,* under C.S. 984, by conduct impeding and impairing the respect due to, and the authority of, the court, by abusing and assaulting a juror. Such conduct occurred during the term of the court, but not in the immediate presence of the court.

The Court held *In re Gorham,* 129 N.C. 485, that in a proceeding as for contempt in attempting to influence a juror, the findings of fact by the trial judge, if there is any evidence, cannot be reviewed on appeal, and that the respondent can purge himself only where the intention is the gravamen of the offense. *Baker v. Cordon,* 86 N.C. 116. Here there is evidence, and the offense was in the act and not in the intention.

In this case, moreover, there was slight divergence between the evidence for the State and the respondent, and there was ample evidence to justify the findings of fact by the court. While the respondent denies attempting to strike the juror Liles, he does not deny the abusive and threatening language as to him and the other jurors on account of the verdict they rendered against him. Said juror testified that when the respondent upon the recess of the court met him and began cursing and abusing him and the rest of the jury who had sat on the case, using profane and vile
(52) expressions, that he started to walk away from said Fountain, but the latter continued to walk beside him, cursing and abusing him and all members of the jury, and repeatedly raised his hand and shook it in his face, continuing to threaten and abuse both affiant and all other members of the jury, talking in an angry and vehement manner and threatening him so that affiant had to walk away from him, being an old man 70 years of age, to avoid a

battery upon him, and walked into the lot of an adjacent stables to avoid personal encounter and fisticuff, as he thought the said Fountain was going to strike him, and he was actually put in fear, and that this was before the court had adjourned for the term, and about two hours after the affiant had been discharged as a juror. There was also an affidavit by the deputy sheriff that he was unable at that term of the court to serve the rule upon said Fountain, though his residence and place of business was in Tarboro, he absenting himself from the county for the purpose of avoiding said officer or keeping himself concealed to prevent service of said rule upon him. On an appeal in such proceedings from an inferior court, the findings of fact are reviewable, but it is otherwise when the appeal is from the Superior Court. *In re Deaton,* 105 N.C. 62.

The respondent does not deny the use of abusive language, as stated by the juror as above, and says that he might have used gestures and raised his hand, but that he did not intend to assault him or put him in fear, and asserts he left town upon business.

In re Hampton, 63 N.C. 13, where the defendant in striking distance of the prosecutor, his arm being bent but not drawn back, said to the prosecutor, "I have a great mind to hit you." Whereupon the prosecutor walked away. It was held that the defendant was guilty of an assault.

But it was not necessary, indeed, that there should have been a battery upon the juror. This is not an indictment for such battery. It is sufficient if the juror was called in question in the manner above stated for the discharge of his official duty in rendering his verdict, for the court properly held that such conduct tended "to impede and hinder the proceedings of the court, and to impair the respect and authority for the proceedings of the court." and adjudged that the respondent had been guilty of contempt of the court. C.S. 984.

The defendant contends that he has purged himself of contempt by denying his intention to show contempt for the court. The question is not whether the respondent intended to show his contempt of the court, but whether he intentionally did the acts which were a contempt of the court. *In re Parker,* 177 N.C. 467.

The adjustment of differences between parties or the investigation of conduct forbidden by law by legal tribunals, instead of by personal strength, marks the line between civilized government and barbarism. When the tribunals established for (53)
that purpose have investigated the matter at issue, or are investigating it, their action is to be respected and obeyed and is subject to review only in the method provided by law.

In *Ex parte McCown,* 139 N.C. 95, there was a personal attack upon a judge during the recess of the court and before it had ac-

tually adjourned, though the case on account of which the judge was attacked had been finally disposed of, and the court held that McCown was in contempt; that the right of the court to be protected in the discharge of its duty an inherent power of which it could not be deprived, for the Constitution, Art. IV, sec. 12, provides: "The General Assembly shall have no power to deprive the Judicial Department of any power or jurisdiction which rightfully pertains to it as a coördinate department of the government." It is a most essential power rightfully pertaining to the Judicial Department that those administering it, whether judges or jurors, shall not be assaulted or intimidated by violent and threatening conduct from the untrammeled discharge of their duties, and this is as essential in regard to jurors, who are a part of the court, as it is to the judges.

There would be small assurance of the impartial and fearless administration of justice if the judges only are to be protected from such misconduct as is here shown, but the jurors who are much more liable to be thus called in question should be left to defend themselves by physical strength or by indictment or prosecution of the offenders.

In re Brown, 168 N.C. 417, the Court held that a newspaper criticism after the court had adjourned was personal to the judge and not a matter of contempt. That case was rested upon the ground that the court had adjourned.

In the *McCown* case, 139 N.C. 110, Judge Walker said: "As courts can exercise judicial functions only through their judicial officers, an assault upon such officer because he has discharged a required duty is necessarily an attack upon the court for what it has done in the administration of justice." That case holds that such conduct is direct contempt, and is constructively done in the presence of the court and falls within subsection, C.S. 978(1). Besides the able and full discussion of the whole matter in that case, see, also, *S. v. Little,* 175 N.C. 743, in which it is held, Hoke, J., that the power of the court to attach for contempt includes in its protection all officers of the court, jurors, attorneys, and others who in the line of their official duties are assisting the court in the dispatch of its duties, and all witnesses who are in attendance under subpœna. In that case the defendant in a criminal action had assaulted the State's witness before the trial, for the purpose of hindering or delaying the administration of justice, and he was
(54) held to be in direct contempt, and that the respondent had no right of appeal, or to demand trial by jury or to demand that his hearing be removed before another judge. Nothing could be added to the very full and careful discussion of the subject-matter in *S. v. Little.*

The respondent was entitled to an appeal *(In re Parker, supra)*, but if he were not — if his sentence were excessive or the jurisdiction was doubtful — his remedy was by *habeas corpus* proceedings and a *certiorari*, if necessary, from this Court. *In re Holley*, 154 N.C. 163.

Disregarding, however, this phase of the case, we find in the judgment of the court

No error.

Cited: Snow v. Hawkins, 183 N.C. 368; *S. v. Yates*, 183 N.C. 755; *Cotton Mills v. Abrams*, 231 N.C. 439; *Cotton Mills v. Textile Workers Union*, 234 N.C. 548; *Wood Turning Co. v. Wiggins*, 246 N.C. 118.

THOMAS B. NEWTON v. CARRIE NEWTON.

(Filed 21 September, 1921.)

1. Evidence—Writing—Genuineness—Jury—Statutes.

The principle, formerly recognized in this State, that confined the proof of handwriting to the testimony of a competent witness in comparing that sought to be established with handwriting either admitted or proven as that of the party, has been changed by statute, C.S. 1784, and where the disputed writing has been rendered competent under this principle, it may now be submitted to the jury, together with that admitted or proven since 5 March, 1913.

2. Appeal and Error—Irrelevant Evidence—Harmless Error.

In this case the handwriting sought to be introduced as evidence before the jury and to be considered by them was irrelevant, and the action of the court in refusing to let the writing be submitted to the jury, to determine its genuineness, under the statute, was harmless error. C.S. 1784.

APPEAL by plaintiff from *Calvert, J.*, at April Term, 1921, of EDGECOMBE.

This is an action for divorce. Verdict and judgment for defendant. Appeal by plaintiff.

G. M. T. Fountain & Son and Don Gilliam for plaintiff.
Allsbrook & Philips for defendant.

CLARK, C.J. A letter purporting to be from the defendant was offered as competent evidence against her, as tending to show the

misconduct alleged. Its genuineness being denied, the judge admitted witnesses to compare the signature and handwriting of the letter with the defendant's signature to the answer, which she
(55) admitted to be genuine, but refused to permit the writings to be submitted to the jury for their inspection.

In *Outlaw v. Hurdle,* 46 N.C. 150, the Court held that while witnesses can testify to the genuineness of the handwriting by comparison with other papers admitted or proved to be genuine, the jury must pass upon its genuineness upon the testimony of witnesses, holding: "Writings are not properly submitted to a jury's inspection. As a general rule all evidence is addressed to the hearing of the jury and not to their sight." In *Tunstall v. Cobb,* 109 N.C. 321, the Court said: "In North Carolina it seems to be settled law that an expert in the presence of the jury may be allowed to compare the disputed paper with other papers in the case, whose genuineness is not denied, and also with such papers as the party whose handwriting gives rise to the controversy is estopped to deny the genuineness of, or concedes to be genuine, but no comparison by the jury is permitted. *Pope v. Askew,* 23 N.C. 16; *Outlaw v. Hurdle,* 46 N.C. 150; *Otey v. Hoyt,* 48 N.C. 407; *Yates v. Yates,* 76 N.C. 142; *Fuller v. Fox,* 101 N.C. 119," and this has continued to be the settled law in this State. See cited cases to *Tunstall v. Cobb,* in the Anno. Ed.

But a recent statute, ch. 52, Laws 1913, now C.S. 1784, has provided, "In all trials in this State, when it may be otherwise competent and relevant to compare handwritings, a comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute, provided this shall not apply to actions pending on 5 March, 1913." The last line is an unequivocal declaration of change in the rule obtaining theretofore.

As we understand the statute, the admission of testimony as to the genuineness of a writing by comparison of handwriting is now on the same basis as the declarations of agents. The Court determines whether there is *prima facie* evidence of agency or of the genuineness of writing admitted as a basis of comparison, and then the testimony of the witnesses and "the writings" (in the plural) themselves are submitted to the jury. It is fair to the presiding judge to say that this statute was not called to his attention. It was adverted to by Walker, J., in *Bank v. McArthur,* 168 N.C. 55, though the disputed writing in that case did not come within the statute.

Though it was error to exclude the writings from the jury if the testimony was competent and pertinent, it was not reversible error

in this instance, for we are of opinion that the letter, if genuine was irrelevant, not tending to prove any fact or (56) circumstance in issue, and the refusal to submit the writing to the jury to determine its genuineness was harmless error.

Upon the whole case we can find no error of which the plaintiff can complain.

No error.

Cited: *S. v. Beam,* 184 N.C. 744; *Gooding v. Pope,* 194 N.C. 405; *In re Will of Williams,* 215 N.C. 268; *In re Will of Gatling,* 234 N.C. 567; *Kaperonis v. Hwy. Comm.,* 260 N.C. 599.

W. H. PROCTOR ET AL., V. BOARD OF COMMISSIONERS OF NASH COUNTY ET AL.

(Filed 21 September, 1921.)

School Districts—Bonds—Statutes—Sinking Fund—Taxation.

Where a statute authorizes a school district to issue bonds for school purposes, and requires that a sinking fund at a certain rate of taxation be provided for the retirement of the bonds at maturity, and the taxable property in the district is not sufficient to pay the interest and provide an adequate sinking fund, the retirement of these bonds is as vital to their validity as the authorization to issue them, and their issuance will be permanently enjoined at the suit of a taxpayer within the district. In this case the bonds had not been issued and the rights of purchasers had not intervened.

APPEAL by plaintiffs from *Connor, J.,* at chambers, 1 July, 1921, from NASH.

Civil action to determine the validity of certain proposed bonds. The facts are set out in the judgment of the Superior Court, which is as follows:

"This is a civil action wherein the plaintiffs are seeking a permanent injunction against the defendants against the issuance and sale of certain school improvement bonds of Oak Level School District, Nash County, North Carolina. A temporary restraining order was issued against the defendants by Bond, J., August 20, 1919, and notice issued to the defendants to appear before Devin, J., at Nashville, 28 August, 1919, and show cause why said injunction should not be granted. The hearing thereof was continued from time to time without final disposition, and the same now comes on to be heard on 1 July, 1921, before his Honor, George W. Connor, resident

judge of the Second Judicial District, in chambers at Wilson, N. C., upon motion of the defendants to dissolve the temporary restraining order herein issued. After hearing the complaint and answer and the affidavits in the cause and the arguments of counsel, it appears to the court, and the court finds as a fact:

"1. That on or about 7 April, 1919, the county board of education of Nash County filed with the board of county com-
(57) missioners of Nash County a petition for an election within Oak Level School District in Nash County upon the question of issuing $20,000 of school improvement bonds for the purpose of building a schoolhouse in said district, as provided by ch. 55 of the Public Laws of 1915 of North Carolina, and the said board of county commissioners thereupon ordered an election to be held in said school district for said purpose on 22 July, 1919.

"2. That said election was held as in said order and notice of election directed, 22 July, 1919, and was declared carried; that the registration books were closed 10 July, whereas they should have remained open until Saturday night, 12 July; that between 10 July and 12 July, 1919, J. B. Wallace and W. J. Bunn, qualified voters of said district, were refused registration by the registrar.

"3. That there is no public high school maintained in said district.

"4. That there is a community in said school district consisting of two stores and several residences known as Westrays; that by chapter 39 of the Private Laws of the Special Session of 1908, the territory embracing said community, known as Westrays, was incorporated under the name of the town of Westrays; that by said act John C. Lindsay was designated as mayor, M. J. Hedrick, J. B. Land and J. S. Proctor as commissioners; that the said John C. Lindsay, J. B. Land and J. S. Proctor have each long since moved from the territory embraced within said act, and M. J. Hedrick never lived within said territory, and that said town has not for the past ten years elected any officers or employees, levied any taxes, or performed any other duty or exercised any other privilege usually performed or exercised by towns; that said community has had no board of aldermen, nor other body, has held no election or meeting or kept any minutes or records of same and in no way held itself out to the public as a town, and has in no manner functioned or attempted to function as such.

"5. That the total taxable property in said district for the year 1919 was $476,549, and the total number of polls was 177, and that the total amount of taxes that could be raised by the levy of the maximum amount permitted by said chapter 55, Public Laws of 1915, as limited by chapter 84, section 3, Public Laws of 1919, is

$1,718.13, which amount is insufficient to create a sinking fund for the retirement of said bonds at maturity and pay the interest thereon.

"And upon the foregoing findings of fact the court is of the opinion:

"1. That the irregularities, if any, in calling and holding said election and in the registration of voters were cured by the provision of chapter 133, Public Laws of 1921, and that there was not a sufficient number of voters refused registration to affect the result of said election.

"2. That the community designated as the town of Westrays, within said territory of Oak Level School District, is an incorporated town within the meaning and purpose of chapter 55 of Public Laws of 1915. (58)

"3. That the amount of taxable property within said district and the maximum amount of tax that can be raised thereon under the statute does not affect the validity of said bonds, but only affects their marketability.

"Whereupon, it is ordered and adjudged by the court that the said temporary restraining order herein issued be and the same is hereby dissolved. It is further ordered that the plaintiffs pay the cost of this proceeding, to be taxed by the clerk of the Superior Court of Nash County. "GEORGE W. CONNOR,

"Resident Judge," etc.

From the foregoing judgment the plaintiffs excepted and appealed.

M. V. Barnhill for plaintiffs.

Finch & Vaughn, and Thorne & Thorne for defendants.

STACY, J. This case presents for consideration the old but ever new question of taxation. It comes in the form of a proposed bond issue, and we are asked to pass upon the validity or legality of the same.

The following are the objective and controlling facts:

1. By an election held in Oak Level School District, Nash County, N. C., on or about 7 April, 1919, a bond issue of $20,000 for school improvement purposes was approved by a vote of a majority of the qualified voters residents in said district.

2. Chapter 55, Public Laws 1915, provides that, following a favorable election in such district, the county board of commissioners shall issue said bonds, when requested to do so by the county board of education; and further, that said commissioners "shall thereafter levy a sufficient tax (which shall not exceed thirty cents on the one hundred dollars, and ninety cents on the poll) to pay the

interest on said bonds and create a sinking fund sufficient to pay the principal and interest on said bonds when they fall due."

3. The total maximum amount of taxes that could be raised from the taxable property in the present district, under the above limitations, is insufficient to create a sinking fund for the retirement of said bonds at maturity and pay the interest thereon, as required by the law of 1915; or, to state it differently, in order to meet the obligations which these bonds will impose, it would be necessary to levy taxes in excess of the statutory limitations.

(59) Upon these, the facts chiefly relevant, the question then arises: Will the law sanction the issuance of these bonds when admittedly, under the tax limitations, they cannot be paid at maturity? We think not.

A similar question was presented in the case of *Bennett v. Commissioners,* 173 N.C. 625, where the defendant commissioners of Rockingham County were sought to be enjoined from issuing bonds in excess of the county's ability to pay under the existing tax limitations. The authority to issue said bonds was denied, the Court saying:

"In view of the constitutional provision, and the decisions of the Court construing the same, we are of opinion that the county commissioners of Rockingham County are without power to incur this indebtedness of $200,000, issue the negotiable bonds of the county in evidence of their obligation, and stipulate for a continuing tax to pay the interest and provide a sinking fund which is in excess of the established limitation," citing *Board of Education v. Comrs.,* 107 N.C. 110; *French v. Comrs.,* 74 N.C. 692; *Millsaps v. Terrell,* 60 Fed. 193.

We do not understand that Art. IX, sec. 3, of our State Constitution is invoked as bearing upon the questions presented by this appeal; or, at least, it does not so appear on the record. But even if such were the case, it has been held with us that where the Legislature has prescribed a method of procedure of this kind, and such procedure is sought to be followed, the statutory provisions on the subject are controlling. *Hendersonville v. Jordan,* 150 N.C. 35; *Comrs. v. Webb,* 148 N.C. 120; *Robinson v. Goldsboro,* 135 N.C. 382. Indeed, in certain instances, the legislative method and the requirements thereof, whether expressed in permissive or mandatory terms, are declared to be exclusive and binding upon those who are chargeable with the execution of such powers. *Ellison v. Williamston,* 152 N.C. 147; *Wadsworth v. Concord,* 133 N.C. 587.

The authorities, of course, may provide for a six months school, as required by the constitutional provision above mentioned, but if they undertake to do so in the manner prescribed by chapter 55,

Public Laws 1915, they must comply with the terms of the statute. And it would seem that the statutory method is exclusive where district bonds are sought to be issued for such purpose. However, this latter question is not before us for decision, as the defendants are proceeding under the statute. *Trustees v. Pruden,* 179 N.C. 619.

In *Comrs. v. State Treasurer,* 174 N.C. 141, it was said that "an obligation of this kind imports a liability to taxation, and in case of a subordinate municipal corporation it means that payment can be coerced (if the bonds be valid), and that all the taxable values therein may be made available on the claim." In support of this position, the following was quoted with approval from *People v. Township Salem,* 20 Mich. 452: "The exercise by a mu- (60) nicipal corporation of the power to pledge its credit is an incipient step in the exercise of the power of taxation, and unless the object to be promoted be such as may be provided for by taxation, the power to make the pledge does not exist, and the Legislature cannot confer it." And we may add that, where a bond issue is proposed in excess of the taxing power to care for the payment of said bonds, though for a legitimate purpose, the right to issue the same is not to be found within the pale of the law. The authority to issue bonds, or pledge the faith and loan the credit of a subordinate political subdivision of the State is limited by its ability, under the law, to provide for the ultimate payment of said obligations. This is the point up to which it may be permitted to go, but beyond which the law does not sanction. To hold otherwise would be to assert a legal proposition which, to say the least, is doubtful in morals.

There has been no sale of the present bonds, and the appeal presents no question with respect to the rights of innocent third parties, or purchasers for value without notice. The legality of the issue is raised upon objection by plaintiffs who are residents and property owners in said district.

The case of *Comrs. v. MacDonald,* 148 N.C. 125, is not at variance with the principle here declared, for the chief question there debated and decided was whether a county which had been authorized, with the approval of a popular vote, to issue certain bonds, could levy a tax in excess of the constitutional limitation to provide for their payment, with interest, in the absence of express legislative authority. But it does not appear that such a tax was necessary to meet the obligations incurred by said bonds. The fact was not there established as here admitted. This is made clear from the judgment of the Superior Court as set out in the record of that case, from which the following is taken: "And (the court) being further of the opinion that the said board of commissioners have authority to levy tax sufficient to pay the interest on said bonds, and

to provide a sinking fund for the payment of the principal thereof at maturity, and that said board can be compelled by mandamus to levy such tax upon its refusal so to do," etc. The bonds were declared valid, and it does not appear that a levy in excess of the constitutional limitation was necessary to meet payment — the court saying that a tax up to this limit might be compelled by *mandamus* if need be. This restricted tax seems to have been sufficient. Hence, the crucial point now presented was not decided in *MacDonald's* case, nor was it before the Court in *Trustees v. Pruden, supra.* These cases are thus distinguishable.

We are not impressed with the argument or contention that the inability to provide for the payment of said bonds affects
(61) only their marketability and not their validity. The authority to issue the proposed bonds is derived from the statute, and its limitations are equally as effective and curbing as its enabling provisions are life-giving. Therefore, where the territory embraced in a given district is too small, under the limitations of the statute, to provide for the payment of the bonds in the amount proposed, and this fact is affirmatively established prior to a sale of the bonds, we must deny the authority to embark upon such an enterprise. In the instant case the amount of bonds proposed is too large, considering the taxable values within the territorial limits of the school district. The undertaking, as it appears on the record, is top-heavy and wanting in self-sufficiency, for which reason the law must withhold its approval.

Again, as said in *Lang v. Development Co.,* 169 N.C. 662: "It is no answer to this position that, in the particular case before us, no harm is likely to occur or that the power is being exercised in a considerate or benevolent manner, for where a statute is being squared to requirement of constitutional provision (or where the contemplated action of a governing body is being squared to statutory regulations) it is what the law authorizes and not what is being presently done under it that furnishes the proper test of its validity."

The statute provides that an election of this kind may be held in any school district "which embraces an incorporated town or city, or in which there is maintained a public high school." It is admitted that the present district contains no high school, and it is very doubtful as to whether "Westrays" is such an incorporated town within the meaning and purpose of chapter 55, Public Laws 1915. But for reasons otherwise sufficient, we do not now pass upon this point, as it is unnecessary to do so.

Upon the facts as found the temporary restraining order should

have been made permanent, and this will be certified to the Superior Court.

Error.

Cited: Cooper v. Comrs., 183 N.C. 235; *Wilson v. Comrs.,* 183 N.C. 640; *Bd. of Ed. v. Bray,* 184 N.C. 487; *Armstrong v. Comrs.,* 185 N.C. 408; *Parks v. Comrs.,* 186 N.C. 498; *Long v. Rockingham,* 187 N.C. 204; *Wilkinson v. Bd. of Ed.,* 199 N.C. 672; *Blackmore v. Duplin County,* 201 N.C. 245; *Trust Co. v. Statesville,* 203 N.C. 409; *Barbee v. Comrs.,* 210 N.C. 719.

A. R. LEE v. SAPHRONY ANN LEE.

(Filed 21 September, 1921.)

Divorce—Separation—Insanity—Suit of Party at Fault.

Our statute, C.S. 1659(4), amended by ch. 63, Laws 1921, making a separation of husband and wife for five years a ground for absolute divorce, does not extend to granting the decree upon the suit of the party in fault, or where the other party has been forcibly separated by infirmity; nor will the divorce be granted at the suit of the husband when the separation of the wife has been occasioned by her incarceration in a hospital for the insane.

APPEAL from *Connor, J.,* at Special July Term, 1921, of JOHNSTON. (62)

This is an action by the husband for divorce. The plaintiff and defendant were married 31 May, 1896, and there were five children born to them. They lived together till 1910, when the wife was committed to the State Hospital for the Insane, and has not been home since. This is an action for divorce, alleging that "There has been a separation of husband and wife and that they have lived separate and apart for ten successive years."

Verdict and judgment for defendant. Appeal by plaintiff.

Wellons & Wellons for plaintiff.
F. H. Brooks for defendant.

CLARK, C.J. This appeal presents but one question. The court charged the jury that though the plaintiff and defendant had lived separate and apart for more than five years, Laws 1921, ch. 63, amending C.S. 1659(4), such separation having been caused by in-

carceration in the State Hospital for the Insane, is not such separation as is contemplated in the statute under which this suit is brought.

The appellant rests his case solely upon the statement in *Cooke v. Cooke,* 164 N.C. 275, that "This statute is broad enough to include, and clearly does include, any kind of separation by which the marital association is severed." But the judge in that case immediately added: "And which may be made the subject of further judicial investigation. There is nothing in the law to indicate that the right conferred is dependent on the blame which may attach to the one party or the other, nor that the time which may be covered by a judicial divorce from bed and board shall be excluded from the statutory period, nor which permits the interpretation chiefly insisted upon by the defendant, that the statute applies only when there has been a separation by mutual consent of the parties."

The Court in that case was not extending the causes of divorce to instances in which the living apart was caused by insanity and immurement in the State Hospital, but was combatting the idea that the separation must be by mutual consent. It is very clear that the separation must be in contemplation of law a separation at least of the kind recognized by statute, and could not apply to cases where the party driving the other from the home, or who should desert the home, should be the party seeking to take advantage of his own wrong by pleading the separation which he had
(63) caused. It is true that in *Cooke v. Cooke* the majority of the Court took the view that the application for the divorce was not required to be "by the party injured," but the statute has since been expressly changed, for this section (C.S. 1659) does now require that the action must be by "the party injured."

The party injured means the "party wronged by the action of the other." Where each party has been guilty of wrong, the defendant can plead recrimination. This statute goes no further than to allow a divorce where the separation has been by mutual consent or wrongful act of at least one of the parties, or by judicial decree, and has existed for five years.

It certainly was not intended that this statute should apply to cases where the separation was without fault on either side and involuntary, as in cases like this or incarceration in an asylum for the insane.

The word "separation" is thus defined in Black Law Dictionary, 1073: "In Matrimonial Law it means a cessation of cohabitation of husband and wife by mutual agreement," or in the case of judicial separation "under decree of court." To these our statute contemplates the addition of "separation" caused by desertion, or abandon-

ment, or other wrongful act of the party sued. It certainly does not intend to give an action for divorce to the party who has caused the separation by driving the other from the home, or has voluntarily deserted it for the specified period. C.S. 1660(1) and (2).

It cannot be contended that the years spent by the wife in the hospital for the insane was desertion or a separation by mutual consent, or even a voluntary, much less a wrongful, act on her part.

There are numerous decisions which hold that insanity accruing after marriage is not ground for divorce. *Lloyd v. Lloyd,* 66 Ill. 87; *Powell v. Powell,* 18 Kan. 371; 26 Am. Rep. 774; *Pile v. Pile,* 97 Ky. 308.

The grounds for divorce are entirely statutory and vary in the different states. The status is thus summed up in 19 C.J. 71: "In some states insanity is made a ground for divorce by statute" (but it may be said that it seems this is confined to the State of Washington), "while in others a divorce is absolutely prohibited where either party is insane. In the absence of statute insanity arising after marriage is not ground for divorce." This State comes under the latter head.

While it is in the power of the Legislature of this State to make the misfortune of either party a ground for divorce, it has not done so, and the Court cannot by judicial construction extend the grounds of divorce beyond the statute. With us, the lawmaking power has adhered to the obligation of the marriage vow, that the parties "take each other for better or for worse, to live together in sickness and in health till death do them part," with the exceptions only where the misconduct of the parties, and not their (64) misfortunes, are made by our statute to justify the divorce.

Certainly the husband whose wife has been placed in the asylum for insanity has not been wronged by her, and he has no ground under our statute to a divorce from her, without any wrongful act on her part. Instead of insanity being a ground for divorce, the wife is still entitled to support from her husband, and to her dower as a support should she outlive him, and to other rights of which an innocent and faithful wife would be deprived should the misfortune of insanity be imputed to the wife as a ground for divorce. The same is true where the husband is the insane party.

No error.

Cited: Sitterson v. Sitterson, 191 N.C. 322; *Parker v. Parker,* 210 N.C. 266; *Woodruff v. Woodruff,* 215 N.C. 688; *Oliver v. Oliver,* 219 N.C. 304; *Byers v. Byers,* 222 N.C. 302; *Byers v. Byers,* 223 N.C. 88; *Lockhart v. Lockhart,* 223 N.C. 560; *Williams v. Williams,* 224 N.C. 92; *Taylor v. Taylor,* 225 N.C. 82; *Cameron v. Cameron,* 235 N.C. 87.

TYRRELL COUNTY ET AL., V. S. J. HOLLOWAY ET AL.

(Filed 21 September, 1921.)

1. Constitutional Law — Counties — Treasurer—Statutes—Banks—Trust Companies.

Sec. 14 of Art. VII of our Constitution should be construed with reference to other sections therein, with certain specified exceptions not relevant to this case, and thereunder the Legislature is given full power to modify, change, or abrogate any and all provisions thereof and substitute others in their place; and though section 1 provides in terms that for the ordinary purposes of general county government there shall be elected a county treasurer, etc., it is yet within the legislative authority to so modify this requirement that they may delegate to the county commissioners the authority to abolish the position of county treasurer and appoint a bank or banks to act in this capacity for the consideration only which may arise to them from a deposit therein of the taxes collected; and C.S. 1389, is constitutional and valid.

2. Same—General Laws.

It is not required that the power conferred in sec. 14, Art. VII, of the State Constitution to modify, change, or abrogate any and all provisions of this article, with the exceptions enumerated, should be general in its operation, or that it should in terms formally abrogate any given section therein, and substitute another in its stead, for the act making such change, local in its operation, must be given effect under its provisions, if otherwise valid.

3. Same—Government Agencies—Delegated Powers.

While legislative powers may not ordinarily be granted by our General Assembly, they may be granted under our system of government to municipal corporations for local purposes, where, as such agencies, they are possessed and in the exercise of governmental powers in designated portions of the State territory, whether such localities are the ordinary political subdivisions of the State or local governmental districts created for special and *quasi*-public purposes.

4. Mandamus—Counties—Treasurer—Public Funds.

Where, under the power of a valid statute, C.S. 1389, the county commissioners have abolished the office of county treasurer, and have vested the duties of the office in certain banks and trust companies which have qualified thereunder, mandamus will lie to compel the treasurer, seeking to hold over and denying the validity of the statute, to turn over to the proper party the moneys that he has received and attempts to hold by virtue of his former office.

5. Same — Statutes — Questions for Court — Demand for Jury Trial — Waiver.

An action to enforce the turning over of public funds by the ex-treasurer of the county to the present financial agents regularly appointed, and who have qualified to act in that capacity according to the terms of valid statutes directly applicable, C.S. 1400, 3205, 3206, 4385, is not in strictness a money demand, under sec. 867, which must be proceeded with as an ordinary civil action, requiring a finding of disputed facts by a jury, but comes under sec. 868, providing that the summons may be re-

turnable before the judge at chambers or in term, who shall determine all issues of law and fact unless a jury is demanded by one or both of the parties, which, in the instant case, comes too late, being taken for the first time without exception in an additional brief allowed to be filed after the argument of the case in the Supreme Court has been made.

APPEAL by defendant from *Allen, J.*, at the April Term, 1921, of TYRRELL. (65)

The action is in the nature of mandamus to compel the defendant, S. J. Holloway, to turn over to two banks, the lawfully designated depositaries made parties of record, the public funds of the county, which plaintiffs aver and offered proof to show had come into the hands of said defendant while treasurer of said county, and which he wrongfully refuses to deliver. Plaintiffs further allege, and offered evidence tending to show, that said office of treasurer had been lawfully abolished by resolution of the commissioners, and the two banks referred to, duly designated as depositaries to act as treasurer without charge, etc., and that defendant continued to withhold the funds, claiming that he was still the lawful treasurer of the county. There was a preliminary order issued restraining said defendant from other and further disposition of said funds, which was returnable at said term and which on proof submitted was heard at the same term as the principal cause. Defendant admitted that he had received the county funds in controversy while treasurer of the county and claimed the right to hold and disburse on allegation and evidence tending to show that the office had not been abolished, and that said defendant was still county treasurer and as such had control and lawful disposition of same. His Honor, having heard the case, entered the following judgment: (66)

"This cause coming now to be heard at Columbia, N. C., on 25 April, 1921, according to continuances upon motion in this cause, and being heard upon the evidence taken and affidavits filed, the court finds:

"That the board of county commissioners on 5 April, 1920 abolished the office of treasurer of Tyrrell County, to take effect 1 December, 1920, and elected the two banks at Columbia, the Merchants and Farmers Bank, and the Tyrrell County Bank, as its financial agents, to act as its treasurer, upon giving bond and without compensation; that on Monday, 6 December, 1920, being the first Monday in December, the new board of county commissioners, which was elected in November, 1920, at the November election, duly qualified and passed resolutions abolishing the office of treasurer of Tyrrell County, and elected the said two banks as the financial agents, and to act as treasurer for the said county without compensation, and the said banks duly accepted on the said

6 December, 1920, and tendered their bonds; that the bonds were accepted, except the bond for the county road fund, and a question having arisen as to whether the money should be paid to the treasurer of the county or to the treasurer of the highway commission of the county, the question was referred to the Attorney-General, and the bonds for these amounts were not accepted until 3 January, 1921, which was the next meeting of the board of said commissioners, and that this bond was accepted at that time.

"That the two banks have been acting as financial agents and treasurer of Tyrrell County ever since 6 December, 1920.

"That the said S. J. Holloway did not tender any bond on the first Monday in December, 1920, as treasurer of the county, and has not at any time since, and has not paid over to the county the moneys in his hands belonging to the said county, nor to either of its financial agents as required by law.

"The court finds that the defendant, S. J. Holloway, is not the treasurer of Tyrrell County; that he has not settled with the said county, and has in his hands a large sum of money belonging to the said county; that it is his duty to pay over the same to the duly elected and qualified financial agents of said county, to wit, The Merchants and Farmers Bank, and the Tyrrell County Bank, and that they have been elected and qualified.

"It is ordered, decreed and adjudged that the defendant, S. J. Holloway, pay over to the said Merchants and Farmers Bank one-half of all moneys which is due to the county by the said Holloway, and the other half to the Tyrrell County Bank, and that he be and is hereby enjoined and restrained from paying out
(67) any moneys belonging to the said county, or its financial agents, except as set out above, and enjoined and restrained from acting as said treasurer.

"It is further ordered and adjudged that he pay over to the Tyrrell County Bank the half of all the moneys due to it as said financial agent of said Tyrrell County on or before 15 July, 1921.

"It is further adjudged that the said S. J. Holloway enter into a good and sufficient bond in the sum of $50,000 for the faithful compliance with the above order, and that he pay over and account to the said banks, as set out above, the said moneys due to them as financial agents of said county.

"It is further adjudged that the defendant Merchants and Farmers Bank execute a good and sufficient bond in the sum of $50,000 for the faithful handling of the moneys described in the pleadings in this cause, and to account for any and all of the moneys referred to in this proceeding that may come into its hands

or should come into its hands, and that it will faithfully account to the plaintiff for said moneys.

"It is further adjudged that the defendants pay the cost of this proceeding and that this restraining order continue to the hearing.

"O. H. ALLEN, *Judge Presiding.*"

Defendant and his surety, also defendant, excepted and appealed.

Aydlett & Simpson, W. L. Whitley for plaintiffs.
Thompson & Wilson, R. W. Winston for defendants.

HOKE, J. In section 1389, C.S., ch. 26, it is provided that the board of county commissioners of Tyrrell and certain other counties therein specified may abolish the office of county treasurer by resolution to that effect, passed at least sixty days before a primary or convention held for the purpose of nominating candidates for said office, and when so abolished the board of commissioners may appoint one or more solvent banks or trust companies to perform the duties of treasurer, or sheriff acting as *ex officio* treasurer of the county, such designated depositaries not being allowed to charge or receive anything in compensation other than the advantages accruing to them from such a deposit. And said banks and trust companies, termed financial agents, are also required to give bond for safe keeping and proper disbursement of said funds, and for faithful performance of their duties concerning them. Acting under this statute the commissioners of Tyrrell County, by formal resolution passed in apt time, have abolished the office of country treasurer and designated the banks to act as financial agents of the county, who have duly accepted and qualified, and if these proceedings are valid, we find no good reason for disturbing (68) the judgment of his Honor, as it appears of record.

The only objection against the propriety of this judgment urged before us on the oral argument and the original brief filed in behalf of the appellant is that the office of treasurer being one provided for in the Constitution, may not be abolished except by direct legislative action, and the attempt to vest such power in the board of commissioners of any county may not be upheld. It is true that Article VII of the Constitution, sec. 1, provides in terms that for the ordinary purposes of general county government there shall be elected biennially a treasurer, register of deeds, and five commissioners, but it is also provided in the same article, section 14, that as to this and all other sections of the article, except sections 7, 9, and 13, neither of which have any bearing on the question presented here, the General Assembly shall have full power by statute to modify,

change, or abrogate any and all the provisions of this article and substitute others in their place. In reference to the power conferred in section 14, it has been frequently held, and is now the accepted construction, that in order to its exercise it is not required that an act to effect a change in municipal government should be "general in its operation or that it should in terms formally abrogate any given section of this article and substitute another in its stead, but that an act of the General Assembly making such change, and local in its operation, must be given effect under this provision if otherwise valid." *Smith v. School Trustees,* 141 N.C. 157, citing *Harris v. Wright,* 121 N.C. 179.

This being the established position, the Legislature, under approved principles, in our opinion had the undoubted right to confer the exercise of the power referred to in section 14 upon the board of county commissioners of Tyrrell County, and said board, proceeding properly under the act, having formally abolished said office, the judgment of his Honor must be upheld.

While legislative power granted by the Constitution may not as a rule be delegated, it is fully recognized that under our system of government such power may be delegated to municipal corporations for local purposes where as agencies of the State they are possessed and in the exercise of governmental powers in designated portions of the State's territory, whether such localities are the ordinary political subdivisions of the State, or local governmental districts created for special and public *quasi*-purposes. *Trustees v. Webb,* 155 N.C. 379; *Smith v. School Trustees,* 141 N.C. 143-149; *S. v. Austin,* 114 N.C. 855; *People of N. Y. in re Dunn v. Ham,* 166 N.Y. 477; *S. and Josephine Tantor v. Mayor, etc.,* 33 N.J.L. 57;
(69) 1st Smith Modern Law of Municipal Corporations; 1st Cooley on Taxation (3 ed.), 101; Black's Constitutional Law (3 ed.), 373.

In the citation to Cooley the principle is stated as follows: "There is, nevertheless, one clearly defined exception to the rule that the legislature shall not delegate any portion of its authority. The exception, however, is strictly in harmony with the general features of our political system, and it rests upon an implication of popular assent which is conclusive. This exception relates to the case of municipal corporations. Immemorial custom, which tacitly or expressly has been incorporated in the several state constitutions, has made these organizations a necessary part of the general machinery of state government, and they are allowed large authority in matters of local government, and to a considerable extent are permitted to make the local laws."

And in Black, 374, the author says: "Municipal corporations

are regarded as subordinate agencies of government created with a view to the more judicious and effective administration of local governmental affairs. The Legislature has power to create such corporations and to invest them with such powers and prerogatives as are necessary to enable them to make rules for the government of their own affairs, particularly in matters of taxation and police, provided that their by-laws and ordinances shall not be inconsistent with the general laws of the State."

The case before us comes clearly within the principle, and the commissioners of Tyrrell County were well within their powers in the abolition of the office. And the defendant, admitting that he received the public funds of the county while he was the treasurer, and insisting on the right to hold and disburse them under a claim that the office has not been abolished and that he has them as of official right, the authorities are to the effect that mandamus is the appropriate procedure. *O'Donnell v. Dusman,* 39 N.J.L. 677; *S. ex rel Meinger, Collector, v. Disbrow, late Collector,* 42 N.J.L. 141; *S. v. Oates,* 86 Wis. 634; 26 Cyc. 258, and authorities cited in note 40; 18 R.C.L., title, Mandamus, secs. 120 and 186. And it appearing from a perusal of the record that this is an action to enforce the turning over the public funds of Tyrrell County pursuant to the requirement of the statutes directly applicable, C.S., ch. 56, sec. 1400; ch. 62, secs. 3205 and 3206, and ch. 82, sec. 4385, the case presented is not in strictness a suit on a moneyed demand, coming under C.S. 867, and which requires that the summons be returnable to term, and to be proceeded with as in ordinary civil actions wherein the material issues must be determined by jury unless formally waived, but it comes under the subsequent section, C.S. 868, which provides that the summons may be returnable before the judge in chambers or in term, and he shall determine all issues of law and fact, unless a jury trial is demanded by one or both (70) of the parties. *Coleman v. Coleman,* 148 N.C. 299; *Audit Co. v. McKenzie,* 147 N.C. 461; *Martin v. Clark,* 135 N.C. 178.

In the present case no demand was made for a jury trial by any of the parties, no exception was entered because same was not allowed, nor by exception or otherwise was any objection made to the mode of trial in the oral argument before us nor in any brief as then filed. In a brief filed by one of defendants some fifteen days later, and by consent, objection is made that there are disputed questions of fact presented in the affidavits and evidence, but these are only as to differences arising at the hearing, and no demand is therein shown or claimed that any jury trial was claimed on any material issues arising on the pleadings.

There is no error, and this will be certified that the funds of

county, admitted to be in the hands of defendant Holloway, shall be forthwith delivered to the financial agents of the county, and that the amounts in dispute be so delivered when and determined in accordance with law and the course and practice of the court, and the restraining order in the meantime be continued as directed in the judgment.

No error.

Cited: Comrs. v. Comrs., 184 N.C. 467; *Grantham v. Nunn,* 188 N.C. 242; *Road Comm. v. Comrs.,* 188 N.C. 366; *Lenoir County v. Taylor,* 190 N.C. 340; *Ellis v. Greene,* 191 N.C. 764; *Weaver v. Hampton,* 201 N.C. 802; *Watkins v. Bd. of Elections,* 210 N.C. 451; *Brown v. Comrs.,* 222 N.C. 405.

M. M. JONES v. T. L. BLAND ET AL.

(Filed 21 September, 1921.)

1. Negligence—Hotels—Guests—Invitee—Ordinary Care.

Where one enters a hotel as an invitee of a guest, the owner or proprietor owes him the duty of ordinary care for his safety.

2. Same—Prima Facie Case—Res Ipsa Loquitur.

Where there is evidence tending to show that the plaintiff was an invitee at the defendant's hotel and received the injury complained of by falling through an open door in the elevator shaft, while going to the room of the guest who had invited him, such injury not ordinarily occurring, in the exercise of proper care, and the elevator being under the sole control and management of the hotel, raises a *prima facie* case of defendant's negligence under the doctrine of *res ipsa loquitur.*

3. Same—Instructions—Burden of Proof—Evidence—Appeal and Error.

Where an invitee of a hotel has made out a *prima facie* case of negligence in his action against the proprietor, under the doctrine of *res ipsa loquitur,* this alone would justify a verdict in plaintiff's favor on that issue, the burden of the issue remaining with the plaintiff, but it is reversible error for the court to place the further burden on plaintiff to show by affirmative proof the special grounds of negligence attributable to defendant.

4. Same—

Where an invitee of a hotel has been injured by falling through a door left open in a passenger elevator shaft, and a *prima facie* case of negligence has been established, it is reversible error for the trial judge to charge the jury that in order to recover the plaintiff must show further by affirmative proof that the elevator was either in charge, at the time of

the injury, of an employee of the defendant's hotel, or had been left open by another for a sufficient time for the proprietor to have discovered it in time, in the exercise of ordinary care.

5. Same—Trespasser—Licensee—Wanton or Willful Injury.

An invitee of a hotel loses his character as such when on the premises for the unlawful purpose of gambling at cards in the room of a guest, and when he has been injured while on the premises and on his way for this unlawful purpose, the only duty owed him by the owner or proprietor is not to willfully or wantonly injure him, of which the trial judge properly held there was no evidence in this case.

6. Same—Scope of Invitation.

Where one enters a hotel at the invitation of a guest for the unlawful purpose of going to his room to gamble, he is beyond the scope of an invitee of the hotel, and becomes a trespasser or mere licensee, and as such may not recover of the proprietor for an injury received by him in falling through an open door in the elevator shaft when the carriage was at some upper portion of it, by the mere failure of the employees of the hotel to exercise ordinary care for his safety.

APPEAL by plaintiff from *Allen, J.*, at the April Term, 1921, of BEAUFORT. (71)

The action is to recover damages for the alleged negligence of T. L. Bland, proprietor of Hotel Louise, and another, in leaving open the elevator shaft leading off the hotel lobby and into which plaintiff fell, receiving serious, painful, and enduring injuries. There was denial of liability and plea of contributory negligence on part of plaintiff. On the trial there was evidence tending to show that on the afternoon of 23 January, 1918, about 3:30 p.m., plaintiff was invited into said Hotel Louise by W. B. Troy, a boarder at the hotel, and the two were going up to the room of said Troy on the fourth floor of the building; that it was a dark, cloudy day, the elevator being behind the stairs, shutting off much of the light that existed, and the elevator shaft from its placing and color of paint was such that plaintiff was unable to discern whether carriage was in place, and believing it was, stepped into the open door, falling to cement floor of the basement, a distance of nine to eleven feet and causing painful and permanent injuries from which he is still suffering, and greatly hindered in his ability to work.

It was proved that the carriage of the elevator at the time was at one of the upper floors, where it had been taken by some one, and that the door on the lobby floor was open. It was also shown that Mr. Troy, the inmate of the hotel, had been sick and confined to the house for about a week, and there were (72) facts on evidence permitting the inference that it was the purpose of Troy in calling plaintiff into the building and of the two in going to Troy's room to play cards for money at a fine of

10 cents limit, involving a loss of 25 or 50 cents, etc. There were submitted the three ordinary issues as to the negligence of defendant, contributory negligence of plaintiff, and damages, and the court having charged the jury, there was verdict for defendant on the first issue. Judgment for defendant, and plaintiff excepted and appealed, assigning errors.

Daniel & Carter for plaintiff.

Robert Ruark, Small, MacLean, Bragaw & Rodman, William B. Campbell for defendants.

HOKE, J. It is earnestly urged for error that his Honor charged the jury in part on the first issue that if they should find that Jones and Troy were on the way to Troy's room for the purpose of playing cards for money they should answer the first issue for defendants, the objection being that such unlawful purpose, even if established, could in no legal sense be considered as the proximate or contributing cause of plaintiff's injury. As an abstract proposition, considered entirely apart from the proprietary rights of the defendant as owner and in the management of the property, the position embodied in this objection should be upheld. In *Sutton v. The Town of Wauwatosa,* 29 Wis. 1, Chief Justice Dixon, in an opinion of great force and learning, approves and sustains the principle that "the fact that a plaintiff at the time he suffers injury to his person and property from the negligence of the defendant was doing some unlawful act will not prevent a recovery unless the act was of such character as would voluntarily tend to produce the injury." That is, unless the very unlawfulness of the act would have that tendency. And the principle so stated is fully recognized in this State as in accord with the better considered authorities on the subject. *Ferrell v. R. R.,* 172 N.C. 682; *McNeill v. R. R.,* 135 N.C. 682; *Waters v. R. R.,* 110 N.C. 338; Watson on Damages for Personal Injuries, sec. 230 *et seq.* to sec. 237.

A judge's charge, however, must be considered and interpreted in reference to the material facts submitted for his decision, and on this record it appears that defendant is the owner and proprietor of the hotel where the incident occurred, and plaintiff is insisting upon the position that he was there at the time on the invitation of a guest of the hotel, and has been injured in breach of the duty owed to one in that position. In the case suggested, and without
(73) more, it is very generally held that such a one, termed an invitee, is entitled to the duty of ordinary care from the proprietor and his employees, but the principle does not extend to a claimant who enters a hotel for an ulterior purpose and who, go-

ing beyond the scope and purpose of the invitation, wanders into some remote portion of the premises not covered by the same, and where there is no reason to expect him to go. Under such circumstances he loses the position of invitee and the privileges incident to it, and is to be considered a trespasser or mere licensee, towards whom no duty is owing except not to willfully or wantonly injure him. *Money v. Hotel Co.,* 174 N.C. 508; *Monroe v. A. C. L. R. R.,* 151 N.C. 374; *Quantz v. R. R.,* 137 N.C. 136; *Glaser v. Rothschild,* 221 Mo. 180, reported also in 17 A. & E. Anno. Cases 576; *Ryerson v. Bathgate,* 67 N.J.L. 337; *Reardon v. Thompson,* 149 Mass. 267; *Plummer v. Dill,* 156 Mass. 426; *Zoebish v. Tarbell,* 10 Allen 385. And the principle as stated should clearly prevail where under the guise of an invitee the claimant has entered or remains upon the premises for an unlawful purpose, assuredly so where the proprietor has not knowledge of such purpose and takes no part therein. *McGhee v. Norfolk & Southern,* 147 N.C. 142; *Newark Electric, etc., Light Co. v. Gordon,* 78 Fed. 74; 1st Thompson on Negligence, sec. 969.

In the last citation the position is stated as follows: "The distinction is that the person coming on the premises to whom this duty of care is due must not come as a mere trespasser or wrongdoer, but for some purpose lawful in itself, and such as the owner or occupier might reasonably expect to bring him there."

As applied to the facts of this record, therefore, his Honor correctly charged the jury that if claimant was going to the room for the unlawful purpose of gambling they should answer the issue as to defendant's negligence No, and he gave the right reason for it. "For in such case there would be no duty owing to him except not to willfully or wantonly injure him." *Emry v. Navigation Co.,* 111 N.C. 94. And he was correct also in holding that there were no facts in evidence to justify a finding of that character. There being no claim of willfulness and wantonness, in this connection being negligence so gross as to manifest a reckless indifference to plaintiff's rights. *Everett v. Receivers,* 121 N.C. 519.

The appellant excepts further that the court charged the jury as follows:

"The burden is on the plaintiff to satisfy you by the greater weight of the evidence that Shepard, the boy in charge of the elevator, or whoever was in charge of it, left the door open or that if opened by some one other than an agent or employee of defendants, that defendants knew it or that it remained (74) open long enough for them, in the exercise of ordinary care, to have discovered it, and if plaintiff has failed to so satisfy you of these facts, you will answer the first issue 'No.' "

The court is dealing here with the general question of defendant's negligence as involved in the first issue and on the assumption that plaintiff was an invitee on the premises and entitled to the duty of ordinary care. In this aspect of the case he so instructed the jury and correctly charged them further that the burden of the issue was on the plaintiff and in effect that he was required to establish a breach of duty towards him, the proximate cause of his injury. Going further and referring to some of the contentions of the parties, he gave the instruction excepted to as a further rule to guide the jury in their deliberations, and in this we think there was error to appellant's prejudice which entitles him to a new trial. It will be noted that his Honor is here charging the jury as to the burden of proof, telling them in terms that to find the issue for plaintiff the burden is on him to show by greater weight of evidence either that the employee of defendant left the door open or if done by a third party, it had remained open so long that defendant should have discovered it.

In this aspect of the case there are facts tending to show, and they are without substantial contradiction, that on 23 January, 1918, about 3:30 in the afternoon, plaintiff, an invitee on the hotel premises, walked into an elevator shaft, opening on the lobby, and fell to the cellar, eleven feet below, receiving permanent and painful injuries from which he still suffers, and disqualifying him to a great extent from active labor in his calling; that it was a dark afternoon, sleet was falling, and from this cause and the color of the paint and intervening obstructions to what light was prevailing on the outside, the place was so dark that ordinary observation did not disclose the opening or absence of the elevator carriage; that the door leading into lobby where plaintiff was at the time had been left open, or was open, and the elevator carriage was at one of the upper stories. If these facts are accepted by the jury, and, as stated, they are not challenged in the record, a *prima facie* case of negligence is made out which would justify the jury in finding a verdict on the issue against the defendant without further proof. It is the accepted position here and elsewhere "that where a thing which causes an injury is shown to be under the management of the defendant, and the occurrence is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care."

(75) This was held in the recent cases against the Texas Company, reported in 180 N.C. 546-561, and the principle has been approved and applied in many of our decisions on the subject. *Fitzgerald v. R. R.*, 141 N.C. 530; *Stewart v. Carpet Co.*,

138 N.C. 60; *Womble v. Grocery Co.,* 135 N.C. 474; *Haynes v. Gas Co.,* 114 N.C. 203; *Aycock v. R. R.,* 89 N.C. 321; *Sweeney v. Erving,* 228 U.S. 233; *Cincinnati Traction Co. v. Holzenkamp,* 74 Ohio St. 379, reported also in 113 Am. St. 980, with an informing and helpful note on the subject. Labatt on Master and Servant, sec. 834. In the citation to Labatt, quoted with approval in *Womble's* case, it is said: "The rationale of the doctrine, spoken of in the cases as *res ipsa loquitur* is that in some cases the very nature of the occurrence may itself, and through the presumption it carries, supply the requisite proof. It is applicable when under the circumstances shown the accident presumably would not have happened if due care had been exercised. Its essential import is that on the facts proved the plaintiff has made out a *prima facie* case without direct proof of negligence. The doctrine does not dispense with the rule that the party who alleges negligence must prove it; it merely determines the mode of proving it, or "what shall be *prima facie* evidence of negligence." And a clear and accurate statement of the position will be found in the case of *Stewart v. Carpet Co., supra.*

In *Fitzgerald's* case the opinion cites an English decision on the subject, as follows:

"In *Scott v. Dock Co.,* 3 Hurl. & Colt, the plaintiff proved that while conducting his duties as custom officer, he was passing in front of a warehouse in the dock yard and was felled to the ground by six bags of sugar falling upon him, and the principle is declared as follows: 'There must be reasonable evidence of negligence, but when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care.' "

And again a case from New Jersey is referred to with approval as follows: "In *Sheridan v. Foley,* 58 N.J. Law 230, it is said: 'It is urged, however, on behalf of the defendant that the plaintiff was bound, in order to entitle him to a verdict, to prove affirmatively that the injury which he received was caused by the negligent act of the defendant or of his servants; that the mere proof that the plaintiff was injured by a brick falling from the hod of one of the defendant's hod-carriers, or from a scaffolding upon which some of the employees of the defendant were engaged in laying a wall, does not, standing alone, raise any presumption of negligence; and that, as there was no evidence offered to show under what circumstances the brick fell, there was nothing in the case to (76) warrant the jury in inferring that the injury complained of

was the result of carelessness of the defendant or of his employees. While it is true, as a general principle, that mere proof of the occurrence of an accident raises no presumption of negligence, yet there is a class of cases where this principle does not govern — cases where the accident is such as, in the ordinary course of things, would not have happened if proper care had been used. In such cases the maxim *res ipsa loquitur* is held to apply, and it is presumed, in the absence of explanation by the defendant, that the accident arose from want of reasonable care.' "

On the record, therefore, in charging the jury that in order to render a verdict for plaintiff on the first issue, the burden was on him to show by a preponderance of the evidence either that the boy in charge of the elevator left the door open, or if opened by some other than an agent of plaintiff, that defendant knew it or it had been open long enough for them to have found it out in the exercise of proper care, the court, in our opinion, was putting on plaintiff a greater burden than is warranted by the proper application of the principle referred to. It no doubt made the impression upon the jury that in order to a verdict on first issue, plaintiff was required to offer direct and affirmative proof of the facts suggested, whereas the jury, if they so determined, or in the absence of satisfactory explanation, were well warranted in finding negligence from the objective and attendant facts of the occurrence without such affirmative proof.

In many cases on the subject these passenger elevators are likened to railroad carriers of passengers in which there is a presumption of negligence arising from an unexplained injury. *Edwards v. Mfg. Co.*, 61 R.I. 646; *Oberfelter v. Doran*, 26 Neb. 118; *Fox v. Philadelphia*, 208 Pa. St. 207. But in this jurisdiction the objective facts similar to those presented here, as shown in *Stewart's* and *Womble's* decisions, only make out a *prima facie* case of negligence and justifying a verdict without further or direct and affirmative proof. Having undertaken to lay down the rule as to the burden of proof, it should have been done correctly, and no prayer for instructions was required. *S. v. Wolf*, 122 N.C. 1079-1081; *Bynum v. Bynum*, 33 N.C. 632.

For the error indicated, plaintiff is entitled to a new trial of the issues, and it is so ordered.

New trial.

Cited: Weathers v. Baldwin, 183 N.C. 279; *Brigman v. Construction Co.*, 192 N.C. 795; *Barnes v. Hotel Corp.*, 229 N.C. 731; *McIntyre v. Elevator Co.*, 230 N.C. 543; *Schueler v. Good Friend Corp.*, 231 N.C. 418; *Young v. Anchor Co.*, 239 N.C. 290; *S. v. Hairr*, 244 N.C. 509.

(77)

CHARLES KANNAN ET AL., V. H. ASSAD.

(Filed 28 September, 1921.)

1. Appeal and Error—Verdict—Pleadings—Evidence—Admissions.

On appeal, the verdict of a jury may be given significance and correctly interpreted by reference to the pleadings, the evidence, the admissions of the parties, and the charge of the court.

2. Same—Motion to Set Aside Verdict.

Where, upon the admissions of the parties, the cause has been proceeded with in the Superior Court upon conflicting evidence as to the establishment of a certain fact upon an issue agreed upon, a party, in disregard to or in conflict with his admissions, may not, after verdict, successfully move for judgment thereon.

APPEAL by defendant from *Calvert, J.*, at June Term, 1921, of WILSON.

Summary proceedings in ejectment tried originally before a justice of the peace and then *de novo* upon appeal in the Superior Court, where the following verdict was rendered by the jury:

"1. Did plaintiff and defendant enter into a contract for the rental of the property in question for a term of three years beginning 25 February, 1921? Answer: 'Yes.'

"2. Did defendant Assad fail to perform on his part the terms of said contract? Answer: 'Yes.'

"3. What is the reasonable rental value, per month, of the property? Answer: '$20.' "

As bearing upon the meaning and sufficiency of the issues, the following appears in the record:

"At the close of the testimony attorneys for both plaintiffs and defendant, and the court, indulged in some discussion as to the proper issues to be submitted. During the course of the discussion it was conceded by attorneys for both plaintiffs and defendant that if the jury should find that the plaintiffs and defendant did enter into a contract for the rental of the property for a period of three years beginning 25 February, 1921, and should further find that the defendant had failed on his part to do and perform the things that he had agreed to do as to the making of the repairs, that such breach on the part of the defendant Assad would constitute a forfeiture of the rental contract. The whole case was tried upon the theory that if the jury should find that the contract was entered into, as they did find and should further find that the defendant had failed to perform on his part, as the jury did find, then such failure would constitute a breach of contract. Counsel for both plaintiffs and defendant conceded this position before the court and

(78) in the argument of the case before the jury. It was only after the jury had returned the verdict that any point was made by the defendant that he was entitled to judgment upon the verdict."

From a judgment declaring the lease forfeited and that the plaintiffs are entitled to the immediate possession of the premises, and from his Honor's refusal to enter a contrary judgment on the verdict, the defendant appealed.

W. A. Finch and Connor & Hill for plaintiffs.
O. P. Dickinson for defendant.

STACY, J. We do not think the defendant is entitled to a judgment on the verdict in view of the admissions and concessions made in open court and before the rendition of the verdict. The case was tried on a different theory with a different understanding, and it would seem that the defendant ought to be content with the result.

It is well understood that, except in proper instances, a party to a suit should not be allowed to change his position with respect to a material matter, during the course of litigation, nor should he be allowed to "blow hot and cold in the same breath." *Ingram v. Power Co.*, 181 N.C. 359; *Lindsey v. Mitchell*, 174 N.C. 458. *A fortiori*, after a verdict has been rendered against him, he should not be permitted to withdraw his admissions solemnly made on trial. This would not be conducive to the ending of litigation, a policy much favored in the law. *Webb v. Rosemond*, 172 N.C. 848; *Coble v. Barringer*, 171 N.C. 445.

His Honor might well have found as a fact, and embodied it in his judgment, that an affirmative answer to the second issue was conceded to mean and admittedly would work a forfeiture of the lease. This would have cured any apparent irregularity. But we think the judgment is supported by the record and is entirely sufficient without such finding being incorporated therein.

It has been held with us in a number of cases that the verdict of a jury may be given significance and correctly interpreted by reference to the pleadings, the evidence, admissions of the parties, and the charge of the court. *Howell v. Pate*, 181 N.C. 117; *Reynolds v. Express Co.*, 172 N.C. 487; *Bank v. Wilson*, 168 N.C. 557. Tested by this rule or standard, we have experienced no difficulty in arriving at the conclusion that the judgment below should be affirmed.

"He that sweareth to his own hurt, and changeth not," is promised an abiding place, from where he "shall never be moved" (Psalm XV), but the present defendant apparently has not brought himself within the protection vouchsafed to this class. He invokes

the promise and asks not to be moved, because he has spoken to his own hurt, but he seems unwilling to comply (79) with the steadfast or "changeth not" condition.

After a careful consideration of the defendant's exceptions and assignments of error, we conclude that the judgment of the Superior Court must be upheld, and it is so ordered.

No error.

Cited: Brewington v. Loughran, 183 N.C. 561; *Pierce v. Carlton,* 184 N.C. 178; *Holmes v. R. R.,* 186 N.C. 61; *Irvin v. Harris,* 189 N.C. 467; *Short v. Kaltman,* 192 N.C. 156; *Newbern v. Gordon,* 201 N.C. 318; *S. v. Whitley,* 208 N.C. 664; *Edge v. Feldspar Corp.,* 212 N.C. 248; *Cody v. England,* 216 N.C. 609; *Jernigan v. Jernigan,* 226 N.C. 206.

J. M. MONROE ET AL., V. W. N. HOLDER.

(Filed 28 September, 1921.)

Pleadings—Examination of Party—Statutes—Appeal and Error.

An appeal will not directly lie to the Supreme Court from an order of the Superior Court judge affirming the action of the clerk in ordering the examination of the defendant to elicit certain information, alleged to be not otherwise obtainable, and material to the filing of the complaint, C.S. 900, when it does not appear that the defendant will be prejudiced or injured by the examination.

APPEAL by plaintiff from *Cranmer, J.,* at July Term, 1921, of LEE.

Civil action pending in the Superior Court of Lee County.

The plaintiffs, desiring to elicit certain information, which they allege is not otherwise obtainable, and is necessary and material to enable them to file their complaint, submitted the requisite affidavit and moved before the clerk for an order to examine the defendant as provided by C.S. 900 *et seq.* This was allowed. Whereupon, the defendant entered a special appearance before the clerk and moved to vacate the order of examination on the ground that it had been improvidently and improperly granted. From the clerk's refusal to strike out the order, the defendant appealed to the judge of the Superior Court, who, upon a hearing affirmed the order and judgment of the clerk. Plaintiff appealed.

Williams & Williams for plaintiff.
Hoye & Hoyle for defendant.

STACY, J. It appearing that the order of examination, as entered by the clerk and approved by the judge, is based upon an affidavit, apparently sufficient in form and substance, and there being no denial of the facts or contrary showing by the defendant, we must dismiss the appeal as premature. *Pender v. Mallett,* 122 N.C. 163; *Holt v. Warehouse Co.,* 116 N.C. 480; *Vann v. Lawrence,* 111 N.C. 32.

(80) It is true, in *Ward v. Martin,* 175 N.C. 287, the Court, in its discretion, entertained an appeal from an order of this kind, because of the important questions presented; but in the instant case it does not appear that the defendant will be prejudiced or injured by the examination.

Of course, as said in *Bailey v. Matthews,* 156 N.C. 81, and repeated in *Fields v. Coleman,* 160 N.C. 11, "The law will not permit a party to spread a drag-net for his adversary in the suit in order to gather facts upon which he may be sued, nor will it countenance any attempt, under the guise of a fair examination, to harass or oppress his opponent." But these are matters which, in the first instance, must be committed to the wisdom and good judgment of those who grant the orders and supervise their execution. Until some right is denied or some wrong is done, the defendant should not be permitted to appeal, and thus delay the trial of the cause. *Holt v. Warehouse Co., supra.*

Appeal dismissed.

Cited: Whitehurst v. Hinton, 184 N.C. 12; *Chesson v. Bank,* 190 N.C. 190; *Abbitt v. Gregory,* 196 N.C. 11; *Johnson v. Mills Co.,* 196 N.C. 94; *Douglas v. Buchanan,* 211 N.C. 668; *Knight v. Little,* 217 N.C. 682; *Suddreth v. Simpson,* 224 N.C. 183; *Fox v. Yarborough,* 225 N.C. 608; *Cuthbertson v. Rogers,* 242 N.C. 627.

ANNIE W. DUNCAN v. J. D. OVERTON AND D. H. OVERTON.

(Filed 28 September, 1921.)

Automobiles—Negligence—Principal and Agent—Father and Son — Evidence—Nonsuit—Trials.

Where there is evidence that a father has given his automobile to his son for the purpose of the latter's driving therein through the country to

town to enter school, with instructions to leave the automobile at a garage, the father is responsible in damages for the negligence of the son in causing an injury to a third person on the streets of the town, while so driving, from which he is not released by a divergence of the son in taking some fellow-students from the depot, where he had met them, to the school, and a nonsuit or a direction of the verdict on the trial in the defendant's behalf was properly refused.

APPEAL by defendant from *Devin, J.*, at October Term, 1920, of CHATHAM.

This is an action for injuries sustained by the plaintiff from an automobile driven by the defendant, D. H. Overton, in the streets of Raleigh, J. D. Overton, the owner thereof, being joined as a defendant. Verdict and judgment for the plaintiff. Appeal by the defendant, J. D. Overton.

Manning, Bickett & Ferguson for plaintiff.
Little & Barnes for defendants.

CLARK, C.J. There are two exceptions, one that the court should have charged the jury as prayed, that if they (81) believed the evidence they should answer the first issue "No," as to the defendant J. D. Overton. The other exception is that there should have been a nonsuit as to the defendant J. D. Overton. There is thus no question raised as to the negligence, or the amount of the damages. The sole question is as to the liability of J. D. Overton, the owner of the machine and the father of the other defendant, who was the driver whose negligence, as the jury find, was the cause of the injury.

In the second paragraph of the complaint it is alleged that "the defendant J. D. Overton was the owner of the automobile which was being driven with his knowledge by his son, D. H. Overton, in the city of Raleigh, at the time hereinafter mentioned." This allegation is admitted in the answer. This admission that the minor defendant was driving the car with the knowledge of his father justifies the inference that it was done with his consent. *Taylor v. Stewart*, 172 N.C. 206. And, indeed, this case falls within the principle laid down in *Tyree v. Tudor*, 181 N.C. 214, in that his father admits that he authorized the son to use the car on this occasion. According to the defendant's evidence, the father had directed his son to drive this car from Nashville to Raleigh, to carry himself and his luggage to the A. and E. College, and thereafter to take the car to the garage in Raleigh for repairs. The son testifies that he met some other college students at the Union depot in Raleigh and was conveying them and

their suit-cases in the car to the college at the time the injury to the plaintiff occurred.

The court instructed the jury: "If you should find from the evidence that the defendant J. D. Overton, who was the owner of the car, only gave permission to his son to take the car to the garage for repairs directly after having gone to the college, and that his instructions in this respect were disobeyed by his son without the knowledge or consent of J. D. Overton, and that the son was not accustomed to drive the car without the express permission of J. D. Overton, then you would answer the first issue 'No' as to J. D. Overton; but if you should find from the evidence, and the greater weight thereof, that it was customary for the son to drive the car, or that at the time of the injury he was engaged in carrying out the father's instructions, then the defendant D. H. Overton would be the agent of the defendant J. D. Overton, and the said J. D. Overton would be liable for the acts of his agent, and if you should find from the evidence, and the greater weight thereof, that there was negligence, you would answer the issue 'Yes' as to both defendants."

There is no assignment of error to this charge, nor that it is not justified by the evidence. We do not think that the defendant has any cause to claim that he was prejudiced thereby. The
(82) case on appeal states that there was other evidence on the part of the plaintiff which the appellant does not set out in his case on appeal.

Indeed, we think the law is stricter against the defendant than as stated in the charge. The father having placed his son in charge of the machine to bring it from Nashville to the A. and E. College at Raleigh, and thence to the garage, is responsible for injuries accruing from the negligence of his agent while in charge of the machine on that errand, and is not released therefrom by an incidental divergence in discharging the duty entrusted to him before the driver reached the garage, such as is testified to in this case.

No error.

Cited: Robertson v. Aldridge, 185 N.C. 296; *Parrish v. Armour & Co.,* 200 N.C. 658; *Lazarus v. Grocery Co.,* 201 N.C. 819; *Jackson v. Scheiber,* 209 N.C. 446; *Parrott v. Kantor,* 216 N.C. 593.

A. J. SIMONDS AND WIFE v. S. T. CARSON.

(Filed 28 September, 1921.)

1. Courts—Justices' Courts—Appeal—Superior Courts— Actions — Damages.

The sending up an appeal to the Superior Court by the justice of the peace upon the payment of the cost thereof is a judicial act, and no action for damages will lie against him for failing to send up the papers in apt time.

2. Same—Laches—Statutes.

It is appellant's duty to docket his appeal in the Superior Court in time, C.S. 660, and his failure to have done so by the next succeeding term of the Superior Court, wherein the motion of appellee to dismiss has been properly allowed, or to apply for a *recordari*, in apt time, is his own laches, which will prevent his recovering damages of the justice of the peace for his failure to send up the case according to his promise, after having accepted his fee therefor, in the absence of a fraudulent intent.

APPEAL by plaintiffs from *Horton, J.*, at March Term, 1921, of PITT.

On 2 May, 1916, J. J. Ford recovered judgment against the plaintiffs in this action (who were defendants in that action), before S. T. Carson, a justice of the peace (the defendant herein). They gave notice of appeal to the Superior Court, and then and there paid to the said justice of the peace, the defendant S. T. Carson, the appeal fee of 30 cents, together with the further sum of 50 cents for docketing the same in the Superior Court, which it is alleged he agreed to send up with the said papers on appeal.

The complaint alleges that the justice negligently and carelessly failed to send up said case, and failed to remit the fee for docketing the appeal, paid to him by the plaintiffs (defendants in said action), whereby the plaintiff in said action at August (83) Term, 1916, procured judgment dismissing said appeal because it had not been docketed in time. The court finds as facts that "The next term of the Superior Court of Pitt convened 20 May, 1916, after said term of court, the justice of the peace having failed to send up the case with the fee for docketing."

The complaint further alleges that by reason of the dismissal of the said appeal the plaintiffs in this action were required to pay the said J. J. Ford the sum of $106.12, and that the plaintiffs had a good and meritorious defense to the action brought by Ford, he being indebted to the plaintiffs at that time more than the amount of said claim.

The plaintiffs paid off the Ford judgment and brought this action in the county court of Pitt to recover the amount thereof, $106.12, and obtained verdict and judgment for the full amount,

whereupon the defendant appealed to the Superior Court, in which the court nonsuited the plaintiffs, who appealed.

Albion Dunn for plaintiffs.
F. G. James & Son for defendant.

CLARK, C.J. This is a case of novel impression in this State, and presents the question whether a justice of the peace is liable in an action for negligence in failing to send up the case on appeal when he has been paid the appeal fee, and the clerk's fee for docketing, and can the injured party recover for damages resulting from such negligent failure?

Rev. 1532, requires the justice of the peace, within ten days after notice of the appeal, to send up to the clerk of the Superior Court all the papers in the cause, provided his fee therefor is paid, which was done in this case. It is then made the duty of the appellant to docket his appeal in the Superior Court, C.S. 660, and if he fails to do so by the next succeeding term of the Superior Court, the appellee may have the case placed upon docket and have the judgment affirmed. It was the duty of the appellant to pay the docketing fee and have the cause docketed, *Sneeden v. Darby,* 173 N.C. 274, and cases there cited, and if the case is not docketed in time the appellee may have it dismissed. *Barnes v. Saleeby,* 177 N.C. 256, and cases there cited.

The action of the justice in not sending up the papers was a judicial duty, and his failure to do so is not actionable. He is liable for a default in a public duty, but not in damages to the plaintiffs, whose own duty it was to see that the appeal was properly docketed, and if the papers were not sent up in apt time it was their duty to apply for a *recordari,* or to apply in time to the justice to make another return. Not having done this, they were in laches, and the
(84) appeal was properly dismissed. *Abell v. Power Co.,* 159 N.C. 348; *Tedder v. Deaton,* 167 N.C. 479; *Bargain House v. Jefferson,* 180 N.C. 32, and cases there cited.

The plaintiff contends, however, that the justice undertook and agreed to send up the 50 cents to docket the appeal and that failure to do this was negligence in the discharge of a ministerial duty. But this was purely a gratuitous offer, a mere matter of courtesy or personal accommodation based upon no consideration and for the failure to discharge this the plaintiff is not entitled to an action unless there were fraud or intent to defeat the appellants of their rights.

Besides, the appeal was taken 2 May and the next term of the Superior Court was held on 20 May, and it was the appellant's own

negligence that they did not ascertain whether the case was docketed and ready for trial at that first term as the statute requires. They should have ascertained that the justice had not paid the docketing fee and have called on him to send up the record. This was not done, and there was no attempt to docket the case until 3 July. The plaintiffs have suffered loss by their own negligence, and this action cannot be maintained.

The plaintiffs rely upon the expression at the end of the opinion in *MacKenzie v. Development Co.*, 151 N.C. 278: "The payment of the clerk's fee to the justice cannot avail him (the appellant), for this should have been paid to the clerk, and its payment to the justice merely made the justice his agent. If the appellant has lost any rights he has lost them through the carelessness of his agent, and his own neglect to avail himself of the remedies of *recordari* and attachment that the law gives him." The Court was there referring to the analogy of the cases in which the transcript is not sent up in time and docketed in the Supreme Court by the neglect of the lawyer who undertook to attend to this, and the Court has held in a long line of cases that as to such matter the lawyer is acting simply as agent for the appellant and his neglect is the neglect of the appellant and does not excuse him. *Truelove v. Norris*, 152 N.C. 757, in which case the statement at the close of the opinion that the client would have an action for the negligence of lawyer as his agent is based upon the fact that the lawyer is acting under a consideration and liable to his principal for negligence. But in this case the justice was acting simply as a matter of accommodation, and under no legal liability except, as has been said, when it is alleged and shown that his conduct was fraudulent or with intent to defeat the appellant of his right to have the case reviewed, which is not alleged here.

The Court intimated in *S. v. Deyton*, 119 N.C. 880, and *Hewitt v. Beck*, 152 N.C. 757, that where the clerk of the Superior Court failed to transmit the transcript in 20 days to this Court he might be liable to indictment. Whether the clerk, who (85) is acting, unlike the justice, ministerially, in sending up the record, would also be liable in an action for damages sustained by such default is not a matter before us. The justice of the peace has no clerk, and his sending up the original papers is a judicial duty unlike the clerk of the Superior Court, who makes a transcript of the record for this Court, which is sent up by the authority of the judge in pursuance of a duty prescribed by law.

Affirmed.

HAYWOOD BARNHILL v. RICHARD HARDEE AND WIFE.

(Filed 28 September, 1921.)

Deeds and Conveyances—Boundaries—Evidence—General Reputation.

Where the location of the boundary line between adjoining owners of land is in controversy, in an action of trespass involving title, and it appears from the call in one of the deeds, from a common source, that it is a certain distance from a certain street, calling in question the width of the street, it is competent to show the general reputation of the width of the street by a witness who has known it for thirty years, commencing at a time before any question relating to it was in controversy, or any of the land was owned by the parties to the action.

APPEAL from *Devin, J.*, at May Term, 1921, of PITT.

From verdict and judgment in favor of plaintiff, defendants appealed.

Julius Brown and F. G. James & Son for plaintiff.
F. C. Harding and L. W. Gaylord for defendants.

CLARK, C.J. This is an action for trespass which turns upon the location of the dividing line of the adjoining lots of the parties in Greenville. Both claim under the same title. The plaintiff's deed, from W. A. Taylor in 1907, describes his boundaries as follows: "Beginning at the corner of Read and Second streets and running south with Read street 30 feet, thence an easterly course parallel with Second street 59 feet to the line of Miles Grimes, thence with the line of Miles in a northerly direction 30 feet to Second street, thence in a westerly direction to the beginning, being a part of lot No. 148 in the plan of the town of Greenville." The description in defendants' deed, executed by W. A. Taylor in 1914, is: "Known as a part of lot No. 148 in the town of Greenville, beginning on the east side of Read street at a point 30 feet south of the intersection of Read and Second streets, it being the southwest corner of the lot which was conveyed to Haywood Barnhill by said W.
(86) A. Taylor and wife and running from thence with Read street south 41 feet, thence east at right angles with Read street 59 feet, thence a northerly direction parallel with Read street 41 feet to line of the lot now or formerly owned by Haywood Barnhill, thence a westerly direction *with the line of the said Haywood Barnhill lot* 59 feet to the beginning."

It will thus be seen that the controversy depends upon the location of the corner of Read and Second streets. The southern line of the plaintiff is described as "beginning 30 feet" from that corner and running east 59 feet, and the northern line of the defendant calls for the southern line of the plaintiff's lot.

If the corner on Second street is where the plaintiff claims, then the defendant has trespassed upon 7 feet of the plaintiff's lot eastwardly 59 feet, and the jury has found in accordance with the plaintiff's contention. There is but one exception which requires our consideration.

S. T. Hooker testified that he has lived in the town of Greenville fifty years, knows the reputation of the size of the blocks, and the width of the streets in said town; that his knowledge of this general reputation extends back thirty or thirty-five years; that he has no knowledge of the width of Second street, except from general reputation; that by the general reputation as to the width of Second street, running back as far as thirty years, the width of Second street is 49½ feet. He says that the streets of Greenville are of different widths; that he does not know the actual width of Second street below or east of Read street; that he never heard a question raised as to the width of Second street; that he lived on the corner of Second street. The judge permitted the witness to state, as above, the general reputation that the width of Second street was 49½ feet, and defendant excepted.

We think the evidence of the general reputation, thirty or thirty-five years old as to the width of the street was competent under the rule laid down by this Court in *Threadgill v. Wadesboro,* 170 N.C. 641; *Sullivan v. Blount,* 165 N.C. 7; *Bland v. Beasley,* 140 N.C. 628. He testified as to the general reputation which began long before this litigation, and before either of the parties owned any of the land in controversy.

No error.

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WILLIAM MORRIS v. KRAMER BROTHERS COMPANY.

(Filed 28 September, 1921.)

Instructions—Courts—Improper Remarks— Prejudice — Statutes — New Trials.

In an action to recover damages for personal injury, where a release from liability is set up and relied upon, with evidence to support it, it is reversible and ineradicable error for the judge, during the trial and in the presence and hearing of the jury, to stop the testimony of the defendant's witness, a nonresident attorney who had procured the release, and question him upon the professional ethics involved and the standard in his own State, of such conduct; which reflected on the witness, and no effort being made on his part to remove, by his instruction or admonitions to the jury, the prejudice thus necessarily occasioned can have that effect, and a new trial before another jury will be ordered on appeal. C.S. 564.

APPEAL by defendant from *Allen, J.*, at January Term, 1921, of PASQUOTANK.

This action was brought to recover damages for injuries alleged to have been caused by defendant's negligence. Plaintiff had been employed by the defendant to work in his sawmill, and was engaged at the time of his injury on the platform in loading sawed lumber upon trucks preparatory to hauling it to the drykilns, or to the yard of the mill. The lumber was brought to the platform by a chain or conveyor, and while so performing his duties he was knocked from the platform by a heavy board, which had fallen from the conveyor, and injured. Plaintiff alleged negligence in several particulars. Defendant answered and denied that there was any negligence on their part, and pleaded assumption of risks and contributory negligence.

There was much evidence taken upon the questions of negligence, contributory negligence and assumption of risks, and exceptions entered to rulings, but they need not now be considered, as we are of the opinion that a material error was committed in another respect. Defendant pleaded that the plaintiff had executed a release to them from all damages growing out of said alleged injury, and Mr. Hoag, an attorney at law, of Norfolk, Va., who procured the release, was examined at length as a witness for the defendant in regard to its execution, the plaintiff having alleged that the release was obtained by fraud, or mistake. The following appears in the record of the case as to what occurred between the judge and the witness during the redirect examination of the witness, Mr. Hoag:

"At this point his Honor, the jury being present, announced that he wanted to ask the witness a question, and did so as follows:

"Q. You say you are a lawyer in Virginia? A. 'Yes, sir.'

"Q. Is it in accordance with your idea of professional
(88) ethics in Virginia for a lawyer to go to a man and approach him if he has not brought any lawsuit and get written statements from him? A. 'Absolutely so. We do not approach him if he has employed a lawyer first, but if he has not we do that quite frequently. It is considered ethical.'

"Q. I wish you would show me one of the rules.

"To all the foregoing questions by the court the defendant in apt time objected. Objection overruled and defendant excepts.

"His Honor continued: I would like to see the ethics for my own information. Is it ethical for a lawyer of one State to go into another State and prepare a case when he is not licensed in that State? A. 'We have done that so frequently in Virginia without any ques-

tion of the bar, just as a matter of information so I could make a settlement, I came here to ascertain the facts.'

"To the foregoing questions by the court the defendant in apt time objected. Objection overruled and defendant excepts.

"The court continues: I don't want the jury to be prejudiced against the witness on account of my asking these questions. It is so unusual for a lawyer from another State to come into the State doing professional work that I wanted to see what standard he was governed by.

"Q. You don't practice in this State? A. 'No, sir.'

"I think it is the duty of the court to look into those matters and protect anything wrong going on, but I don't see anything wrong going on in this case. I think it is proper for the court to inquire, but the jury is not to consider it at all, it is a matter between witness and court, and he being a lawyer.

"To the foregoing questions and statements by the court the defendant in apt time objected. Objection overruled and defendant excepts."

This dialogue between the judge and the witness was duly and specially excepted to by the defendant as it progressed, and has been assigned as error by it.

There was a verdict, followed by a judgment, for the plaintiff, and defendant appealed.

Meekins & McMullan for plaintiff.
Hughes, Little & Seawell, and W. A. Worth for defendant.

WALKER, J., after stating the pertinent facts: We will repeat here what we said in *Bank v. McArthur*, 168 N.C. 48 at page 52: "We are of the opinion that the remark of the learned and unusually careful judge, in regard to calling a certain witness, should not have been made, and was calculated, as an intimation, if not a direct expression, of opinion upon the facts, to prejudice the plaintiff, and is forbidden by the statute, which provides: 'No (89) judge, in giving a charge to a petit jury, either in a civil or criminal action, shall give an opinion as to whether a fact is fully or sufficiently proven, such matter being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon.' There have been numerous decisions upon this statute, and this Court has shown a fixed purpose to enforce it rigidly as it is written. There must be no indication of the judge's opinion upon the facts, to the hurt of either party, either directly or indirectly, by words or conduct. The judges should be punctilious

to avoid it, and to obey the statutory injunction strictly. We are absolutely sure that they fully desire to do so, and their occasional expressions which have come before this Court for review and held to be violations of the statute have evidently been inadvertent, but none the less harmful. The evil impression when once made upon the jury becomes well-nigh ineradicable." Manly, J., who was one of the most eminent and just of our judges, said in *S. v. Dick,* 60 N.C. 440: "He (the presiding judge) endeavored to obviate the effect of his opinion by announcing in distinct terms the jury's independence of him; but this was not practicable for him to do. The opinion had been expressed and was incapable of being recalled. The object (of the statute) is not to inform the jury of their province, but to guard them against any invasion of it. The division of our courts of record into two parts — the one for the judging of the law, the other for the judging of the facts — is a matter lying on the surface of our judicature, and is known to everybody. It was not information on this subject the Legislature intended to furnish, but their purpose was to lay down an inflexible rule of practice, that the judge of the law should not undertake to decide the facts. If he cannot do so directly, he cannot indirectly; if not explicitly, he cannot by innuendo. What we take to be the inadvertence of the judge, therefore, was not cured of its illicit character by the information which he immediately conveyed. The error is one of the casualties which may happen to the most circumspect in the progress of a trial on the circuit. When once committed, however, it was irrevocable, and the prisoner was entitled to have his case tried by another jury." And to the same effect did Hoke, J., speak in *S. v. Cook,* 162 N.C. 586, citing and approving *S. v. Dick:* "The learned and usually careful judge was evidently conscious that he had probably and by inadvertence prejudiced the prisoner's case, for he added: 'But the court has no right to express an opinion about the case,' but the forbidden impression had already been made, and as to the vital portion of the prisoner's plea, and on authority, the attempted correction by his Honor must be held inefficient for the purpose."

(90) So in *S. v. Ownby,* 146 N.C. 678, we said: "The slightest intimation from a judge as to the strength of the evidence or as to the credibility of a witness will always have great weight with the jury, and therefore we must be careful to see that neither party is unduly prejudiced by an expression from the bench which is likely to prevent a fair and impartial trial." And again in the same case: "We know that his Honor unguardedly commented upon the testimony of the witnesses, but when the prejudicial remark is made inadvertently, it invalidates the verdict as much so as if used intentionally. The probable effect or influence upon the jury, and

not the motive of the judge, determines whether the party whose right to a fair trial has thus been impaired is entitled to another trial." Like views and cautionary requests to the judges were stated in *Withers v. Lane,* 144 N.C. 184, as follows: "The learned and able judge who presided at the trial, inspired, no doubt, by a laudable motive and a profound sense of justice, was perhaps too zealous that what he conceived to be right should prevail; but just here the law, conscious of the frailty of human nature at its best, both on the bench and in the jury box, intervenes and imposes its restraint upon the judge, enjoining strictly that he shall not in any manner sway the jury by imparting to them the slightest knowledge of his opinion of the case." The case of *Perry v. Perry,* 144 N.C. 330, repeats this injunction to observe the mandate of the statute, for it is there said: "Any remarks by the presiding judge, made in the presence of the jury, which have a tendency to prejudice their minds against the unsuccessful party, will afford ground for a reversal of the judgment." It is very strongly and urgently reiterated in *Park v. Exum,* 156 N.C. 228, as follows: "The Court has always been swift to enforce obedience to our law which forbids a presiding judge to express an opinion on the disputed facts of the trial, and under numerous decisions construing the statute, we must hold this remark of his Honor, in the presence of the jury and before the verdict, to be reversible error." We have cited these cases in order to show how very carefully this Court has guarded the rights of parties under the statute (Revisal of 1905, sec. 535; C.S., sec. 564). There are other and more recent cases in which reflections by the presiding judge upon a witness have been followed by reversals and the attention of the judges directed to the language and meaning of this important statute, and among others are *Chance v. Ice Co.,* 166 N.C. 495; *S. v. Rogers,* 173 N.C. 755; *Ray v. Patterson,* 165 N.C. 512, and in some of those decisions the disparagement of the witness was not so pronounced, and certainly less harmful, than was the language of the judge in this case.

It was considered so essential to protect the right of trial by jury that the statute was broadly worded and was among the earliest of our remedial enactments, and, while it refers (91) in terms to the charge, it has always been construed as including the expression of any opinion, or even an intimation of the judge, at any time during the trial, calculated to prejudice either of the parties. *Park v. Exum,* 156 N.C. 228; *Withers v. Lane,* 144 N.C. 184; *S. v. Dick,* 60 N.C. 440; Pell's Revisal, sec. 535.

The learned and just judge attempted to correct the error into which he fell by the remarks he made and the criticism of Mr. Hoag, and his conduct as an attorney acting in behalf of his client,

but there is nothing better settled by our cases than that he cannot do so, for the harm is ineradicable. *S. v. Dick, supra; S. v. Cook, supra.* When the damage is once done it cannot be repaired because, as we know, the baneful impression on the minds of the jury remains there still. What a judge says in condemnation of a witness is generally fatal to the party in whose behalf he testifies. The witness stands before the jury not only impeached, but thoroughly discredited. What the judge says in disparagement of him counts for far more than witnesses or counsel may utter against him. It would be dangerous to hold otherwise. There are other cases than *S. v. Dick, supra,* and *S. v. Cook, supra,* in which this Court has held that the impeachment of a witness, emanating from the judge, becomes so deep-seated in the minds of the jury as to be beyond the reach of the judge, however much he may endeavor to counteract its evil influence, and it will, at least, leave the party once prejudiced by it so completely handicapped as to prevent that fair and impartial trial which the law guarantees to him and to which he is justly entitled. One word of untimely rebuke of his witness may so cripple a party and blast his prospects in the case as to leave him utterly helpless before the jury.

It must not be understood that we think that the judge was at all sensible, at the time, of the effect of his remarks upon the jury, for we know that he was not, and that they were made inadvertently and unconsciously. The case then is brought directly within the language of this Court quoted from *Withers v. Lane, supra.* For the judge, even to intimate that the conduct of the witness, an attorney, was unprofessional and unethical was undoubtedly calculated to prejudice the defendant, whatever in the way of explanation or atonement of it he may have said afterwards, and however praiseworthy the motive or intention of the judge may have been. The enforcement of a moral principle, when time and occasion call for it, is highly commendable, but the statute does not permit it to be done from the bench when the rights of one of the parties may be seriously impaired, if not destroyed, by it. We close this branch of the discussion with what was said by the Court in *Chance v. Ice Co.,* 166 N.C. 495, at page 497: "We are quite sure that it was not
(92) intended to prejudice the defendant's case by the able and painstaking judge who tried this case, but it undoubtedly was well calculated to prejudice the jury against that particular witness, and was practically an expression of opinion upon the part of the judge as to the credibility of such witness." To the same effect is the language of the Chief Justice in *Ray v. Patterson,* 165 N.C. 512.

As the case must go back for another trial, it is not necessary to discuss the other questions raised. We may, however, say that there appears to be some evidence of negligence on the part of the defendant, and the references to the insurance company, in one phase of the case, were relevant, though they may, in some respects, have gone too far.

We order a new trial for the error of the judge in his remarks to Mr. Hoag, defendant's witness.

New trial.

Cited: McNinch v. Trust Co., 183 N.C. 41; *S. v. Murdock,* 183 N.C. 781; *Greene v. Newsome,* 184 N.C. 78; *S. v. Sparks,* 184 N.C. 747; *S. v. Hart,* 186 N.C. 587; *S. v. Bryant,* 189 N.C. 114; *S. v. Sullivan,* 193 N.C. 756; *S. v. Rhinehart,* 209 N.C. 153; *S. v. Oakley,* 210 N.C. 210; *S. v. Winckler,* 210 N.C. 559; *Thompson v. Angel,* 214 N.C. 5; *S. v. Buchanan,* 216 N.C. 35; *S. v. Cantrell,* 230 N.C. 48; *S. v. Shinn,* 234 N.C. 398; *S. v. Canipe,* 240 N.C. 64; *S. v. Smith,* 240 N.C. 102.

FRANK WILSON v. ROY BATCHELOR.

(Filed 28 September, 1921.)

1. Pleadings—Superior Courts—Justices' Courts—Statutes.

Pleadings and proceedings in the trial of a cause should be liberally construed so as to prevent a failure of justice because of mere informality or irregularity, especially when the case is tried before a justice of the peace, where the statute expressly provides that the pleadings are not required to be in any particular form and are sufficient when they "enable a person of common understanding to know what is meant."

2. Same—Appeal—Amendments.

Where it appears from an entry on appeal from a justice of the peace, that the plaintiff has sued to recover of an employee the amount of an alleged overdraft, and the defendant has pleaded as a counterclaim that, under his contract of employment, he was to receive a larger amount in contemplation of an increase in the business justifying it; and that on the trial the only question presented was whether there should have been an increase in a specific sum which admittedly was sufficient to cover the defendant's demand; and it further appears from an entry made at the trial in the Superior Court on appeal thereto that the defendant admitted plaintiff's claim, but further claimed he was entitled to a credit to the amount of the promised increase of salary, leaving this the only disputed question: *Held,* the plaintiff was given sufficiently definite notice

of the defendant's claim, and his objection to the insufficiency of the pleadings was untenable.

3. Same—Motions.

Either in a court of a justice of the peace or in the Superior Court an objection to the insufficiency of the pleadings for indefiniteness should be motion to make them more specific. C.S. 537.

4. Same—Jurisdiction.

On appeal from a court of a justice of the peace, the only limitation upon the power of the Superior Court to allow an amendment of the pleadings relates to the jurisdiction of the justice's court over the subject-matter of the action.

5. Instructions—Trials—Evidence—Admissions.

Where the defendant, an employee of plaintiff, in the latter's action to recover a certain amount of the former's overdraft on account of services rendered, admits this amount, but sets up a counterclaim in a certain sum, which would more than cover the plaintiff's demand, and the stipulation as to the salary showing this difference, is the only disputed fact, an instruction to the jury that if they find that the plaintiff had promised to pay the defendant the amount claimed by him, to find the issue for the defendant in the amount of the counterclaim, less the plaintiff's claim, is not erroneous.

6. Jurors — Challenges — Waiver — Verdict — Court's Discretion —New Trials—Appeal and Error—Attorney and Client.

While the relationship of a juror to a party to an action may be ground for challenge in certain cases, the appellant is deemed to have waived his right to object to the verdict for that reason where his objection has been made after the verdict was returned; even though the juror has, unintentionally, so far as appears, misled the appellant's attorney by remaining silent when the general question as to relationship was addressed to the jurors before they were impaneled. It is within the sound discretion of the trial judge, though, to set the verdict aside, the exercise of which is not reviewable on appeal. The question as to whether the relation of attorney and client between the juror, having a cause at issue at the term, and opposite counsel in the pending case, is a sufficient ground of challenge, is not decided.

APPEAL by plaintiff from *Horton, J.*, at the March Term,
(93) 1921, of PITT.

Plaintiff sued before a justice of the peace to recover of defendant $126.19. He had employed the defendant as clerk in August, 1914, at $50 per month, and the defendant's services having proved satisfactory, the plaintiff contracted with the defendant for 1915 and 1916. The plaintiff contends that he was to pay the defendant for his services for 1915 $720, and for 1916 the sum of $800. The defendant contends he was to receive $800 for 1915, and $900 for 1916. The defendant had overdrawn his account by $126.19, about which there was a dispute, and contends that if he had re-

ceived the proper salary credit, it would leave the plaintiff indebted to him in the sum of $53.81, this being the difference between $180 due on his salary and the store account of $126.19.

It was conceded at the trial that, if the plaintiff sustained his contention he was entitled to recover the full amount sued for, and if the defendant sustained his contention that the plaintiff was entitled to recover nothing, and the defendant the sum of $53.81, and the case was tried upon this theory. The jury sustained the contention of the defendant, found that he was not indebted (94) to the plaintiff in any amount, and rendered a verdict against the plaintiff for $53.81. Judgment was rendered accordingly, and plaintiff appealed.

W. F. Evans for plaintiff.
Albion Dunn for defendant.

WALKER, J., after stating the case: The plaintiff's position is, that the defendant has not alleged in his counterclaim that the plaintiff had promised to pay him the sum of $900 for the year 1916, but that he would raise his salary if there was an increase in the business, and that there was a large increase, which reasonably entitled defendant to a salary of nine hundred dollars, but we are of the opinion that the oral pleadings contain a sufficient allegation. The pleadings were somewhat informal, it being an appeal from a magistrate, but in the Superior Court the following entry was made in the record, as appears: "The defendant admits that the plaintiff's account as introduced is correct, except the salary credits, the defendant claiming that he is entitled to a credit of $800 for 1915 and $900 for 1916, instead of $720 for 1915 and $800 for 1916." This gave the plaintiff fair notice of the nature of defendant's demand, and it was substantially a more definite statement of the latter's counterclaim.

We must construe the pleadings and proceedings liberally, and not allow justice to fail because of any mere informality or irregularity, especially when we are dealing with pleadings before justices of the peace. "Pleadings (before a justice) are not required to be in any particular form, but must be such as to enable a person of common understanding to know what is meant." C.S. 1500 (Rule 7), 1 vol. 669. We said in *Smith v. Newberry,* 140 N.C. 385, at page 387, that large power of amendment is vested in the Superior Court, limited only by the condition that the amendment show a cause of action with the jurisdiction of the justice. *Mfg. Co. v. Barrett,* 95 N.C. 36; *Planing Mills v. McNinch,* 99 N.C. 517. If the plaintiff had so desired, he might have called upon the defendant to make his

counterclaim more specific, either in the justice's court or after the case reached the Superior Court upon appeal. Rev. 496; cases cited in Clark's Code, sec. 261. In the absence of any more definite pleadings or any motion to make them so, his Honor properly submitted the issue upon the cause of action which seemed to be, and, as the jury found, was sustained by the evidence. And to the same effect is *Turner v. McKee,* 137 N.C. (Anno. Ed.) 257. While the complaint, as it was briefly noted on the justice's docket and return to appeal, may state merely that if, in 1916, there was an increase in
(95) the business over that of 1915, the salary would be raised, the plaintiff made his promise more definite after he learned what the increase was by fixing $900 as the amount of the salary, and throughout the trial he was apprised of the true claim made by the defendant. There is no legal merit in this exception to the charge of the court that if the jury found that the plaintiff had promised to pay defendant $900 for the year 1916, they should allow the latter that amount, and deducting plaintiff's claim of $126.19 from the balance due defendant on his salary, calculated on that basis, which was $190, their verdict would be for the ultimate balance, which is $53.81.

The plaintiff inquired of the jury, before they were impaneled, if any one of them had retained the counsel for the defendant in this case, in any pending cause, and received no answer. After the verdict was returned defendant moved for a new trial because the said counsel had been retained by one of the jurors in a pending cause, and such was the fact. The motion was overruled, and properly so. We held in *S. v. Maultsby,* 130 N.C. 664 (opinion by the present Chief Justice), that a motion to set aside the verdict on account of relationship between the prosecuting witness and a juror, which was discovered after verdict — even if such relationship is ground of objection, as to which it is not necessary to decide — rested in the discretion of the trial court, and its refusal is not reviewable on appeal. This has been held where the relationship between a party and a juror is not discovered until after verdict. *Spicer v. Fulghum,* 67 N.C. 18; *Baxter v. Wilson,* 95 N.C. 137. The same ruling has been made where, after verdict, the juror was ascertained to be incompetent because a minor (*S. v. Lambert,* 93 N.C. 618), or not a freeholder (*S. v. Crawford,* 3 N.C. 298), or an atheist (*S. v. Davis,* 80 N.C. 412), or a nonresident (*S. v. White,* 68 N.C. 158), or for other causes, see *S. v. DeGraff,* 113 N.C. 690, and *S. v. Council,* 129 N.C. 517, and cases there cited. And in *S. v. Perkins,* 66 N.C. 126, at page 128, the Court said by Pearson, C.J.: "It was the misfortune of the defendant that neither he nor his counsel had been sufficiently on the alert to enable them to find out

the fact in 'apt time' to make it cause of challenge, that one of the jurors was on the grand jury when the bill was found. This might have been grounds for his Honor in the court below to grant a new trial if he had any reason to suspect unfairness on the part of the prosecution, but all suspicion of that kind was put out of the question, for it was stated by the juror, 'if he was on the grand jury he had forgotten it when he was put on the petit jury.' How far this was satisfactory to his Honor was a matter for him, but we will say that we entirely concur in his conclusion. After a defendant has taken his chances for an acquittal the purposes of (96) justice are not subserved by listening too readily to objections that were not taken in 'apt time.'" And so in *S. v. Patrick,* 48 N.C. 443, this Court by Nash, C.J., held that it is too late, after a juror has been taken and accepted by the prisoner, and has served on the trial, to except to him for incompetency, and this was said, in a trial for a capital felony to be the law, even though the objection to the juror, if taken at the proper time, would have been allowed as a good challenge for cause. In all legal proceedings, it was said, there is an apt time for every step in the proceeding, and every objection or privilege must be made or claimed at the proper time, or the party making it will be considered as having waived it. *Briggs v. Byrd,* 34 N.C. 377. The case of *S. v. Davis,* 80 N.C. 412, is an instructive one on this point. It was there held (opinion by Ashe, J.), that the objection to a juror after verdict came too late, and that learned Justice said: "It is well settled by English authorities, sanctioned by the uniform practice of centuries and by numerous decisions in this State, that no juror can be challenged by the defendant without consent after he has been sworn, unless it be for some cause which has happened since he was sworn. The challenge *propter defectum* should be made as the juror is brought to the book to be sworn and before he is sworn; if not then made the defendant waives his right of challenge." *S. v. Seaborn,* 15 N.C. 305; *S. v. Perkins,* 66 N.C. 126; *S. v. Lamon,* 10 N.C. 175; *S. v. Griffice,* 74 N.C. 316; *S. v. Patrick, supra;* 1 Whar. Cr. L. 472; Joy on Jurors, sec. 10; Hawkins P. C., ch. 43, sec. 1; Hale P. C. 274. And in conformity to this rule of practice is the ancient formula used by clerks, both in England and in this country, in their address to prisoners before the jurors are drawn: "Those men that you shall hear called and who personally appear are to pass between our sovereign (or the State) and you upon your trial of life and death; if, therefore, you will challenge them or any of them, your time is to speak to them as they come to the book to be sworn and before they are sworn." It there was further held that "where the ground of objection to a juror existed at the time he was sworn, but was not dis-

covered until after verdict, the court may in its discretion allow the challenge and grant a new trial. Its refusal to do so is not reviewable." To the same effect are the following cases: *S. v. Lipscomb,* 134 N.C. 689; *S. v. Lambert,* 93 N.C. 580; *S. v. Parker,* 132 N.C. 1014; *S. v. Perkins, supra,* and *Spicer v. Fulghum,* 67 N.C. 18, which is directly in point. In the last cited case it was held that "where the plaintiff's counsel, before the jury was impaneled, requested that any juror in the box who was related to any one of the defendants by blood or marriage should retire, and no juror retired or replied: *Held,* that it was not error for the judge to refuse to
(97) grant a new trial, because after verdict and judgment it was ascertained that a juror was connected with one of the defendants, it being a matter of discretion," citing *S. v. Perkins,* 66 N.C. 126.

There is no suggestion in this case of bad faith or corruption on the part of the juror, whose conduct is in question, or that plaintiff sustained any damage by his silence when the inquiry was made. For all that appears, he may have suffered no prejudice. In *S. v. Parker,* 132 N.C. 1014, a boy not under ten years of age had drawn the venire. The court, in the absence of bad faith or corruption, refused to set aside the verdict.

The other exceptions are merely formal.

No error.

J. W. GODWIN v. J. D. GARDNER.

(Filed 5 October, 1921.)

Pleadings—Issues—Evidence—Nonsuit—Demurrer—Trials.

Where the complaint states a good cause of action to recover upon defendant's notes secured by chattel mortgage, and the chattels are taken into possession by claim and delivery, which in turn are delivered to an intervener under bond for possession, the answer of the intervener stating that the defendant's property had been taken upon his adjudication as a bankrupt and his property thereunder distributed according to their respective priorities, raises matters of defense and are pleas in bar, which may neither be determined by motion as of nonsuit or on demurrer *ore tenus.*

APPEAL by plaintiff from *Cranmer, J.,* at April Term, 1921, of HERTFORD.

Civil action, founded on contract and growing out of a certain

promissory note and mortgage executed by the defendant and delivered to the plaintiff on 19 June, 1915. As an ancillary remedy, plaintiff seized the mortgaged property and took same into his possession under a writ of claim and delivery at the time of issuing summons. Jenkins & Boyette subsequently intervened and claimed title to said property by virtue of a prior mortgage, antedating that of the plaintiff's. Upon the execution of a bond, the property was turned over to the interveners.

The defendant filed no answer, but the interveners replied and set up, as an affirmative defense, that since the institution of this action the defendant had been adjudged a bankrupt, and, upon order of the Federal Court, the mortgaged property had been turned over to the trustee in bankruptcy. It was further alleged, in bar of the plaintiff's right to recover, that all the assets of the defendant, J. D. Gardner, had been administered in said court (98) — the plaintiff and other creditors being paid their pro rata part, according to their respective priorities — and that the defendant had been duly granted his full discharge by the bankrupt court.

Upon motion, there was a judgment as of nonsuit entered on the pleadings. Plaintiff appealed.

Roswell C. Bridger, S. Brown Shepherd, and N. G. Fonville for plaintiff.

No counsel for defendant.

STACY, J. While it is stated in the record that a judgment of nonsuit was entered on the pleadings, we will assume that the action was dismissed on a demurrer *ore tenus*. But, in either view, the judgment was erroneous.

Matters set up in defense, or as a bar to the plaintiff's suit, and requiring proof, may not be considered upon a demurrer. *Wood v. Kincaid,* 144 N.C. 393.

A good cause of action is stated in the complaint; hence, the judgment of the Superior Court must be set aside and the parties will proceed as they may be advised. The other questions discussed in plaintiff's brief are not before us for decision.

Reversed.

Cited: Cherry v. R. R., 185 N.C. 93; *Real Estate v. Fowler,* 191 N.C. 618; *Bolick v. Charlotte,* 191 N.C. 678.

(99)

MRS. K. E. BIZZELL v. AUTO TIRE AND EQUIPMENT COMPANY.

(Filed 5 October, 1921.)

1. Attorney and Client—Principal and Agent—Scope of Authority.

By virtue of his employment, an attorney at law has the control and management of a suit of his client in all matters of procedure, and has the implied authority to make such stipulations and agreements as may commend themselves to his judgment in so far as they may affect the remedy he is endeavoring to pursue.

2. Same—Consent Judgments.

Under ordinary conditions there is an implied authority presumed from the relation of attorney and client that the attorney may consent to the rendition of a judgment against his client, in the absence of fraud or collusion, and in proper instances, it will be binding upon his client.

3. Same—Impairment of Client's Rights.

The principle upon which an attorney has implied authority from his client to bind him by consent in the course of the procedure, does not extend to compromising his client's cause of action or to entering into stipulations or agreements which sensibly impair such client's rights and interests involved in the litigation.

4. Judgments Set Aside — Motions — Attorney and Client — Consent of Client—Procedure.

Where the court has entered a judgment appearing by record as upon the consent of the parties, and thereafter it is properly made to appear on motion and by affidavits that the plaintiff's attorney not only did not have his client's consent, but had acted contrary to her instructions, substantially impairing her rights in the subject-matter of the litigation, the Superior Court judge, at a subsequent term, in proper instances, may pass upon the question, and the fact that the former judge has regularly entered the judgment as upon the consent of the parties does not affect the power of the subsequent judge, hearing the motion, to set the judgment aside.

5. Same—Verdicts—Conditions Imposed by Court.

Where the plaintiff in ejectment is suing for possession and the recovery of a certain amount of rent money and the jury has found the issue as to possession in her favor and awarded a recovery for rental in a certain less amount, and the judge has said he would set the entire verdict aside unless the plaintiff agreed to a still less sum than the amount of the verdict, and her attorney without her consent and against her instruction has agreed thereto, and the judgment was accordingly entered, appearing on its face to be by consent of the parties, on a subsequent motion and affidavits to set the verdict aside, the plaintiff may not take advantage of the verdict on the issue in her favor, and repudiate the verdict on the second one, as to the amount of recovery for the rent, and the judge hearing the motion and so finding the facts, should set the entire verdict aside.

6. Judgments Set Aside—Motions—Terms of Court—Equity.

C.S., sec. 591, requiring that a motion to set aside a verdict be made before the judge who tried the cause, and in term, refers to motions made in the ordinary course and practice of the courts, and does not impair or interfere with equitable principles controlling the conduct of the litigant in the subsequent course of a proceeding.

7. Judgments Set Aside—Verdict—Attorney and Client—Consent—Estoppel—Equity.

Where the trial judge has announced his decision to set aside a verdict unless the parties should agree in a certain particular, to which the plaintiff's attorney agreed without the consent of his client and against her instructions, and the judgment so agreed upon has been accordingly entered, the plaintiff may not thereafter repudiate the agreement made in her behalf by her attorney, and also repudiate the result thereby attained, and she is estopped from resisting the entry of judgment setting aside the verdict *nunc pro tunc.*

8. Landlord and Tenant — Leases — Contracts—Notice—Tenant Holding Over—Damages.

Where the written contract of rental provides that the landlord may increase the rental of the premises at any time during the life of the lease without further notice, and there is evidence that subsequently, by parol, the parties have agreed that in consideration of the tenant's having put valuable improvements on the premises the rental should not be increased within the year, and that within that period the landlord has notified him of an increase and he had continued for a time in possession: *Held*, the tenant so holding over under a reasonable claim of right is not as a matter of law held to the payment of the increase of rental demanded by the plaintiff in ejectment, as no contract, express or implied, has been established for a greater rental than a fair and reasonable value of the property, and this is the measure of damages if a wrongful holding over of the defendant has been established.

APPEAL by both parties from *Lyon, J.*, at the April Term, 1921, of WAYNE. (100)

Summary proceedings in ejectment, under the landlord and tenant act, instituted before a justice of the peace, carried by appeal to the county court of Wayne County, and thence to Superior Court of said county, where it was tried before Devin, J., and a jury, at November Term, 1920. On the trial plaintiff offered in evidence a contract of rental of the property to defendant at $57.50, for month beginning 19 January, 1920, said contract containing, among others, the following provision: "The party of the first part hereby reserves the right to raise the rent at any time, and it is further agreed that if any part of the rent hereinbefore mentioned shall not be paid at the time agreed upon, although no demand shall have been made for same, the parties of the second part hereby contract and agree that this agreement shall serve as notice to vacate the premises within three days of such failure."

Defendants occupied under said lease, paying the stipulated rent till 9 June, 1920, when plaintiff caused to be served on defendants a written notice to the effect that if defendants should hold over "for one day after 18 June they would be held legally responsible for rent at $150 per month. Defendant alleged and offered evidence tending to show that subsequent to the written lease above referred to, plaintiff and defendant had mutually entered into a further agreement to the effect that if defendant should put certain specified improvements on the premises, amounting to near $2,000, and which had been done, defendants would be allowed to keep the premises for at least one year, and that the rental should at no time be raised higher than $75 per month. The witnesses all testified that a fair monthly rental for the property would not exceed $60.

The jury rendered the following verdict:

"1. Is plaintiff entitled to recover possession of the store buildings described in plaintiff's affidavit? Answer: 'Yes.'

"2. In what amount is defendant indebted to plaintiff for rent of said building? Answer: '$111.66⅔ per month.'"

His Honor having ruled, and so instructed the jury, on
(101) the second issue that if first issue was answered for plaintiff, she was entitled to recover a fair monthly rental for the property.

On the rendition of verdict, and motion by defendant to set same aside, the court, as against the weight of the evidence, intimated that he would set aside the entire verdict as against the weight of the evidence unless the plaintiff would consent to reduce the amount of the verdict to $60 per month. Thereupon, in open court, plaintiff's attorney consented, without being authorized to do so by his client, that the monthly value of the building, as found by the second issue, be reduced from $111.66⅔ to $60, and judgment was thereupon entered for $60 per month for the time building was occupied after notice, etc., said judgment reciting that plaintiff consented to same.

Defendant insisted on his position and excepted and appealed from judgment as rendered, but same was not perfected. Plaintiff did not appeal, and made no motion in the case at November or at the January term of the court, but at April Term, 1921, before his Honor, Lyon, J., presiding, moved to set aside the judgment on the ground that the attorney acted without authority and contrary to their express instructions in consenting to a reduction of the verdict. On affidavits submitted, the court finds that said consent was given without authority; that but for said consent the judge presiding would have set aside the entire verdict. The court, on his

findings, adjudged that the former judgment of Judge Devin be set aside, but being of opinion that he was without authority to disturb the verdict of $111.66⅔, this being at a term subsequent to term when same was rendered, entered judgment for plaintiff for the amount of the original verdict, and both plaintiff and defendants appealed.

Hood & Hood and Rouse & Rouse for plaintiff.
E. M. Land and Dickinson & Freeman for defendant.

DEFENDANT'S APPEAL.

HOKE, J., after stating the case: It is very generally understood, uniformly so far as examined, that an attorney at law, by virtue of his employment as such in a given case, has the control and management of a suit in all matters of procedure, and in the absence of fraud and collusion can make such stipulations and agreements as may commend themselves to his judgment in so far as they may affect the remedy he is endeavoring to pursue. *Chemical Co. v. Bass,* 175 N.C. 426; *Gardiner v. May,* 172 N.C. 192; *Harrill v. R. R.,* 144 N.C. 542; *Westhall v. Hoyle,* 141 N.C. 338; *Hairston v. Garwood,* 123 N.C. 345; *Henry v. Hilliard, etc.,* 120 N.C. 479; 2d R.C.L., title, Attorneys, sec. 63.

Under the principles stated it is held in many decisions on the subject that an attorney may consent to a judg- (102) ment against his client, and the same will be considered as binding, although no actual authority is shown. Under ordinary conditions, an implied authority is presumed from his office and employment. *Harrill's* case, *supra; Stump & Sons v. Long,* 84 N.C. 616, and see numerous authorities to this effect in editorial note to *Tobler v. Nevitt,* 45 Col. 231, appearing in 132 American State, at p. 162.

It is also fully recognized that an attorney, by virtue of his office and ordinary employment in a case, has no implied power to compromise his client's cause of action, or to enter into stipulations or agreements which sensibly impair such client's substantial rights and interests presented and involved in the litigation. *Moye v. Cogdell,* 69 N.C. 93; *Gibson v. Nelson,* 111 Minn. 183, and see concurring opinion of Walker, J., in *Chemical Co. v. Bass,* 175 N.C. 426, the same containing a helpful discussion and full citation of cases on the subject.

Though it is sometimes said that the weight of judicial opinion is in favor of upholding consent judgments entered under the implied powers of an employed attorney, some of the decisions referred to have been subjected to adverse comment by intelligent writers as

trenching upon the second position stated, that an attorney may not, without express authority, enter into a compromise of the cause of action committed to him, and the sensible impairment of his client's rights thereunder. See editorial note to *Clark v. Randal,* 9 Wisconsin 135, appearing in 76 American Decisions 252-259, and 2d R.C.L., title, Attorneys at Law, sec. 91.

And in this jurisdiction it has been expressly held that where a judgment has been taken by consent of the attorney, and it appears of record that such consent is pursuant to a compromise which sensibly impairs the client's substantial rights and on motion made in apt time, it is established that the consent and compromise is without express authority from the client, and even contrary to his instructions, such judgment will be set aside. And the same position should obtain where, though not appearing of record, it is shown on motion and proper proof that such a judgment has been entered and the impeaching facts were known to the opposing litigant or the attendant circumstances were such that knowledge should be imputed. *Bank v. McEwen,* 160 N.C. 414, and cases cited.

Under these decisions, and others of like kind, and by courts of approved ability and learning, his Honor clearly had the right to deal with the questions presented in the motion, it appearing that the agreement and consent judgment entered into by way of compromise and adjustment was not only without authority, but contrary to the express instructions of the client, and that by
(103) such judgment plaintiff was precluded from insisting on her claim for $150 monthly rental, and also deprived of the $111.66⅔ monthly rental which had been awarded her by the jury. And this case of *Bank v. McEwen* is authority for the position also that when the facts call for the application of the principle, its effect and operation is not prevented because the course has been taken with the sanction and approval of the court. This by no means intimates that his Honor would have permitted or signed the judgment entered had the lack of authority been made known. That was only made to appear at the later hearing, and we deem it not improper here to note also that no blame is laid by any one on the attorney who, always faithful to his client's interest, did the duty that he thought was required of him under the circumstances presented.

While we thus uphold the power of the court to take cognizance of the questions presented in the motion, we are of opinion that his Honor should have gone further and set aside the entire verdict as the only lawful adjustment of the rights of the parties in the premises. It is an equitable principle, very generally recognized, that in a given transaction a man may not assume and maintain inconsistent

positions to the prejudice of another's rights. And the principle so stated is usually allowed to prevail either in court proceedings or in transactions between individuals. *Ingram v. Power Co.,* 181 N.C. 359-411; *Maxton Auto Co. v. Rudd,* 176 N.C. 497; *Lipsitz v. Smith,* 178 N.C. 98-100; *Brown v. Chemical Co.,* 165 N.C. 421; *R. R. v. McCarthy,* 96 U.S. 258.

In the case of *Maxton Auto Co. v. Rudd, supra,* it is said that "the position is properly referred to the doctrine of estoppel *in pais,* which rests in its last analysis on the principles of fraud." From the facts presented in the record, it appears that plaintiff on the first issue had established the right to eject defendant, and on the second had recovered $111.66⅔ monthly rental for a wrongful detention. The judge from the bench gave intimation that unless the plaintiff agreed to a reduction of the amount awarded on the second issue he would set aside the entire verdict, and the Court, on the present hearing, finds as a fact that his Honor would have done so. Acting on this, the counsel, in good faith, believing he was within his authority, consented to the reduction, and plaintiff thereby succeeded in maintaining her recovery on the first issue. We have held that the agreement, being in the nature of the compromise and contrary to the client's instructions, could be set aside at plaintiff's demand, but when she repudiates the benefits she must surrender the advantages that arose to her from the action of her attorney, and under a proper application of the authorities cited and the principles they approve and illustrate, his Honor should have set aside the entire verdict, thus giving the parties opportunity to relitigate the issues. This was the course pursued in *Bank v. McEwen, supra,* a case that is decisive of the principal questions pre- (104)
sented on defendant's appeal.

In making this disposition of defendant's appeal we are not unmindful of C.S. 591, which requires that a motion to set aside a verdict may be made before the judge who tried the cause, and only at the trial term. That statute, however, refers to motions made in the ordinary course and practice of the court, and does not and is not intended to impair or interfere with equitable principles controlling the conduct of the litigant in the subsequent course of a proceeding. As a matter of fact, the trial judge had decided to set aside the entire verdict, and at the trial term, and was only prevented from doing so by reason of the agreement which plaintiff has repudiated, and this being true, she is estopped from resisting the entry of such judgment *nunc pro tunc.*

On defendant's appeal the judgment will be modified to accord

with this opinion, and the costs of said appeal will be divided between the parties.

Modified.

PLAINTIFF'S APPEAL.

HOKE, J. Plaintiff appeals in the cause, insisting for error that the court should have ruled that on a wrongful holding over the defendant was liable for $150 monthly rental, as a matter of law, and this by reason of the notice given and the stipulations of the contract, that she reserved the right to raise the rent at any time, and that if any of the rent was not paid, though no demand was made, that defendant would surrender the premises on three days notice, etc.

There are authorities to the effect that where a landlord, in proper time before termination of lease, notifies the tenant that if he continues to occupy longer it shall be at a rental specified, and the tenant, after such notice received, holds over without demur or protest, there will be an obligation to pay the higher rental as specified. 2 McAdam, Landlord and Tenant (3 ed.), sec. 279. But this we apprehend is on the ground of acquiescence, and from which an implied contract to pay the higher rental could be reasonably inferred. It may be that such a principle might be extended to a case where a tenant, after such a notice given, withholds possession wantonly without any fair and reasonable belief in his right, though on this supposition we make no present decision. It is ordinarily true that the obligation to pay rent must arise out of contract, express or implied, and we are very well assured that on the facts of this record defendant may not be held to a rental of $150 as a matter of law merely on plaintiff's notice that such an amount would be insisted on after the stipulated date, it appearing that defendant
(105) withheld possession under claim of right and with evidence on his part tending to show that by a contract subsequent to the principal lease and in consideration of valuable improvements, plaintiff had agreed that defendant's possession should not be disturbed within the year, which had not expired, and no witness having so far testified that the fair rental value would exceed $60 per month. On the record, plaintiff has established no contract, express or implied, for a greater rental than the fair and reasonable value of the property, and his Honor correctly held that in case a wrongful withholding should be established this should be the measure of plaintiff's recovery. *Martin v. Clegg*, 163 N.C. 528; *DeYoung v. Buchanan*, 10 Gill & Johnson 149.

There is no error, and on question presented on plaintiff's appeal, the judgment is affirmed.

No error.

Cited: In re Ricks, 189 N.C. 188; *Richardson v. Satterwhite,* 203 N.C. 117; *Deitz v. Bolch,* 209 N.C. 206; *King v. King,* 225 N.C. 641; *Bath v. Norman,* 226 N.C. 505; *Dobias v. White,* 239 N.C. 415; *S. v. Barley,* 240 N.C. 255; *Bailey v. McGill,* 246 N.C. 298.

F. B. AYCOCK v. ELLA W. BOGUE, EXECUTRIX, ETC.

(Filed 5 October, 1921.)

Principal and Agent—Contracts—Procurement of Purchaser—Evidence—Nonsuit—Appeal and Error.

Where there is evidence that the agent, upon commission, has procured a purchaser for lands upon the terms of payment and within a specified time, and there is evidence that the purchaser refused the deed the day after, upon the ground that the period of his obligation to do so had expired, and there is further evidence that the delay was in accordance with a mutual agreement of the parties to the contract of agency, and acquiesced in by them: *Held,* a *prima facie* case was established by the agent, in his action against the owner for his profits, and a judgment as of nonsuit upon the evidence was erroneously granted.

APPEAL by defendant from *Lyon, J.,* at May Term, 1921, of WAYNE.

Civil action to recover broker's commissions alleged to be due under a contract of agency, said agreement being in words and figures as follows, to wit:

AUTHORIZATION TO SELL LAND.

NORTH CAROLINA — WAYNE COUNTY.

In consideration of the sum of one dollar and other valuable considerations, to A. G. Bogue, the undersigned, paid by F. B. Aycock, the receipt of which is hereby acknowledged, I hereby authorize F. B. Aycock, of Fremont, N. C., to sell, or contract to sell, to any person for me on or before 1 December, 1919, at the price of $30,000, upon the following terms: $10,000 cash; $2,000 1 January, 1921; $2,000 1 January, 1922; $2,000 1 January, 1923; $2,000 1 January, 1924; $12,000 1 January, 1925. Secured by mortgage on land, and interest annually at 6 per cent, the lot or tract (106) of land belonging to A. G. Bogue situated and described

as follows: Adjoining the lands of E. L. Pippin, Simon Aycock and others, containing 100 acres, more or less, and being land bought of Kennedy-Moye Realty Company, and known as Wyatt M. Barnes land.

It is agreed that A. G. Bogue may rent out all crops for the year 1920.

I agree and bind myself to pay said F. B. Aycock all over the price above mentioned, if he makes said sale, or contract of sale, for me on or before the time above specified.

And I do hereby bind myself that I will make a good and indefeasible title in fee, free from all incumbrances, by warranty deed, to any person or persons whom the said F. B. Aycock may sell said land to, on or before the date above specified.

This 2 October, 1919.

(Signed) A. G. BOGUE. [SEAL.]

On the afternoon of 1 December, 1919, the plaintiff produced one W. R. Ballance, who was ready, able, and willing to buy in accordance with the terms of the above agreement and in keeping with his written contract to purchase. It appears that the signing of the deed by Bogue and his wife, by common consent and mutual acquiescence, was delayed until the next morning, 2 December, as it was desirable not to disturb Mrs. Bogue and her baby that night.

On the following day, and thereafter, Ballance declined to accept the deed on the ground that under his contract of purchase he was not bound to take the property unless the deal was consummated on or before 1 December. His written agreement is as follows:

AGREEMENT TO PURCHASE LAND.

NORTH CAROLINA — WAYNE COUNTY.

In consideration of one dollar ($1) and other valuable considerations to me in hand paid by F. B. Aycock, the receipt of which is hereby acknowledged, I do hereby agree and bind myself, my heirs and assigns, to purchase from the said F. B. Aycock, at the price of $31,500, upon the terms of $11,500 cash; $2,000 1 January, 1921; $2,000 1 January, 1922; $2,000 1 January, 1923; $2,000 1 January, 1924; $12,000 1 January, 1925; on or before 1 December, 1919, the following described land adjoining the lands of E. L. Pippin, Simon Aycock and others, containing 100 acres, more or less, and being land purchased from G. A. Norwood and Kennedy-Moye Realty Company, and known as Wyatt Barnes land, owned by A. G. Bogue, and under contract to be sold by F. B. Aycock.

Said land to be conveyed to me in fee, free from incum-
(107) brances when said sale is made.

Witness my hand and seal, this 21 November, 1919.

(Signed) W. R. BALLANCE. [SEAL.]

Witness: J. H. BEST.

At the close of plaintiff's evidence and upon motion of counsel for defendant, his Honor entered judgment as of nonsuit. Plaintiff appealed.

Dickinson & Freeman and E. M. Land for plaintiff.
Langston, Allen & Taylor for defendant.

STACY, J. There is evidence on the record tending to show that the plaintiff produced a purchaser, or a contract of sale, in accordance with his agreement, which *prima facie* entitles him to his commissions. Therefore, the judgment of nonsuit was erroneous.

As to whether there has been any release or abandonment of the contract, so participated in by the plaintiff as to bar his right of recovery, can only be determined by a jury upon a full hearing and under proper instructions from the court. In the absence of all the evidence we refrain from discussing the case, as it goes back for a new trial; and, in all probability, if Ballance is required to live up to his contract of purchase, which apparently is enforceable, the plaintiff will have no further cause for complaint.

Reversed.

Cited: Croom v. Bryant, 194 N.C. 815; *Johnson v. Ins. Co.,* 221 N.C. 445.

W. P. ROSE v. FREMONT WAREHOUSE AND IMPROVEMENT COMPANY ET AL.

(Filed 5 October, 1921.)

Actions—Parties—Subject-Matter—Misjoinder—Severance.

A contractor sued the owner for the contract price of the building and the latter had the architects made parties and then answered setting up an offset or counterclaim upon allegation that certain damages were caused either by faulty construction or fault of the architects in their plans and specifications, without allegation that the architects in any manner had charge of or participated in the construction of the building, to which the architect demurred upon the ground of misjoinder of parties and causes of action: *Held*, a demurrer was good, and a severance of the causes could not be ordered. C.S. 607.

APPEAL by defendant from *Lyon, J.*, at May Term, 1921, of WAYNE.

Civil action, brought by plaintiff, a contractor, to recover the balance due on a building contract. Upon motion of the
(108) defendant, Fremont Warehouse & Improvement Company, the architects, Benton & Benton, who drew the plans and specifications for said buildings, were made parties defendant. The original defendant then answered, admitted the plaintiff's contract, but set up by way of cross action and counterclaim the following:

"That by the terms of the contract entered into between the plaintiff and this defendant the plaintiff agreed to have said buildings constructed in a proper and workmanlike manner, which, as this defendant is informed and believes, he failed to do, in that the roof trusses of both of said tobacco warehouses were improperly constructed by the plaintiff, and that by reason of said defective construction the said trusses have buckled, thereby rendering the roofs of said warehouses unsafe and dangerous, and thereby rendering said buildings defective and unworkmanlike in their construction; or that if the buckling of the trusses is not caused by improper and unworkmanlike construction by said plaintiff, it is due to the defective plans and specifications prepared and delivered by said defendants, Benton & Benton; and that by reason of the said improper and unworkmanlike construction, or by reason of the defective plans and specifications, or by reason of both the improper and unworkmanlike construction and the defective plans and specifications, this defendant is damaged in the sum of $20,000."

Benton & Benton demurred to this pleading upon the ground of a misjoinder of parties and causes of action. The demurrer was sustained, and the defendant, Fremont Warehouse & Improvement Company, appealed.

No counsel for plaintiff.

E. M. Land and Dickinson & Freeman for Fremont Warehouse & Improvement Company.

W. A. Lucas and Langston, Allen & Taylor for Benton & Benton.

STACY, J. It will be observed from the allegations of the defendant's cross action and counterclaim that the architects, who furnished the plans and specifications, did not undertake to superintend the erection and construction of the buildings. Their agreement called for the preparation and delivery of the plans and specifications and no more. The buildings were constructed by the plaintiff, but without assistance from or consultation with the architects. There is no allegation of any privity of contract or com-

munity of interests between the contractor and the architects. Indeed, they seem to have been employed at different times and for different purposes. Therefore, the defendant's cross action against Benton & Benton is based upon one contract and its counterclaim against the plaintiff is founded upon another. The two causes of action are separate and distinct; they are set up (109) against different parties, and they are incorporated in the same pleading. This is demurrable. *Roberts v. Mfg. Co.*, 181 N.C. 204; *Lee v. Thornton*, 171 N.C. 209; *Cromartie v. Parker*, 121 N.C. 198; *Quarry Co. v. Construction Co.*, 151 N.C. 345, and cases cited.

The several causes of action which may be united or joined in the same complaint are classified and enumerated in C.S. 507; and, in addition, the following limitation is expressly incorporated therein: "But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated." Under a proper interpretation of this section, we think his Honor's ruling sustaining the demurrer must be upheld.

But it is contended that if the two causes of action have been improperly united in the same pleading, his Honor should have ordered a separation or division under C.S. 516. It is well settled by a number of decisions that this cannot be done where there is a misjoinder of both parties and causes of action. *Roberts v. Mfg. Co., supra; Morton v. Tel. Co.*, 130 N.C. 299; *Thigpen v. Cotton Mills*, 151 N.C. 97; *Campbell v. Power Co.*, 166 N.C. 488.

Upon the record we think his Honor was correct in sustaining the demurrer and dismissing the defendant's cross action as to Benton & Benton in this particular proceeding.

Affirmed.

Cited: Bickley v. Green, 187 N.C. 774; *Robinson v. Williams*, 189 N.C. 256; *Harrison v. Transit Co.*, 192 N.C. 546; *Bank v. Angelo*, 193 N.C. 578; *Shemwell v. Lethco*, 198 N.C. 348; *Atkins v. Steed*, 208 N.C. 246; *Wilkesboro v. Jordan*, 212 N.C. 200; *Holland v. Whittington*, 215 N.C. 333; *Montgomery v. Blades*, 217 N.C. 656; *Blades v. R. R.*, 218 N.C. 704; *Schnepp v. Richardson*, 222 N.C. 230; *Southern Mills, Inc. v. Yarn Co.*, 223 N.C. 485; *Moore County v. Burns*, 224 N.C. 702; *Horton v. Perry*, 229 N.C. 322; *Teague v. Oil Co.*, 232 N.C. 66; *Erickson v. Starling*, 233 N.C. 541; *Amusement Co. v. Tarkington*, 246 N.C. 453; *Durham v. Engineering Co.*, 255 N.C. 104.

J. S. CLAYPOOLE, TRUSTEE OF THE ESTATE OF WILLIS GROCERY COMPANY v. W. A. McINTOSH ET AL.

(Filed 5 October, 1921.)

1. Corporations—Subscriptions—Unpaid Balance—Statutes.

Stockholders of an insolvent corporation are liable *pro rata* for their unpaid subscriptions to an amount necessary to liquidate the corporate debts. C.S. 1160.

2. Corporations—Directors—Unlawfully Declaring Dividends—Statutes.

A director of a corporation who has not brought himself within the provisions of C.S. 1179, exonerating him from liability for the payment of dividends to the stockholders when the profits of the business did not justify it, or its debts exceeded two-thirds of its assets, etc., is liable, in the action of the trustee in bankruptcy of such corporation, for the amount of such debts, and the proper court costs and charges, not exceeding the amount of the dividends unlawfully declared.

3. Courts—Costs—Bankruptcy—Instructions—Trials.

It appearing in this case that the trustee in bankruptcy had a certain amount of money available to creditors, subject to costs and fees in the bankrupt court: *Held*, there was sufficient evidence to justify the court in instructing the jury to deduct a certain allowance from the amount in the trustee's hands and credit the amount of indebtedness with the difference, leaving the balance due as the costs chargeable to the defendants in the bankrupt court.

4. Appeal and Error—Presumptions.

On appeal to the Supreme Court the presumption is against error, and in this case it is *held*, the appellee's objection is not sufficiently supported to justify the court in disturbing the results of the trial.

APPEAL by defendants from *Devin, J.*, at the February (110) Term, 1921, of CRAVEN.

The action is instituted by plaintiff, trustee in bankruptcy of Willis Grocery Company, an insolvent corporation, the same being by order of bankruptcy court to collect assets to pay creditors from stockholders on their unpaid subscriptions under C.S. 1160, and against defendants, directors and officers in control of said corporation and its affairs, by reason of dividends paid out to themselves contrary to law as contained in section 1179, etc. On denial of liability, the jury rendered the following verdict:

"1. What amount of stock in the Willis Grocery was held by the defendants McKeel, McIntosh, and Weeks at the time the said company became insolvent? Answer: 'McKeel, $2,000; McIntosh, $2,000; Weeks, $1,000.'

"2. What amount, if any, is due by each of said defendants on the stock held by them? Answer: '$2,000; Weeks, $1,000.'

"3. Were the defendants officers of the Willis Grocery Company? Answer: 'Yes.'

"4. Did the defendants pay out of the funds of said Willis Grocery Company dividends when debts of said company were more than two-thirds of its assets, and if so, in what amount? Answer: '$6,644.'

"5. Did the defendants pay to or for themselves any part of the capital stock of Willis Grocery Company, and if so, in what amount? Answer: '$5,308.'

"6. What amount will be refunded to pay the debts of Willis Grocery Company, over and above the assets of the bankrupt estate of the Willis Grocery Company? Answer: '$3,234.' "

Judgment on verdict for plaintiffs for $3,234, amount required to pay the corporate debts, and defendants excepted and appealed.

H. P. Whitehurst and R. A. Nunn for plaintiff.
Whitehurst & Barden and Ward & Ward for defendants.

HOKE, J. Both under general principles of corporate law, appertaining to the subject, and with us by express (111) enactment, stockholders of an insolvent corporation are liable pro rata for their unpaid subscriptions to an amount necessary to liquidate the corporate debts. *Whitlock v. Alexander,* 160 N.C. 465; *McIver v. Hardware Co.,* 144 N.C. 478; C.S., ch. 22, sec. 1160. In the same statute, sec. 1179, it is also provided as follows:

"No corporation may declare and pay dividends except from the surplus or net profits arising from its business, or when its debts, whether due or not, exceed two-thirds of its assets, nor may it reduce, divide, withdraw, or in any way pay to any stockholder any part of its capital stock except according to this chapter. In case of a violation of any provision of this section, the directors under whose administration the same occurs are jointly and severally liable, at any time within six years after paying such dividend, to the corporation and its creditors, in the event of its dissolution or insolvency, to the full amount of the dividend paid, or capital stock reduced, divided, withdrawn, or paid out, with interest on the same from the time such liability accrued. Any director who was absent when the violation occurred, or who dissented from the act or resolution by which it was effected, may exonerate himself from such liability by causing his dissent to be entered at large on the minutes of the directors at the time the action was taken or immediately after he has had notice of it."

The verdict of the jury on the fourth issue brings case of defendants directly within the provisions of this section 1179, to an amount

more than sufficient to pay the corporate debts, and the judgment for the amount of such debts and proper costs and charges has been properly entered against them.

The only objection to the judgment insisted upon in the argument before us was to the allowance of $500 for costs and expenses of the bankruptcy court. It appeared that plaintiff as trustee in bankruptcy had on hand from other sources $636 available to creditors subject to costs and fees of the bankruptcy proceedings, and the court merely instructed the jury that they should deduct the amount of $500 for such costs from this $636 and credit the amount of indebtedness with the difference which would leave the balance due from defendants the amount found by the jury in response to the sixth issue. This was clearly permissible, and the objection made was not to the allowance of the fees, but that the evidence on the subject is not as full and satisfactory as could be desired. We think the testimony of the trustee made without objection on the cross-examination is sufficient to uphold the amount allowed.

The presumption is against error, *Bernhardt v. Dutton,*
(112) 146 N.C. 206-209, and we are of opinion that the objection is not sufficiently supported to justify the Court in disturbing the results of the trial. Judgment affirmed.

No error.

Cited: *S. v. Mullis,* 233 N.C. 545.

ROSCOE B. WILLIAMS v. STARR HICKS ET AL.

(Filed 5 October, 1921.)

Wills—Devise—Estates—Fee—Contingencies—Words and Clauses—"Or" Construed as "And."

In a devise to the testator's son of certain lands, and in the event he "should die during his minority, or childless, . . . the remainder" over to the trustees of a certain church, the words "or childless" will be construed "and childless," so as not to deprive the son, the primary object of the testator's bounty, of the right and title to the land upon his coming of age, when not in clear contravention of the purpose of the testator elsewhere expressed in his will. *Patterson v. McCormick,* 177 N.C. 448, cited and distinguished.

CIVIL action, heard on demurrer and by consent before *Allen,* resident judge, at chambers in Kinston, N. C., on 20 August, 1921. Plaintiff appealed.

The action is to remove a cloud from plaintiff's title to certain real property held by plaintiff, Roscoe Williams, under the will of his father, John W. Williams, deceased, and more particularly under the third item of the will as follows:

"In the event that my said son, Roscoe B. Williams, should die during his minority, or childless, it is my will and desire that the remainder of the several properties herein named that would revert to him shall go to the trustees of St. John's Free Will Baptist Church, and their successors and assigns forever for the sole use and benefit of said church. Said St. John's Free Will Baptist Church being in the town of Kinston, N. C."

The proof showed that the property belonged to the testator and passed under this item of said will. That Roscoe B. Williams, plaintiff and devisee named in this item of said will, had become twenty-one years of age, and insisted that the property became vested in him in absolute ownership on his majority.

Defendants claimed and insisted that said estate, on death of Roscoe B. Williams without issue or children surviving, would belong to the said church. The court being of opinion with defendants, gave judgment for defendants and sustaining their demurrer filed to plaintiff's complaint. Plaintiff excepted and appealed.

Dawson & Greene for plaintiff. (113)
Rouse & Rouse for defendants.

HOKE, J. In 40 Cyc., at page 1506, it is laid down as a rule of interpretation which very generally obtains in a devise of this character that "where 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 the period before arrival at the age specified, to aid which the word 'or' will be construed 'and.'" This position was held to be controlling in *Dickinson et al. v. Jordan and Blount,* 5 N.C. 380, a case not dissimilar to the one presented here, and in the opinion, Taylor, J., says: "That on examination of the cases on the subject, the point will be found completely settled, and the estate was held absolute in the first taker on arrival at full age." And, unless in contravention of the clear purpose of the testator as otherwise expressed in his will, the principle stated has been recognized and approved as the correct position in many of our decisions on the subject, and more especially when the first taker, as in this case, usually considered as the primary object of the testator's bounty, is his child and heir at law. *Bell v. Keesler,* 175 N.C. 526; *Bank v. Murray,* 175 N.C. 62; *Ham v. Ham,* 168 N.C. 486; *Dunn v. Hines,* 164

N.C. 113; *Burton v. Conigland,* 82 N.C. 100; *Turner v. Whitted, etc.,* 9 N.C. 613; *Parker v. Parker,* 46 Mass. 134-137. In *Bell v. Keesler* the above quotation from 40 Cyc. is approved, and the opinion quotes further from the Massachusetts case of *Parker v. Parker,* where the rule of construction, and in part the reason for it, is stated as follows:

" 'The manifest object of the testator was, we think, that if 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.' "

And in *Ham v. Ham, supra,* where the subject is discussed with ability and learning, the Court held, among other things, that on a devise of land to four sons, but should either of them die before arriving at the age of twenty-one or without children surviving, the word "or" should be read as "and," so as to require both contingencies to occur before the limitation over should take effect and thus save the inheritance to the child or children of any of the sons who should die under age.

(114) It was earnestly insisted before us that there were certain expressions in the will, and attendant facts relevant to its construction, which showed a manifest intention on the part of the testator that either or both contingencies should affect the estate till the son's death, but without special reference to these suggestions we think that they are entirely insufficient to displace this, a settled rule of interpretation, on the facts presented, and where in aid of such rule it appears that to uphold the position contended for by appellees would be to deprive the son and heir of any absolute ownership in his deceased father's property until his death. Under a proper application of the decisions referred to, and the principles they approve and illustrate, we must hold that on the record the estate of plaintiff, the son and heir at law of the testator, became vested in absolute ownership on his becoming of age, that the demurrer be overruled, and defendant's claim be declared invalid.

Our decision in no way conflicts with *Patterson v. McCormick,* 177 N.C. 448, to which we were referred by counsel. In that well considered case the Court was passing on a devise over on a death of the first taker without issue as controlled by our statute on the

subject, and entirely unaffected by the presence of a double contingency, and which, on the facts of this record, require, as we have seen, a different rule of construction. There is error, and this will be certified that judgment be entered for plaintiff.

Reversed.

SAMUEL HORACE McCALL, JR., BY HIS NEXT FRIEND ET AL., v. C. M. LEE, ADMINISTRATRIX, ET AL.

(Filed 5 October, 1921.)

1. Statute of Frauds—Contracts to Convey Lands—Memorandum.

Where the mother has contracted and agreed with her children to add her separate property to that of her deceased husband and divide it among them, reserving a life estate, and one of them being a minor son, she has proceeded before the court upon verified petition reciting the facts, for the conveyance of such minor's property, the recitation in her petition of the agreement is a sufficient memorandum under the statute of frauds, C.S. 988, and her contract in respect to all the children is valid and enforceable under the statute.

2. Same—Parol Agreement—Subsequent Writing.

The written memorandum required of the statute of frauds (C.S. 988) for the conveyance of lands need not necessarily be made at the time of the agreement, and when reduced to writing thereafter, and otherwise sufficient, it will be valid.

APPEAL by defendants from *Lyon, J.*, at June Special Term, 1921, of SAMPSON.

Lovett Lee died intestate in Duplin County in March, 1916, leaving him surviving his widow, the defendant C. (115) M. Lee, and 7 children. The widow qualified as administratrix. She proposed to said children that if they would convey to her the entire real and personal estate which they had inherited from their father she would combine the same with her estate, and putting the whole in hotch-potch she would divide the whole of their father's estate combined with the greater part of her own estate (most of which had been conveyed to her by her husband by deeds of gift), and would make an equal division of both estates among the 7 children. They accepted the offer and all the children made her such conveyances by deed of gift for their shares in the real and personal estate of their father, except James Lovett Lee, who was a minor. As to him, she instituted a special proceeding in which she recited all the above facts in a petition signed and sworn to by her,

and a commissioner was appointed who made a conveyance upon these terms to his mother, upon the promise and agreement that she would in turn combine her husband's estate with the greater part of her own estate (acquired largely from her husband) and make an equal division of both estates among her said children, and make deeds to each of them for one-seventh thereof.

Thereupon, C. M. Lee, the mother, in accordance with said contract, made a deed to each of her said children except her son, Harry B. Lee (who was the first one to convey to her his interest in his father's estate, in pursuance of her proposition), for an equal share, and thereby carried out in good faith her agreement with all her children except with Harry B. Lee.

After her son, Harry B. Lee, made his deed to his mother on 28 May, 1918, he married on 10 June, 1918, and died in October, 1918, leaving the plaintiff, Clara E. Lee, his widow, and a posthumous son, Eugene Scott Lee, who is represented in this action by his next friend, his grandfather, Horace McCall. C. M. Lee refused to execute a deed to said Harry before his death, or to his widow and son after his death (it is alleged because she was displeased with his marriage), but in violation of the contract with Harry, she retained all his share in the real and personal estate of his father, and has deprived Harry and his widow and son of the share in his father's estate, which he conveyed to her, and also of any share in hers.

The jury found on the issue submitted to them in accordance with the above statements of fact. All the brothers and sisters were made parties defendant, and the administrator of Harry B. Lee was also a party plaintiff. Judgment accordingly, and the defendants appealed.

Butler & Herring for plaintiffs.

Stevens, Beasley & Stevens and Fowler & Crumpler for defendants.

CLARK, C.J. The following issue was submitted to the
(116) jury: "Was the deed, dated 28 August, 1918, from Harry B. Lee to C. M. Lee made in pursuance of a contract and agreement that when the children of her deceased husband, Lovett Lee, should convey to her their respective interests in the real and personal estate of her deceased husband, thereby combining her estate with her husband's estate, that she would then in turn make deed to her children, and each of them, for a one-seventh of her husband's estate, together with the greater portion of her own individual estate," to which the jury responded "Yes."

The judgment reciting the uncontradicted evidence and admis-

sions in the pleadings adjudged that "the plaintiffs recover of the defendants, as their interest may appear, one-seventh undivided interest in the real estate of Lovett Lee, deceased, at the time of his death, and that the plaintiffs also recover of the defendant such share or portion of the estate of the defendant, C. M. Lee, as of the date of the contract and agreement, entered into between the said C. M. Lee and her children, as will give to the plaintiffs as the real and personal representatives of Harry B. Lee, deceased, one-seventh interest in her said estate, or a share equal in value in real and personal property, or cash, to that heretofore conveyed by her to each of her other children, as shown by the several deeds executed by her to them on 1 April, 1919, as fully set out in the complaint in this action."

The judgment further provides that "the deeds made by and between C. M. Lee and the other defendants, her children, in parceling out said estate in so far as they may conflict with the provisions of this judgment shall be set aside and declared inoperative and void as between the parties to this action."

The decree further recites: "It having been, in the trial of this action, agreed between the parties plaintiffs and defendants that this trial should be limited to ascertaining only the liability and rights of the parties and not the specific amount and character of the plaintiffs' recovery, . . . this cause shall be retained upon the docket for the purpose of ascertaining the value of plaintiffs' recovery against the defendants and the method of ascertaining the amount and kind of such recovery and investing the plaintiffs with the title and possession of same."

The chief defense, and indeed the only one that requires consideration, is the plea of the statute of frauds, the defendants contending that the above agreement was oral and therefore invalid. We pass by as unnecessary to consider, in view of the other evidence, the question whether by the conveyance by Harry B. Lee to his mother upon the terms ascertained by the verdict, she did not receive the property conveyed by Harry B. Lee on a verbal trust to be held by her according to said agreement. The plaintiffs put in evidence the petition filed by C. M. Lee in the Su- (117) perior Court for the conveyance of the property of said James Lovett Lee, her minor son, which petition was duly subscribed and sworn to by her and filed in said cause and contains as a recital the facts above stated, and particularly the following: "4. That the said C. M. Lee, petitioner, is owner in her own right of a very valuable landed estate, located in both Duplin and Sampson counties, and, since the death of her said husband, she has proposed to her children, all of whom are of full age except the said James

Lovett Lee, that if they would make over to her a conveyance and bill of sale for their entire interests in the real and personal estate of the said husband so as to combine the estate of her husband with her own, that she would then in turn make deeds to her children for the greater part of her individual estate as well as all of the landed estate of her said husband, and with the view of effectuating this division and disposition of the estate of her said intestate husband, all of his said heirs and distributees, who are of full age, have already conveyed and set over to the said C. M. Lee their entire interests in the real and personal estate of the said Lovett Lee, deceased; and in further pursuance of said proposed plan for said division the said C. M. Lee and the heirs of said Lovett Lee have procured an appraisal to be made of all the lands of the said Lovett Lee, deceased, and all the lands of said C. M. Lee owned by her individually, said appraisal having been made by one O. M. Lee, a brother of Lovett Lee, deceased, and L. A. Byrd of Mount Olive, both of whom are men of ripe experience in the buying and selling of real estate and the present market value thereof." The petition further recites the valuation of aforesaid real and personal property, and adds: "The said C. M. Lee now proposes to make a deed of conveyance to the said James Lovett Lee, however, reserving the life estate therein to herself of the land appraised by the said O. M. Lee and L. A. Byrd, upon condition that the court will approve a conveyance to the said C. M. Lee of all the interests of said minor son, in the estate of his deceased father," describing the property and asking that a commissioner be appointed to execute said deed for her minor son to herself. Thereupon the decree of the court was made in accordance with the petition, reciting the above agreement for the conveyance by the children to their mother of their interest in their father's estate, and directing the commissioner to make a deed for the interest of said minor son upon condition that she will convey to him a good and sufficient deed for one-seventh of the combined property in pursuance of said agreement.

This, omitting unnecessary details in the petition and the decree in conformity thereto, is a complete statement of the transaction. The statute of frauds which is relied upon to defeat the very just claim of the plaintiffs is to be found in C.S. 988, and
(118) so much thereof as bears upon this controversy reads as follows: "All contracts to sell or convey any lands, tenements, or hereditaments, or any interest in or concerning them, . . . shall be void unless said contract or some *memorandum* or *note* thereof be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." The above petition, duly signed, is also sworn to and is

solemnly filed in a petition by C. M. Lee, and there is judgment upon it entered of record, which judgment was procured at her instance. It is not possible for a "memorandum" to be more complete and explicit than is made in this case, or more solemnly, having been signed and sworn to and made a record of the court and a judgment at the instance, and by the procurement, of the said C. M. Lee having been entered thereon.

It would be difficult to add anything in support of this very clear instance of compliance with the memorandum required by said statute. We have many cases in this State, among them *Mizell v. Burnett,* 49 N.C. 249, which says that it has always been held that letters addressed to third parties stating and affirming a contract may be used against the writer as sufficient memorandum of it, and that such writings are sufficient evidence of the contract to warrant the court in giving effect to it. This is also held in *Nicholson v. Dover,* 145 N.C. 18.

The written memorandum may be made subsequent to the time of making the contract. *McGee v. Blankenship,* 95 N.C. 563; *Winslow v. White,* 163 N.C. 29. In 2 Elliott on Contracts, 546-7, sec. 312, it is said: "The form of the memorandum is not material so long as it is sufficient to comply with the requirements of the statute. . . . Any document signed by the party to be charged containing the terms of the contract will suffice, as a letter to a third party, a will, or an affidavit in a different matter."

Neither the defendant C. M. Lee nor any of the other defendants denied or introduced any evidence to explain the execution of the deeds made to her and by her to her children, nor to contradict the terms of the contract between her and her children as set out in the petition signed and sworn to and filed by her in the aforesaid petition, and recited in the judgment procured by her upon said statement and filed of record in said county. The marriage of said Harry B. Lee and the birth of issue in nowise contradicted or modified the terms of said agreement. His widow and son and his administrator, the son appearing by his next friend, stand in his shoes and are entitled to all the benefits in the performance of said contract which he would have been entitled to claim and enforce if he were still living.

No error.

Cited: Millikan v. Simmons, 244 N.C. 200.

(119)

J. C. LEWIS v. F. R. NUNN AND CHARITY NUNN.

(Filed 5 October, 1921.)

Appeal and Error—Review—New Trial—Second Appeal.

A petition to rehear is the method by which the law in a case decided in the Supreme Court may be there reviewed, and this may not be done when a new trial has been granted and the case comes on appeal to the court again upon the same facts, and the Superior Court has ruled the law in accordance with the former opinion.

APPEAL by defendant from *Bond, J.*, at the June Term, 1921, of LENOIR.

The action is by purchaser of land at foreclosure by sale of trustee under a deed to secure four several promissory notes, maturing: $75, on 1 November, 1918; $200, on 1 November, 1919; $200, on 1 November, 1920; $600, on 1 November, 1921; and with a stipulation that on failure to pay the notes and interest on either of them or any part thereof when due, then "all the amounts due in said bonds shall immediately become due and payable." There was default in payment of first note and interest, and on due advertisement, property was sold by trustee, at which sale plaintiff purchased and received his deed, etc.

Defendant alleged, and offered evidence tending to show, that the creditor had agreed to indulge defendant as to payment of first note, and that prior to sale and after its maturity he had tendered the amount of the first note and accrued interest thereon, together with all other interest on the debt due at time of tender.

The cause was submitted to the jury and verdict rendered on the following issue:

"1. Are defendants, or either of them, entitled to redeem the land in controversy in this action? Answer: 'No.'"

Judgment for plaintiff. Defendant excepted and appealed, assigning for error the charge of the court that on the evidence, if believed, the jury should answer the issue as stated.

Moore & Croom and Cowper, Whitaker & Allen for plaintiff.
Rouse & Rouse for defendant.

HOKE, J. This cause was before us on a former appeal, and will be found reported in 180 N.C. 159. On questions more directly relevant to the present trial, it was held there:

"1. That the mere promise of the mortgagee to extend the time to the mortgagor for the payment of the mortgage note without more has no legal consideration and is unenforceable.

"2. Where several notes secured by mortgage are in series, and due at different dates, with provision that upon (120) default in payment of one, all shall become due and payable with interest, after such default in the payment of the note first becoming due, a tender of payment of the note thus due, and interest on all of them in the series, is an insufficient tender."

In this aspect of the matter the evidence pertinent is substantially the same as that offered at the former trial, there being no testimony or claim on the part of defendant that there had ever been any tender of the amount of the debt, "but only of the note first due, and the accrued interest on the entire sum." His Honor correctly ruled that the decision on the former appeal was conclusive, and that in any view of the case the plaintiff was entitled to recover.

In his very earnest and forcible argument before us, counsel for appellant insisted that while the agreement for indulgence would not constitute a binding contract for lack of a consideration, it should be considered in reference to the first note a waiver of the stipulation maturing the entire debt under the principles recognized and approved by this Court in *Bizzell v. Roberts,* 156 N.C. 272. Without intimation that such a position could be maintained on the facts presented in this record, we think it is not open to appellant in view of our decision on the former appeal that a tender of the entire debt was required to stay action on the part of the trustee. That decision on substantially similar facts affords the controlling rule by which the rights of the parties in the present case must be determined, and the recovery by plaintiff must be sustained.

In *Holland v. R. R.,* 143 N.C., at page 437, it was said, "That a party who loses in this Court cannot review the decision in a second appeal, as the proper way is by a petition to rehear." *Public Service Co. v. Power Co.,* 181 N.C. 356. Judgment for plaintiff affirmed.

No error.

Cited: Pettitt v. R. R., 186 N.C. 18.

W. A. TAYLOR v. THE POSTAL LIFE INSURANCE COMPANY ET AL.

(Filed 12 October, 1921.)

1. Pleadings — Misjoinder — Parties — Causes of Action — Severance — Statutes.

A demurrer will be sustained for a misjoinder of both parties and causes of action in the same action, and a severance thereof is not permissible. C.S. 516.

2. Same—Multifariousness—Related Transactions.

In an action against a life insurance company and the beneficiaries, to recover upon a policy, the plaintiff alleged that the insured, then deceased, had previously assigned or transferred his policy to him, and the beneficiaries answered, setting up as a cross-action or counterclaim that the plaintiff and deceased had purchased lands in common, and that in their partnership dealings the deceased had assigned the policy upon certain conditions which the plaintiff had failed to perform. The insurance company paid the amount of the policy into court to await the final disposition of the controversy: *Held*, the matters alleged in the counterclaim or cross-action were not so unrelated and independent of each other as to make the defendant's pleading defective for multifariousness; and that the matters for adjudication arose out of the same transaction, or series of transactions, making a complete whole, and the plaintiff's demurrer thereto was bad. C.S. 507.

APPEAL by plaintiff from *Horton, J.*, at August Term,
(121) 1920, of PITT.

Civil action to recover the amount of an insurance policy issued on the life of J. C. Taylor and by him duly assigned to his brother, W. A. Taylor, plaintiff herein. The widow of deceased denies the right of plaintiff to receive the proceeds of said policy of insurance, and has set up by way of cross-action and counterclaim that the plaintiff and his brother purchased certain lands in common, and that in their partnership dealings the policy in question was assigned upon condition that the said W. A. Taylor would convey to J. C. Taylor two tracts of land held by him in trust for their mutual benefit. Defendant further alleges that plaintiff neglected to make such conveyance during the lifetime of her husband, and that he now refuses to carry out his part of the contract. Wherefore, she asks for an accounting and an adjustment of these matters before plaintiff is allowed to collect said insurance.

Plaintiff demurred to the counterclaim upon the ground of a misjoinder of parties and causes of action. His Honor overruled the demurrer and, by consent, permitted the insurance company to relieve itself from further liability by paying the amount of its policy into court, and it was ordered that said funds be held by the clerk to await the final determination of the issues raised by the pleadings. Plaintiff appealed.

Skinner & Whedbee for plaintiff.
Julius Brown for defendants.

STACY, J. It has been held with us in a uniform line of decisions that, where there is a misjoinder of both parties and causes of action in the same pleading, a demurrer for this reason will be sustained, and that a separation or division in such a case is not permissible under C.S. 516. *Rose v. Warehouse Co., ante,* 107; *Roberts v. Mfg. Co.,* 181 N.C. 204, and cases there cited.

But as said in *Quarry Co. v. Construction Co.,* 151 N.C. 345: (122)

"If the grounds of the bill be not entirely distinct and wholly unconnected, if they arise out of one and the same transaction or series of transactions, forming one course of dealing and tending to one end, if one connected story can be told of the whole, then the objection cannot apply. *Bedsole v. Monroe,* 40 N.C. 313.

"The plaintiff may unite in the same complaint several causes of action when they arise out of the same transaction or transactions connected with the same subject of action, the purpose being to extend the right of the plaintiff to join actions, not merely by including equitable as well as legal causes of action, but to make the ground broad enough to cover all causes of action which the plaintiff may have against the defendant arising out of the same *subject* of action, so that the Court may not be forced 'to take two bites at a cherry,' but may dispose of the whole subject of controversy and its incidents and corollaries in one action." *Hamlin v. Tucker,* 72 N.C. 502.

Applying these principles, we do not think the causes of action set out in the defendant's answer and counterclaim are so unrelated and independent of each other as to make the pleading defective for multifariousness. All the matters sought to be adjudicated arise out of the same transaction, or series of transactions which make one composite whole. The final adjustment of the insurance money is linked with the settlement of these items and with the estate. Under C.S. 507, such causes may be united in the same complaint. *Oyster v. Mining Co.,* 140 N.C. 135; *Fisher v. Trust Co.,* 138 N.C. 224.

Therefore, upon authority, we think the action of his Honor in overruling the demurrer and refusing to strike out the defendant's further defense and counterclaim must be sustained.

Affirmed.

Cited: Scales v. Trust Co., 195 N.C. 776; *Berger v. Stevens,* 197 N.C. 237; *Schnepp v. Richardson,* 222 N.C. 230; *Prince v. Barnes,* 224 N.C. 702; *Pressley v. Tea Co.,* 226 N.C. 519; *Teague v. Oil Co.,* 232 N.C. 66.

(123)

IN RE SALE OF SERMON'S LAND.

(Filed 12 October, 1921.)

1. Mortgages—Sales of Lands—Powers of Sale—Statutes.

The provisions of C.S. 2591, concerning the sale of land under a power thereof contained in a mortgage or deed of trust, enter into and control the sale under such instruments.

2. Same—Proposed Bidder—Judicial Sales.

Under the provisions of C.S. 2591, requiring that a sale of land under a mortgage or deed of trust be left open for ten days for the acceptance of an increased bid, under certain conditions, and a resale if these conditions are complied with, the bidder at the sale during such period acquires no interest in the property itself, but only a position similar to a bidder at a judicial sale, before confirmation.

3. Same—Title—Possession.

Before the expiration of the ten days required by C.S. 2591, for the sale of land under a mortgage or deed of trust, the sale shall not be deemed closed, and the successful bidder thereat acquires no title or right of possession during that time, but is only considered as a preferred bidder, his right depending upon whether there is an increased bid and a resale of the land ordered under the provisions of the statute.

4. Same—Value Substantially Diminished—Fires.

Where the mortgaged premises has been materially diminished in value by the loss by fire of a house thereon, which has been sold under a power contained in the instrument, the bidder at such sale having no title or right of possession, or control over the property for its preservation or protection, within the ten days provided by C.S. 2591, the loss occurring within that time falls on the owner, and the preferred bidder is not chargeable therewith, or required by law to take the property at the price he has bid therefor.

5. Same—Contracts—Specific Performance.

The principle upon which specific performance of a binding contract to convey lands is enforceable, has no application to the successful bidder at a sale under the power contained in a mortgage or deed of trust of lands, during the ten days allowed by C.S. 2591, in which an increase of bid may be received and a resale ordered, for, within that time, there is no binding contract of purchase, and the bargain is incomplete.

6. Same—Courts—Clerks of Court—Resales.

C.S. 2591, controls as to ordering a resale of lands sold under a power of sale contained in a mortgage or deed of trust, and confers no power on the clerk to make such order, unless within the ten days allowed there shall be an increased bid, etc., and does not extend to instances wherein a material loss has been sustained by destruction of a house on the lands, within the stated period.

7. Appeal and Error—Statutes—Mortgages—Courts—Resales—Dismissal of Appeal.

Where it appears on appeal to the Supreme Court that the clerk of the

court, under judgment of Superior Court on appeal, has ordered a resale of lands theretofore sold under the power of sale contained in a mortgage or deed in trust, not according to the provisions of the statute as to increase bids within the ten days, etc., the appeal will be dismissed.

8. Appeal and Error—Mortgages—Powers of Sale—Sales—Preferred Bidder—Harmless Error.

Where the preferred bidder at a resale of land theretofore sold under a power contained in the mortgage has become the successful bidder at the second sale, without the suggestion of unfairness or fraud, the mere fact that the resale was unwarranted will not affect the validity of the resale, or cause it to be set aside on appeal to the Supreme Court, it appearing that this was the proper course to have pursued.

9. Mortgages—Deeds in Trust—Sales—Powers of Sale—Assignments.

A written assignment, under seal, of a mortgage on lands transferring to the purchaser the interest of the mortgagee therein, the power of sale and the property of the mortgagee therein, confers the right of foreclosure on the assignee. *Williams v. Teachey*, 85 N.C. 402, cited and distinguished.

10. Appeal and Error — Dismissal — Expression of Opinion — Supreme Court.

The Supreme Court may dismiss an appeal and express an opinion as to the law on the facts contained in the record, in exceptional instances, where the importance of and the general interest in the question presented make it desirable.

MOTION to relieve a bidder from obligation to buy land, heard on appeal from clerk of the Superior Court before (124) his Honor, *Devin, J.*, holding the courts of the Fifth Judicial District on 24 May, 1921.

From the facts properly presented it was made to appear that R. L. Sermons and wife having executed a mortgage with power of sale to H. L. Sermons, of date 12 September, 1919, to secure three promissory notes aggregating $3,200. The mortgagee, for valuable consideration, duly assigned said notes and mortgage and the land conveyed to Merchants Bank of Kinston, N. C., by assignment under seal, written on back of said mortgage, as follows: "For value received, I hereby transfer and assign all my right, title, interest and estate in and to the within mortgage and the property conveyed therein to the Farmers and Merchants Bank of Kinston, N. C., including the power of sale therein contained. This 12 December, 1919." Default having been made in the payment of said note and requirements of the mortgage, the said bank sold same by proper advertisement in said county on 18 April, 1921, at which Clarence Oettinger became the last and highest bidder in the sum of $4,500, and said sale was immediately reported to the clerk of the Superior Court of the county.

It appears further that within the ten days, where it is provided by statutes that such a sale "should not be deemed closed," C.S., sec. 2591, the dwelling house on the lot, amounting to a third or more of its value, was accidentally destroyed by fire, whereupon the bidder, Clarence Oettinger, filed his petition before the clerk alleging the facts and asking that sale be rescinded and the applicant be relieved from his bid. The clerk being of opinion against the applicant, entered his judgment as follows: "This cause coming on to be heard and being heard upon the petition and affidavit of Clarence Oettinger, and the court finding that the building described in the petition was a material part of the value of the premises and was destroyed by fire as set out in the affidavit, but the court being of the opinion that the destruction of said house by fire does not affect or release the petitioner's liability or his said bid, and that
(125) it has no jurisdiction and is not vested with power to set aside the sale and to direct a resale, denies the petition, confirms the sale and directs the assignee of the mortgagee to collect the purchase money and execute deed to the purchaser."

On appeal by the bidder from the order his Honor, Devin, J., reversed the action of the clerk and entered judgment as follows:

"This cause came on to be heard before Devin, J., upon the appeal of Clarence Oettinger, petitioner, from an order of the clerk of the Superior Court of Craven confirming a sale and denying petitioner's plea to withdraw his bid therein.

"This was a proceeding before the clerk in relation to sale of land under mortgage made by the Farmers and Merchants Bank, assignee of mortgage. After due advertisement sale was made under power contained in the mortgage and reported to the clerk. At the sale the petitioner became the last and highest bidder for the land at the price of $4,500. A material inducement to the sale and one relied on by the petitioner was the statement at the sale that a valuable dwelling house was situated on said land.

"After said sale and within ten days thereof, and before confirmation, the dwelling house on said land was, without fault on part of petitioner, accidentally destroyed by fire. Thereupon petitioner filed his plea asking that he be allowed to rescind his bid and that the sale be not confirmed.

"The facts set forth in the petition are found by the clerk to be true, and his findings are approved by the judge.

"It therefore appearing by the admitted facts that a substantial part of the property, to wit, a third or more in value, was destroyed after sale and before confirmation, and that such fact was a material inducement for petitioner's bid and a substantial part of the consideration thereof, and that the property has been physically

changed before confirmation, that the court is of the opinion that before confirmation no title had passed to petitioner and that his rights were only those of a preferred bidder, and that the loss sustained by the destruction of a portion of the property ought not to fall upon the petitioner when he had neither possession to enable him to protect it, nor title to permit him to insure it, and had only the uncertain right of a preferred proposer and the assignee of the mortgage unable to make title to the petitioner for all the property advertised and bid off by him, the court should not now confirm the sale and order him to pay the full purchase price. For these reasons the order of the clerk herein is overruled and a resale of the property according to law directed to be made."

To this judgment the assignor of the mortgage excepts and appeals to the Supreme Court. Notice waived, etc. Appeal bond given.

It is further stated in the record that upon the foregoing appeal being prayed there was no request for a stay bond (126) by the applicant and none was fixed by the judge. Thereafter the land was advertised and sold again on 1 August, 1921, when and where the former bidder, Clarence Oettinger, again became the last and highest bidder in the sum of $2,500, which bid was reported to the clerk, and after a delay of ten days from the filing of the report, order was made that a deed be executed. No increased bid had been made.

R. A. Nunn for H. L. Sermons.
Cowper, Whitaker & Allen, and Guion & Guion for appellee.

HOKE, J., after stating the case: Chapter 54, section 2591, Consolidated Statutes, is as follows: "In the foreclosure of mortgages or deeds of trust on real estate, or in the case of public sale of real estate by an executor, administrator, or administrator with the will annexed, or by a person by virtue of the power contained in a will, the sale shall not be deemed to be closed under ten days. If in ten days from the date of the sale, the sale price is increased ten per cent where the price does not exceed five hundred dollars, and five per cent where the price exceeds five hundred dollars, and the same is paid to the clerk of the Superior Court, the mortgagee, trustee, ex- in the first instance. The clerk may, in his discretion, require the sale of said property and advertise the same in the same manner as in the first instance. The clerk may, in his discretion, require the person making such advance bid to execute a good and sufficient bond in a sufficient amount to guarantee compliance with the terms of sale should the person offering the advance bid be declared the purchaser at the resale. Where the bid or offer is raised as prescribed

herein, and the amount paid to the clerk, he shall issue an order to the mortgagee or other person and require him to advertise and resell said real estate. It shall only be required to give fifteen days notice of a resale. Resales may be had as often as the bid may be raised in compliance with this section. Upon the final sale of the real estate the clerk shall issue his order to the mortgagee or other person, and require him to make title to the purchaser. The clerk shall make all such orders as may be just and necessary to safeguard the interest of all parties, and he shall keep a record which will show in detail the amount of each bid, the purchase price, and the final settlement between parties. This section shall not apply to the foreclosure mortgages or deeds of trust executed prior to 1 April, 1915." The section enters and must be allowed controlling effect upon every deed of trust or mortgage with power of sale executed since the date specified, see *White v. Kincaid*, 149 N.C. 415, and provides and intends to provide that during the ten days, as stated in the first clause, the bidder acquires no interest in the
(127) property itself, but he acquires a position similar to a bidder at a judicial sale and before confirmation. This in our opinion follows not only as the natural meaning of the words used, that the sale shall not be deemed closed under ten days, but the position is fully confirmed by the further provision of the law that during said ten days the matter is kept open for receipt of increased bids, and in case the stipulated increase is made, the property shall be readvertised and a second sale had. This being clearly the meaning of the law and the position of the purchaser. It is the accepted law in this State that a bidder at a judicial sale before confirmation acquires no interest in the property itself, but his bid is considered only a proposal to buy, which the court may accept or reject in its discretion. In *Upchurch v. Upchurch*, 173 N.C. 88-90, the court said: "His offer is considered only as a proposition to buy at the price named, the court reserving the right to accept or reject the bid." And in *Harrell v. Blythe*, 140 N.C. 415, quoted with approval in the *Upchurch* case, the position is stated as follows: "Where land is sold under a decree of court, the purchaser acquires no independent right. He is regarded as a mere preferred proposer until confirmation, which is the judicial sanction or the acceptance of the court, and, until it is obtained, the bargain is not complete." Under the facts presented, therefore, the bidder during the ten days covered by the statute acquired no interest in the property, and in such case it is very generally held that where pending a contract for sale of improved real estate, the buildings thereon are damaged by fire the loss, as a rule, must fall upon the owner, and if the destruction wrought is such as make a material change in the property or sub-

stantially impair its value, specific performance will not be enforced at the instance of the vendor and the bidder will be relieved of his obligation. By the weight of authority on the subject, when there exists a binding and enforcible contract to convey, the vendor being in the present position to make title, the purchaser is regarded as the owner and the loss must fall on him. But where the vendor has not yet obtained a title, or where the bargaining between the parties has not been such as to give the proposed purchaser any interest in the property, or the contract is otherwise incomplete, the loss, as stated, falls on the vendor, and under the circumstances indicated he may not insist on performance. *Sutton v. Davis*, 143 N.C. 474; *Phinizy v. Guernsey*, 111 Ga. 346; *Huguenin v. Courtenay*, 21 S.C. 403; *Eppstein v. Kuhn*, 225 Ill. 115; *Lombard v. Chicago Sinai Congregation*, 64 Ill. 477; *Christian v. Cabell*, 63 Va. 82; *Blew v. McClelland*, 29 Mo. 304; Pomeroy on Contracts, secs. 434-435; 29 A. & E. (2 ed.), 712-713. In the citation to 29 A. & E., *supra*, it is said, "to the general rule that the purchaser must bear all losses there is one well recognized exception, that if the loss occurs at a time when for any reason the contract lacks completion, the vendor being in such case the owner in equity, (128) must be responsible for the loss. Thus where the loss occurs before the vendor is in a position to convey a good title, it will fall on the vendor. So also where the vendor has an option to withdraw from the contract. But to make the vendor bear the loss, he must be in some fault other than mere delay in making the deed where he has never been requested to make it." And the principle as stated has been directly applied to the case of a bidder at a judicial sale and before confirmation. 4 Edwards Chancery (N.Y.) 702; *Ex parte Minor*, 11 Ves. Jr. 559; 32 Eng. Rep. 1205; 24 Cyc. 34, and cases cited in note 54. As has been heretofore stated, during the ten days where the statutes provide that the sale shall be considered unclosed and open for further bids the applicant in the instant case is in a position exactly similar and the building having been destroyed during that period making a diminution in value of $2,000 in a $4,500 sale. We think his Honor correctly ruled that the proposed purchaser should be relieved and a resale had under the powers contained in the deed. As well said by the presiding judge in entering his judgment to that effect: "It therefore appearing by the admitted facts that a substantial part of the property, to wit, a third or more in value, was destroyed after sale, and that such fact was a material inducement for petitioner's bid and a substantial part of the consideration thereof, and that the property has been physically changed before confirmation, the court is of the opinion that before confirmation no title had passed to petitioner and that his rights were only

those of a preferred bidder, and that the loss sustained by the destruction of a portion of the property ought not to fall upon the petitioner when he had neither possession to enable him to protect it, nor title to permit him to insure it, and had only the uncertain right of a preferred proposer." While we hold that the same should be set aside at the instance of the bidder, we are of the opinion that on the record neither the clerk nor the judge on appeal from him had jurisdiction or power on the bidder's mere application to make any orders affecting the rights of the parties in the premises. The power of foreclosure by advertisement and sale of the mortgagee or trustee fills a useful and important place in our business life and should not be interfered with except to the extent expressly provided by law. The statutes, section 2591, as we have seen, in express terms provides that any and all sales of this character shall remain "unclosed for ten days," but it confers no power on the clerk to make any orders in the matter except in case of an increase of bid, nor is any report required to be made in any other instance. That and that alone is the basis for his interference in sales of this kind. It might be well in the case presented the law should give the clerk jurisdiction to make the order that justice and right would require,
(129) but thus far the statutes has not done so, and we are not at liberty to go beyond the statutory provision. We consider it not improper to say, however, that as the parties have gone on and had another sale in which the same purchaser became the last and highest bidder, with or without orders of the clerk this was the proper course to pursue, and if the facts are as now admitted, no court would make other disposition of the matter. And inasmuch as the assignment written on the back of the mortgage and under seal transfers both the interest of the mortgagee and the power of sale, as well as the property contained in the mortgage, such assignment and deed clearly confers the right of foreclosure on the bank, the assignee. *Weil & Bros. v. Davis*, 168 N.C. 298. The case is thus distinguished from *Williams v. Teachey*, 85 N.C. 402, and that class of cases, in which it was held that as the assignment didn't purport to pass the property itself, the power of sale and right of foreclosure remained in the mortgagee. Being of the opinion that on the record and a proper interpretation of the statutes the clerk and the judge on appeal from him are without jurisdiction to make orders and decrees in the matter, we must hold that the appeal and other proceedings be dismissed. But we have deemed it not improper to express an opinion on the facts contained in the record, a course pursued by the Court in exceptional instances where the importance and general interest in the question presented make it desirable.

Gilbert v. Shingle Co., 167 N.C. 287-290; *Milling Co. v. Finlay*, 110 N.C. 411; *S. v. Wylde*, 110 N.C. 500.

This will be certified that the cause be

Dismissed.

Cited: S. v. Yates, 183 N.C. 756; *Grocery Co. v. Newman*, 184 N.C. 375; *Lawrence v. Beck*, 185 N.C. 198; *Warehouse Co. v. Warehouse Corp.*, 185 N.C. 523; *In re Ware*, 187 N.C. 694; *Trust Co. v. Powell*, 189 N.C. 376; *Briggs v. Developers*, 191 N.C. 787; *Cherry v. Gilliam*, 195 N.C. 235; *Hanna v. Mortgage Co.*, 197 N.C. 186; *Banking Co. v. Green*, 197 N.C. 537; *Davis v. Ins. Co.*, 197 N.C. 620; *Alexander v. Boyd*, 204 N.C. 106; *Creech v. Wilder*, 212 N.C. 165; *Beaufort County v. Bishop*, 216 N.C. 215; *Poole v. Scott*, 228 N.C. 466; *Foust v. Loan Asso.*, 233 N.C. 37; *Products Corp. v. Sanders*, 264 N.C. 242.

HATTIE E. BATTS, GUARDIAN, v. BRYANT SULLIVAN.

(Filed 12 October, 1921.)

1. Landlord and Tenant—Crops—Title—Possession.

The possession and title to all crops raised by a tenant or cropper in the absence of a contrary agreement, are deemed vested in the landlord until the rent and advancements have been paid.

2. Insurance—Landlord and Tenant—Crops—Insurable Interests.

The interest of the tenant in the undivided crops, and housed in the landlord's barn, is insurable.

3. Same—Insurance Taken Out by Tenant—Payment of Policy.

Where the undivided crop of the landlord and tenant has been housed in the latter's barn, and while insured by the tenant for his sole benefit has been destroyed by fire, and the insurance company has paid the loss, in the landlord's action the tenant is entitled to the full amount of the loss so paid; and the question as to the validity of the policy and the extent of the landlord's interest in the crop does not arise.

APPEAL by plaintiff from *Bond, J.*, at February Term, 1921, of LENOIR. (130)

Civil action brought by plaintiff, the landlord, against defendant, tenant upon her farm, to recover for certain advancements made during the year 1919.

The single point presented on this appeal grows out of a dispute as to what disposition, or division, if any, should be made between

the landlord and tenant of the proceeds of a fire insurance policy taken out by the tenant to protect his interest in the tobacco crop while stored in the plaintiff's pack-house. The tobacco in question had been raised by the defendant as tenant on the lands of the plaintiff. It had been harvested, cured and stored in her barn, but there had been no division of the crop. The landlord was entitled to one-third of said tobacco and the tenant the remaining two-thirds.

The defendant, without the knowledge or consent of the plaintiff, and at his own expense, purchased a policy of fire insurance to protect his interest in said tobacco. While this policy was in force the plaintiff's pack-house and its contents, including the undivided tobacco, was destroyed by fire. The defendant collected the insurance. The check was made payable to both parties, and plaintiff alleges that by agreement the money was to be divided according to their respective interests in the property, but the jury have found otherwise, and the alleged agreement is not a material or controlling point in the case.

The plaintiff contends that she is entitled to one-third of the insurance money because she owned an undivided one-third interest in the property destroyed. His Honor held that as the insurance contract was purchased to protect the interest of the tenant, he alone was entitled to the proceeds derived therefrom, and so charged the jury. Plaintiff excepted and assigns this as error.

From a verdict and judgment in favor of defendant the plaintiff appealed.

Rouse & Rouse for plaintiff.
Shaw & Jones for defendant.

STACY, J. It will be observed at the outset that the controversy here presented is between the landlord and the tenant, and the validity of the insurance policy is in nowise involved. This has been paid and the insurance company is not a party to the proceeding.

(131) The case arises out of a contest over the question as to whether the landlord, by virtue of her legal title and interest in the tobacco, is entitled to any portion of the insurance money.

It is true that under our statute, C.S. 2355, the possession and title to all crops, raised by a tenant or cropper, in the absence of a contrary agreement, are deemed to be vested in the landlord until the rent and advancements have been paid. *S. v. Austin,* 123 N.C. 749; *Boone v. Darden,* 109 N.C. 74; *Smith v. Tindall,* 107 N.C. 88. But this perforce does not divest the tenant of an insurable interest in the crops before division. "It is well settled that any person has

an insurable interest in property by the existence of which he will gain an advantage, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of, the property itself." *Harrison v. Fostlage,* 161 U.S. 57; *Eastern R. Co. v. Relief F. Ins. Co.,* 98 Mass. 423.

"It may be stated as a general proposition, sustained by all the authorities, that whenever a person will suffer a loss by a destruction of the property, he has an insurable interest therein." *Gilman v. Dwelling House Ins. Co.,* 81 Me. 488; *Getchell v. Mercantile, etc., Ins. Co.,* 109 Me. 274; 42 L.R.A. (N.S.), 135. And to the same effect are our own decisions, *Gerringer v. N. C. Home Ins. Co.,* 133 N.C. 407; *Grabbs v. Mut. Fire Ins. Assn.,* 125 N.C. 389, and cases there cited.

It is also a well recognized principle, and uniformly upheld by the decisions, that the different interests in the same property, such as that held by a mortgagor or lienor on the one hand, and that of a mortgagee or lienee on the other, and such kindred relations, are each separately insurable.

"Wherever property, either by force of law or by the contract of the parties, is so charged, pledged, or hypothecated that it stands as a security for the payment of a debt, or the performance of a legal duty, each of the parties (the owner of the lien, and the person against whose property it exists) has an insurable interest in the property. The one, that the security shall remain sufficient; the other, that it may be kept unimpaired and the property restored to his use or enjoyment in whole or in part, after the incumbrance is relieved. And each may insure his separate interest at one and the same time without incurring the imputation of double insurance, provided the applications and policies are the individual and separate acts of each." *Commercial Fire Ins. Co. v. Capital City Ins. Co.,* 81 Ala. 320; May on Insurance, secs. 80 to 87, inclusive; Flanders on Fire Insurance, 342 *et seq.; Insurance Co. v. Stinson,* 103 U.S. 25; *Niagara Ins. Co.,* 60 N.Y. 619; *Cumberland Bone Co. v. Andes Ins. Co.,* 64 Me. 466; *Franklin Fire Ins. Co. v. Coates,* 14 Md. 285, and *Humboldt Fire Ins. Co.,* 12 Iowa 287. In the last case it was said, "Any interest is insurable, if the peril against which insurance is made would bring upon the insured, by (132) its immediate and direct effect a pecuniary loss."

In *Insurance Co. v. Reid,* 171 N.C. 513, a case involving the rights of mortgagor and mortgagee, this doctrine is clearly stated as follows:

"It is well recognized that a mortgagee and mortgagor may each insure the mortgaged property for his own benefit, and where a mortgagee has taken out such insurance at his own expense, without

stipulations in favor of the mortgagor or conditions of any kind imposing an obligation or duty on the mortgagee to protect the property for the mortgagor's benefit, such mortgagee, in case of loss of the property by fire or damage thereto, is not accountable to the mortgagor for the amount collected from the insurance company, either on the debt or otherwise." *Leyden v. Lawrence,* 79 N.J.L. 113; *Ins. Co. v. Woodbury,* 45 Me. 447; *Fire Ins. Co. v. Bond,* 48 Neb. N.Y. 343; 1 Jones on Mortgages (4 ed.), sec. 420. In *Ins. Co. v. Woodbury* the principles referred to are stated as follows:

"a. If a mortgagee insures his own interest without any agreement between him and the mortgagor, and a loss accrues, the mortgagor is not entitled to any part of the sum paid on such a loss to be applied to the discharge or reduction of his mortgage debt.

"b. When the mortgagee effects insurance at the request and cost and for the benefit of the mortgagor as well as his own, the mortgagor has the right in case of loss to have the money applied in discharge of his indebtedness."

Applying these principles, we think his Honor's charge to the jury with respect to the insurance money was correct in the light of the facts appearing on the record.

Of course, if the insurance policy had been procured for the mutual or joint benefit of the landlord and the tenant, a different question would be presented, but this is not our case. *King v. State Mutual Fire Ins. Co.,* 54 Am. Dec. 683, and note.

After a careful examination of the defendant's exceptions, we have been unable to find any error committed on the trial, and this will be certified to the Superior Court.

No error.

Cited: Trust Co. v. Doughton, 187 N.C. 274; *Bank v. Assurance Co.,* 188 N.C. 751; *Bank v. Bank,* 197 N.C. 71; *Houck v. Ins. Co.,* 198 N.C. 305; *Rigsbee v. Brogden,* 209 N.C. 514; *Stockton v. Maney,* 212 N.C. 233; *Bryan v. Ins. Co.,* 213 N.C. 396; *People v. Ins. Co.,* 247 N.C. 306; *King v. Ins. Co.,* 258 N.C. 435; *Ins. Co. v. Assurance Co.,* 259 N.C. 487.

(133)

J. F. FAISON ET AL., v. S. T. MARSHBURN.

(Filed 12 October, 1921.)

Vendor and Purchaser — Sales — Principal and Agent — Commissions — Parties—Pleadings—Demurrer—Evidence—Nonsuit—Trials.

An agent for the sale of land upon commission had the land platted into lots and sold to the highest bidders at public outcry, and brings his action against the highest bidder on two of these lots, to recover his commissions, who refused to take the lots in accordance with the terms of sale and a memorandum made at the time. Upon the allegations of the complaint: *Held*, on demurrer, a good cause of action had not been stated, no sale having been consummated, and there being evidence on the trial that the owner himself was not insisting on bidder taking the lots, a judgment as of nonsuit was properly rendered.

APPEAL by plaintiff from *Bond, J.*, at March Term, 1921, of DUPLIN.

Civil action to recover broker's commissions upon an alleged sale of real estate. The complaint is as follows:

"The plaintiffs, complaining of the defendant, come and allege:

"1. That heretofore, prior to 29 October, 1919, the plaintiffs caused a certain tract of land belonging to the plaintiff, J. F. Faison, and lying in Warsaw Township, Duplin County, North Carolina, to be surveyed and platted into various lots and parcels of land; and thereafter, on 29 October, 1919, after due advertisement, said lands were offered for sale, on the premises, to the highest bidder, upon the terms of one-fourth cash, and the balance to be paid in one, two and three years from date, said deferred payments to be represented by purchase money notes, and secured by mortgage deed upon the lands so purchased.

"That a plat of said lands is hereto attached, marked Exhibit 'A' and made a part of this article.

"2. That on the date aforesaid, to wit, 29 October, 1919, said lands were duly sold upon the premises, at which time and place the defendant, S. T. Marshburn, purchased lot No. 1, and lot No. 2, according to said plat, containing 41.33 and 41.73 acres, respectively, at an agreed price of $142.50 per acre.

"3. That at the time of said sale it was publicly announced by the auctioneer that the terms of sale were as heretofore alleged, and that said sale was made according to the plat hereto attached and above referred to.

"4. That at the time of said purchase the defendant executed a written contract in words and figures as follows:

"This is to certify that I have this day bought through the Fort Realty Company, of Raleigh, N. C., lot No. 1 and No. 2, 83.06a, as

shown by the map of J. F. Faison, at $142.50, for which I
(134) promise to pay for on the terms announced at sale.

"Witness my hand and seal this 29 October, 1919.

"(Signed) S. T. MARSHBURN. [SEAL.]

"5. That the plaintiffs have offered to execute and deliver to the defendant a good and sufficient deed for said lots, and have demanded of him the payment of one-fourth part of the purchase price, and requested him to execute and deliver to them his promissory notes, secured by a mortgage deed, in accordance with his said contract; and the defendant has failed and refused, and still fails and refuses to pay to the plaintiffs any part of said money, except the sum of $50, which was paid on the day of sale.

"6. That the total purchase price of said lands, as agreed upon, amounted to $11,836.05, of which sum $50 has been paid.

"7. That under the terms of agreement, between the plaintiff, J. F. Faison, and the plaintiff, J. J. Matthis, the said J. F. Faison was to receive one hundred and twenty-five dollars ($125) per acre from said sale, and the balance was to belong to the plaintiff, J. J. Matthis; that after deducting the $50 hereinbefore referred to, the balance due and owing to the plaintiff, J. J. Matthis, on account of said contract, is $1,403.05, which amount is now justly due and owing to him by the defendant.

"Wherefore the plaintiff, J. J. Mathis, demands judgment against the defendant for the sum of $1,403.05, together with the costs of this action to be taxed by the clerk."

J. F. Faison, the owner of the land, testified as follows: "I have never signed a deed because I never got the cash payment. I have never tendered the defendant Marshburn a deed to the lands in controversy. I am not bringing any suit against the defendant Marshburn nor asking for any relief against the defendant, and the option that I gave Matthis is now out. I think Matthis made a profit on the other land sold that day." At the close of plaintiff's evidence and upon motion of counsel for defendant his Honor entered judgment as of nonsuit. Plaintiff, J. J. Matthis, excepted and appealed.

Faison & Robinson, Grady & Graham, Fowler & Crumpler, and Stevens, Beasley & Stevens for plaintiffs.

H. D. Williams, D. L. Carlton, and R. D. Johnson for defendant.

STACY, J. We fully concur with his Honor below that, upon the evidence J. J. Matthis is not entitled to recover of the defendant Marshburn, and further, that the complaint fails to allege facts sufficient to constitute a valid cause of action.

It will be observed that J. F. Faison, the owner of the land, is not insisting or demanding that the defendant comply with his bid. No deed has been tendered, and he expressly states that he is not asking for any relief in this action. The broker is seeking to recover his commissions out of the prospective purchaser without any sale having been consummated. His agreement was with Faison, the owner of the land, not with the defendant. The case in many respects is not unlike *Aycock v. Bogue, ante,* 105, except there the broker sued the owner and here he has brought suit against the bidder, who never became a purchaser. (135)

Upon the record, and as now presented, we are of opinion that the judgment of nonsuit must be sustained.

Affirmed.

J. R. WILLIAMS ET AL., TAXPAYERS, V. COUNTY COMMISSIONERS OF FRANKLIN.

(Filed 12 October, 1921.)

1. Taxation—Counties—Equalization—Statutes — County Commissioners —Officers—Functus Officio.

Our statute, Laws 1921, ch. 38, provides for the revaluation of property for purposes of taxation by the commissioners of a county, that their action be certified to and approved by the State Tax Commission, etc., and specifies, in the various sections, the dates "not later than which" these things shall be done: *Held*, the dates so fixed are mandatory and not directory, and the county commissioners are *functus officio* thereafter.

2. Same—Elective Procedure.

After the board of county commissioners have met within the time prescribed by statute, and have elected, upon investigation, to make a horizontal cut in equalizing the value of property, and have certified the same to the State Tax Commission, which has been approved, etc., ch. 38, Laws 1921, secs. 28(a) and (b), they may not in lieu of these sections proceed under sec. 28(c), to increase the tax value of some of the towns and townships, the remedy being elective at their former meeting, and it being required by this section that the work shall be completed "not later than" 1 July, and reported "not later than 15 July" to the State Tax Commission, their attempt to do so in August was *functus officio*, and their act will be restrained.

APPEAL by defendants from an order of *Bond, J.*, 22 August, 1921, continuing restraining order to the hearing, from FRANKLIN.

This is an action by J. R. Williams and others, taxpayers of Franklin County, to restrain the county commissioners of Franklin

from revaluation and raising the levy of taxes after the date prescribed by law. The restraining order was granted by
(136) Devin, J., 2 August, 1921. The motion to dissolve the restraining order was heard by Bond, J., in Raleigh on 22 August, 1921. The motion was refused and the restraining order was continued to the final hearing. Appeal by defendants.

W. M. Pearson for plaintiffs.
W. H. Yarborough and Ben T. Holden for defendants.

CLARK, C.J. The defendant board of commissioners of Franklin County, in accordance with the provisions of Laws 1921, ch. 38, met on Tuesday after the first Monday in April, 1921, and after inquiry and investigation as to the value of the real estate in said county, recommended the value be reduced by a horizontal reduction of 40 per cent, applicable to the whole county. Their recommendation was certified to the State Tax Commission under section 28(a) and approved by the State Tax Commissioner 15 June, 1921; was the same day certified to the defendant board of county commissioners. Thereafter on the second Monday in July, 1921, the defendant county commissioners met as a board of equalization for the purpose of hearing complaints and equalizing values in the various localities. There being a number of complaints the commissioners, in order to ascertain more fully the values in the different localities, passed a resolution to inspect such parcels of real estate in company with the various taxlisters or other freeholders residing in their respective townships, and after making such investigations the commissioners on 26 July issued 904 notices to taxpayers in two townships in which they had made an increase of approximately a million and a half dollars in valuation to another township in which they had made an increase of $10,000, and to taxpayers in the three towns of Youngsville, Franklinton and Louisburg, in which there had also been increases in taxation, to show cause against the increase on 2 August; but no notices were sent out to any taxpayers in any other townships. There are ten townships in Franklin County. Why this discrimination does not appear.

The ground upon which Devin, J., granted the restraining order and Bond, J., refused to dissolve the same and continued the restraining order to the final hearing, and upon which this Court is asked to affirm rests chiefly, if not entirely upon the proposition that the county commissioners acted without authority in attempting to revalue the property in the parts of the county above designated at a time when they were *functus officio*.

Laws 1921, ch. 38, sec. 28(a), authorizes the board of county

commissioners on Tuesday after the first Monday in April, 1921, acting as a board of review, to make a horizontal reduction throughout the county if, in their judgment, they find that the assessed value is in excess of the actual value. At such (137) meeting the board of commissioners made a horizontal cut of 40 per cent as above stated, which was certified to the State Tax Commission "not later than 20 April, 1921," and the State Tax Commission approved said horizontal reduction, and certified their approval to the county commissioners "not later than 15 June," as the statute provided. This section further provides that this horizontal reduction "shall be the values at which the property *shall be assessed for taxation,* unless and until the same have been changed and revised by the State Tax Commission, and certified to the board of county commissioners of such county, which shall be done *not later* than 1 July, 1921." This was certified as above stated on 15 June.

Section 28(b) of said chapter 38 further provides that the county commissioners shall have authority to hear specific complaints of over-valuation or under-valuation of any particular tracts of land if the complaint is made and the reassessment and reappraisement by the board was made during the month of May. This was not done during May as to any of the property affected by the revaluation as to which this injunction is served.

Said section 28(b) further provides that the county commissioners may appoint the county auditor or any resident freeholder of the county to investigate and report upon all such specific complaints and provides, "The county board of commissioners shall thereupon approve or revise such recommendations, and shall *not later than 15 July, 1921,* make report to the State Tax Commission of the increases and reductions in the valuation of specific properties made under authority of this section.

Said chapter 38, sec. 28(c) provides that if the board of commissioners at their regular meeting on first Monday in April, 1921, "shall be of the opinion that the valuation of real estate in such counties is so unequal as between the owners of real property in such county as to require more general revision of assessments than is practicable to be made under provisions of subsection (a) and (b) of this section" — that is, by horizontal reduction as was made, and by specific complaint which should have been filed in May — "or the value of real property, as heretofore appraised in such county as a whole is in excess of the present actual value of such property, it may by resolution so find and order that such revision be made. In the event that such order is made, it shall be *in lieu of the remedies provided in subsection (a) and (b) of this section,* and

the board of county commissioners shall appoint a board of review composed of three resident freeholders . . . who have general knowledge of the value of real estate in such county, and such board of review may appoint such number of assistants as in their judgment is necessary to complete such revision, not later than 1 July, 1921." Then follows the manner in which they should ex-
(138) ecute their duties, which as above provided should be completed "not later than 1 July, 1921." This section further provides: "A complete abstract of such revised assessment by townships, giving average value per acre, and value of town lots and the value as a whole shall be made to the board of county commissioners of such county, and to the State Tax Commission, "*not later* than 15 July, 1921," and shall be subject to the authority of the State Tax Commission, as the State Board of Equalization, so as to preserve a proper equalized value of real property in the several counties."

Section 28(d) provides that "the report of the board of county commissioners made pursuant to section 28(b) and the abstracts as reported by the board of review, under section 28(c) shall be the basis for the assessment of taxes, unless and until the same are changed by the tax commission on or before 1 September, 1921, and the said State Tax Commission shall, on or before 1 September, 1921, certify down to the board of county commissioners of the several counties its findings and conclusions upon said report and abstracts."

It will be seen by perusal of the above provisions of the statute that section 28(a) authorized the county commissioners on the first Tuesday after the first Monday in April to make a horizontal reduction of the valuation throughout the county and report the same to the State Tax Commission *not later* than 20 April, 1921, and that said commission shall act upon said report, and that said values shall be the values assessed for taxation unless changed by the State Tax Commission, who shall certify down their action *not later* than 1 July, 1921. The action of the county commissioners in making a 40 per cent reduction was approved and certified to defendants 15 June.

Then section 28(b) provides that during May specific complaints may be made as to the valuation of any particular tract of real estate, after the general equalization order provided for in the preceding section shall have been made, and the board during the month of May may act upon such complaints and shall report any modifications thereby made in the general order, and shall report such modifications "*not later* than 15 July" to the tax commission.

That not having been done, the attempt of the board on 2 Au-

gust, 1921, to make increases of over one and a half million dollars in the valuation for taxation of the property of 904 taxpayers in three townships and three towns was without authority of law, and the restraining order was properly granted by Devin, J., and the refusal to dissolve the same by Bond, J., must be affirmed.

The defendants, however, contend that they acted under section 28(c), which authorized the county commissioners when they "shall be of opinion that the valuation of real estate in such county is so unequal as between the owners of real estate (139) in such county as to require a more general revision of assessments than is practicable to be made under the provisions of subsections (a) and (b) of this section" — that is, by a general horizontal reduction and by specific complaints — they "may by resolution so find and order that such revision be made. In the event such order is made, it shall be *in lieu* of the remedies provided in subsections (a) and (b) of this section." It is therefore an alternative remedy which the commissioners might have elected to adopt at their meeting on Tuesday after the first Monday in April. But having adopted the other system of "horizontal reduction and specific complaints" they could not in July proceed to act under subsection (c). Even if they could do so, it would be necessary for them to set aside their horizontal reduction of 40 per cent as to the entire county, though it had been approved by the State Tax Commission, and then proceed under subsection (c) in lieu thereof.

There is this further insuperable objection that if subsection (c) had been chosen as the *alternative* to the "horizontal reduction and specific complaints," the Legislature provided that proceedings thereunder should be completed "not later than 1 July, 1921," and that the county commissioners should make their report of such revision under subsection (c) to the Tax Commission "not later than 15 July, 1921," and that body should certify down their action on or before 1 September, 1921.

On Tuesday after the first Monday in April the board of commissioners had their election to proceed by a general horizontal reduction and specific complaints, which they did, and which has been approved by the State Tax Commission.

Or, they might have chosen then to have proceeded under subsection (c), under which the work could be completed "not later than 1 July," and reported "not later than 15 July" to the Tax Commission, which was practicable.

They chose the first method. When becoming dissatisfied with that, they attempted in August to proceed under subsection (c), they had no authority to set aside the horizontal reduction which had received the approval of the State Tax Commission, for they

were *functus officio,* and it was too late, because the statute was specific that the revision should be complete "not later than 1 July," and reported to the State Tax Commission "not later than 15 July."

There are some circumstances under which a requirement that a certain act shall be done on a date named may be treated as directory, but that is not possible when the statute conferring a power provides that it shall be performed "not later than" the time specified.

The order appealed from is

Affirmed.

Cited: *Spiers v. Davenport,* 263 N.C. 59.

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(140)

DRAINAGE COMMISSIONERS OF MATTAMUSKEET DISTRICT, IN HYDE COUNTY, v. THOMAS D. DAVIS, SHERIFF.

(Filed 5 October, 1921.)

1. Drainage Districts—Maintenance—Assessments—Sheriff's Commissions —Statutes.

Under the provisions of the statute creating the Mattamuskeet Drainage District, ch. 442, Laws 1909 (C.S. 5350), the control thereof, after its completion, is continued in the board of drainage commissioners for the purpose of its maintenance, and authority is given it to levy assessments therefor on the lands benefited in the same manner and in the same proportion as the "original assessments" were made, and collected by the same officers as those by whom the State and county taxes are collected: *Held,* the term "original assessments" refers to those made for construction work or bonds issued therefor, and the assessments for maintenance should be collected by the sheriff of the county for the purpose of maintenance, as taxes for general county purposes are to be collected by him.

2. Same—Compensation Implied.

The policy of our State is to give just compensation for services rendered by its agencies, and while it is within the power of the Legislature to impose further duties upon its sheriffs or tax collectors without increased compensation, in this case the right to commissions upon the collection of assessments for the maintenance of a drainage district, where there is no express provision to this effect, is implied from the language of the statute when construed as a whole.

3. Same—Taxation.

By ch. 67, Laws 1911, certain sections of the general drainage act of ch. 442, Laws 1909, were repealed, and certain other sections substituted, leaving in force section 29 of the latter act, providing for the continuance

of a drainage district established thereunder, under a board of commissioners, for maintenance, with authority to levy assessments for that purpose to be collected by the sheriff or tax collector of the county: *Held*, Rev. 5245 (now C.S. 5245), under the title of sheriffs and tax collectors, allowing them a commission of 5 per cent on "assessments collected," refers only to taxes collected for general governmental purposes, and not to assessments in drainage districts imposed for the special benefits to the lands therein, and commissions on assessments for maintenance are limited to 2 per cent by Laws 1909; and this construction is not affected by the repeal of sec. 36, Laws 1909, by ch. 152, sec. 2, Laws 1917.

4. Same—Government—Political Subdivisions.

A drainage district is not a political division of the State, and assessments to be levied for their maintenance differs from a tax to be levied and collected for State, county, township, and school districts, "and other purposes whatsoever," such other purposes being construed as meaning taxes collected for purposes of general government, and do extend to drainage assessments. Rev. 5245 (C.S. 8042).

5. Drainage Districts—Government—Taxation—Assessments.

Assessments made for the maintenance of a drainage district, incorporated under the provisions of the statute, are not "taxes," though they may be so incorrectly denominated therein: being only assessments made for the special benefits to the land within the district and not imposed for the purpose of general revenue.

6. Statutes—Interpretation—Courts—Legislature—General Assembly.

The bringing forward of sec. 13, ch. 67, Laws 1911, in C.S. 5369, providing that 2 per cent shall be allowed sheriffs "for collecting the drainage assessments as hereinbefore prescribed," is a legislative construction of section 13 of the prior law, and was intended to restrict the compensation of the sheriff to 2 per cent of the amount of the assessments in drainage districts collected by him, and not to allow him a commission of 5 per cent as in case of taxes collected for general governmental purposes.

7. Same.

While the interpretation of a statute is a judicial function, a legislative construction may be considered by the courts, though it is not binding on this.

8. Same.

Where an act applies indiscriminately the terms "tax" and "assessment" to the assessment imposed for maintenance of a drainage district for the special benefit of the lands therein, the Court will construe the word "tax" as "assessment," the word "tax" having evidently been used inadvertently.

9. Statutes—Interpretation—In Pari Materia—Drainage Districts—Sheriff's Commissions.

The relevant sections of the various statutes upon the subject of the collection of assessments on lands in drainage districts by sheriffs and tax collectors, and their compensation therefor, being *in pari materia*, should be construed together by the courts in ascertaining the legislative intent.

COMRS. *v.* DAVIS.

APPEAL from *Bond, J.*, at chambers, July 2, 1921, from
(141) HYDE.

This is a controversy between the Board of Drainage Commissioners of Mattamuskeet District in Hyde County, and Thos. D. Davis, sheriff of said county, submitted without action upon agreed facts. It is admitted that plaintiff is a duly constituted drainage corporation and that defendant was sheriff of Hyde County during the years 1917, 1918, and 1919, and charged with the duty of collecting assessments for construction and maintenance of the drainage system levied in said drainage district. No controversy exists as to compensation for collecting assessments levied for payment of bonds issued for *construction* work, but it arises only with respect to commissions on the assessments levied annually for *maintenance.*

By chapter 509, Laws 1909, the State Board of Education, by virtue of its ownership of Mattamuskeet Lake and other lands near it, was authorized to join in the petition to establish the
(142) drainage district, the corporate name of which was "Board of Drainage Commissioners of Mattamuskeet Lake" (sec. 3). The Board of Education did join in the petition (*Carter v. Comrs.*, 156 N.C. 183), and subsequently sold to the Southern Land Reclamation Co. (*Carter v. Comrs., supra; Caravan v. Comrs.*, 161 N.C. 100; *Gibbs v. Comrs.*, 175 N.C. 5; *Mann v. Mann*, 176 N.C. 353.)

The drainage district has issued bonds and levied assessments to maintain the district. No question is presented as to the legality of the bond issues or the maintenance assessments. The defendant being the sheriff and tax collector of Hyde County, whose compensation is not fixed by salary, collected all these assessments for the years 1917, 1918, and 1919; gave bond for their collection; has paid the same to the treasurer of the county; his accounts have been audited; and for his services and responsibility he retained, and his act in this respect was approved by the court below, the commissions fixed by law, as he contends. It is admitted in paragraph 3 of the facts agreed that the defendant, as sheriff, collected the maintenance assessments and accounted for the same, less his commissions. It is to recover these retained commissions that this action is brought. The contention of the plaintiff is that "no provision is specifically made for any compensation or commission to the sheriff for the collection of maintenance assessments, and that defendant is not entitled to any commission on this maintenance fund." The power to make the assessments is not denied, the obligation resting upon the sheriff to collect is not denied; nor is it denied that the sheriff's failure to collect would subject him to liability. The specific and

only question involved here and for the Court's consideration is: Was the sheriff of Hyde County entitled to receive commissions on collections of assessments levied exclusively for maintenance purposes by the commissioners of said drainage district for the years 1917, 1918, and 1919, and if any, then what commissions? The sheriff has collected and paid to the treasurer of the county these maintenance assessments, less his commission. The plaintiffs insist that the sheriff is obliged to make these collections without compensation and is suing to recover the commissions unlawfully retained by the sheriff.

The plaintiff board of commissioners contends that he was not entitled to such commissions. The defendant sheriff contends that he was entitled to 5 per cent commissions. The court below held with defendant and gave judgment accordingly. Plaintiffs excepted and appealed.

Spencer & Spencer, Small, MacLean, Bragaw & Rodman for plaintiffs.

Mann & Mann, and Manning, Bickett & Ferguson for defendants.

WALKER, J., after stating the material facts: The Mattamuskeet Drainage District was created and organ- (143) ized under chapter 442, Laws of 1909. The provisions of chapter 509, Laws of 1909, are not material here. After the completion of the improvement, it came under control of the board of drainage commissioners, upon whom was expressly imposed the duty to keep it in good repair, for which purpose the commissioners were authorized to "levy an assessment on the lands benefited in the same manner and in the same proportion as the original assessments were made." **Laws of 1909, ch. 442,** sec. 29; C.S. 5350.

It will be noted that in the General Drainage Act of 1909, ch. 442, the **first section which** authorizes an assessment to provide funds for any work in the district is section 29, giving the power to levy assessments for maintenance, "in the same manner and in the same proportion as the original assessments were made." It is clear that the expression "original assessments" refers to those made for construction work, or to pay bonds issued for construction work, as provided for in sections 31, 32, 34 of ch. 442, Act 1909. These sections provide for collection of assessments for construction work "by the **same officers as those by** whom the State and county taxes are collected." Laws of 1909, ch. 442, sec. 34. The legislative Act of 1909 is silent on the subject of compensation to the sheriff or tax collector charged with the duty of collecting these assessments.

That the Legislature could impose the duty to collect this fund upon the sheriffs and tax collectors without permitting them to charge a commission thereon, seems to have been settled. *Comrs. v. Stedman,* 141 N.C. 448; *Fortune v. Comrs.,* 140 N.C. 322. It is evident that in the legislative mind was the purpose and intent that this beneficient law designed to reclaim vast areas of naturally fertile lands for the uses of mankind, and to promote the health of the people, should be economically administered, and that the amount to be raised by assessments should be available for the public benefit planned and contemplated, without diminution by incidental expenses in payment of commissions to existing or future officeholders, for whom already was provided compensation sufficient to allure. The law being written as recited, sheriffs and tax collectors were without express authority to have deducted any commissions from these assessments, but in the act can be found clearly implied authority to this effect. The Legislature of 1911 amended the General Drainage Act of 1909. Laws 1911, ch. 67. The Act of 1911 does not change section 29 of chapter 442, Act of 1909, but does strike out sections 31, 32, 33, and 34 of the Act of 1909, and insert new sections in lieu thereof. Acts 1911, ch. 67, secs. 8, 9, 10, 11, and 12. These new sections provide for the collection of assessments for construction, or the payment of principal and interest on construction bonds issued, and direct that these assessments "shall
(144) be collected by the same officer and in the same manner as State and county taxes are collected." Acts 1911, ch. 67, secs. 8 and 11.

Next in order comes section 13 of the Act of 1911 for the first time making express provision for any commission or fee, as follows: "Sec. 13. That the fee allowed the sheriff or other county tax collector for collecting the drainage tax as prescribed in section thirty-four of chapter four hundred and forty-two of the Public Laws of one thousand nine hundred and nine shall be two per cent of the amount collected, and the fee allowed the county treasurer for disbursing the revenue obtained from the sale of the drainage bonds shall be one per cent of the amount disbursed: *Provided,* no fee shall be allowed the sheriff or other county tax collector or county treasurer for collecting or receiving the revenue obtained from the sale of the bonds provided for in section thirty-four of chapter four hundred and forty-two of the Public Laws of one thousand nine hundred and nine, nor for disbursing the revenue raised for paying off the said bonds: *Provided, further,* that in those counties where the sheriff or tax collector and treasurer are on a salary basis, no fees whatever shall be allowed for collecting or disbursing the funds of the drainage district."

The plaintiffs contend, and we think properly so, that the enactment of the law of 1911 (sec. 13, ch. 67) leads to the conclusion that it was the legislative intent that no longer, if before it had been relied on, should there be any warrant for the contention that the provisions of section 5245 of the Revisal of 1905 (now sec. 8042 of Consolidated Statutes) applied to drainage assessments, entitling sheriffs or tax collectors to 5 per cent commissions on assessments collected, but that the compensation to be paid for collection and disbursement should be limited to that prescribed in the Act of 1911, to wit: That for collecting the larger assessments required for construction work, the sheriff should receive two (2) per cent of the amount collected, and that for disbursing the proceeds of a bond sale the treasurer should receive a commission of one (1) per cent. But we consider the inference as clear, that it was the legislative intent that for collecting the small annual assessments for maintenance there should be commissions allowed, though not as much as five (5) per cent. But more of this hereafter. The judgment rendered decrees that defendant Davis, as tax collector for Hyde County, is entitled "out of the funds collected by him (from assessments) for maintenance of the said drainage district, the same compensation provided by law for collection of 'state, township, school districts or other purposes whatsoever,'" making express reference to section 5345, Revisal of 1905. Upon what theory can this judgment be wholly sustained?

Section 5245 of the Revisal (now sec. 8042 of Consoli- (145)
dated Statutes) was a part of the chapter of the Revisal of 1905 dealing with taxes. This provision is brought forward in Consolidated Statutes of North Carolina under chapter entitled "Taxation." The language of section 5245 of the Revisal of 1905 referred to in the judgment is "That the sheriffs and tax collectors shall receive 5 per cent on all taxes, licenses and privileges collected by them for State, county, township, school district, or other purposes whatsoever," as already stated. Prior to 1905 the commissions allowed to sheriffs for collecting county taxes were fixed at the same per cent as for the collection of public taxes payable to the Treasurer of the State. Code of 1885, sec. 723. The commissions deductible in settlement of State taxes were 5 per cent on the amount collected. Acts 1903, ch. 251, sec. 92. In 1904 a controversy arose in Iredell County as to whether the sheriff was entitled to commissions on the school tax collected. Board of Commissioners, 137 N.C. 63.

The Legislature of 1905 thereafter wrote into the law the language, "That the sheriffs and tax collectors shall receive 5 per cent on all taxes, licenses and privileges collected by them for State,

county, township, school district, or other purposes whatsoever." Acts 1905, ch. 590, sec. 91; Acts 1907, ch. 258, sec. 91; Revisal of 1905, sec. 5345; C.S., ch. 131, sec. 8042. But drainage districts, such as this one, are not political subdivisions of the State as is a county or township; neither are they special tax districts as are the school districts. These assessments are not "taxes, licenses or privileges," even though they be so styled by the Legislature itself. They are local assessments "and made with reference to special benefits derived from the property assessed for the expenditures, while taxes are public burdens, imposed as burdens for the purpose of general revenue." *Shuford v. Comrs.*, 86 N.C. 562; *Sanderlin v. Luken*, 152 N.C. 738; *Comrs. v. Webb*, 160 N.C. 594. By the very language and provisions of the act under which these assessments may be levied, they are subordinate, as liens, to the lien of taxes. Acts of 1911, ch. 67, sec. 12. Can it be seriously contended that by that act the Legislature of 1905 had in contemplation the collection of these assessments for maintenance of drainage canals, which were unknown in their present form in North Carolina until 1909? Only upon that theory can the inference be drawn that this general act of 1905 extends so far.

It is the rational view that we must look to the Acts of 1909 and 1911, which relate to these drainage districts, and which expressly or impliedly specify the compensation of sheriffs and treasurers, to ascertain the legislative intent. We think that they, when taken together and so construed, provide that commissions shall be deducted for collection of maintenance assessments at the rate of two per cent — not five.

(146) In this respect the case at bar differs from the case of *Board v. Comrs., supra,* in that in the latter case nowhere was any express provision for any compensation to the sheriff for collecting the school tax.

The defendant contends, and we think this is his main reliance, that the general statute allowing the sheriff commissions for collecting taxes provides in the Revisal of 1905, sec. 5245: "The sheriff and tax collectors shall receive five per cent on all taxes, licenses and privileges collected by them for State, county, township, school district, or other purposes whatsoever, up to fifty thousand dollars, and upon all such sums so collected by him in excess thereof he shall receive two and one-half per cent commissions." This provision is repeated in section 101, chapter 234, Laws of 1917, and in section 101, chapter 92, Laws of 1919 (sec. 8042 C.S.). The primary purpose of these sections was to fix the sheriff's commissions for collecting *taxes,* in the strict and technical sense of that word. *Comrs. v. Stedman,* 141 N.C. 448. Defendant contends that there is no pro-

vision of the drainage acts which forbids the application of this general provision. It will be noted that the phraseology is somewhat comprehensive — "all taxes collected for State, county, school district *or other purposes whatsoever.*" (Italics ours.) But this view drawn therefrom does not commend itself to our favorable consideration. As we have shown, these collections were not of *taxes,* but of *assessments* proper. The distinction between the two is plainly marked by the law. While in the two acts of 1909 and 1911 the words "assessments" and "taxes" are indifferently used, they both were manifestly intended to describe the same thing, namely, the sums imposed upon the lands receiving benefits from the drainage for the purpose of paying the costs and expenses thereof, and in no proper sense are they "taxes," that word having a well-defined and perfectly well-understood meaning, being levies made, not for special benefits accruing to the particular owner of land, or to the land itself, but for defraying the costs and expenses of government, being, strictly speaking, public burdens. The statute to which defendant refers, and which allows five per cent on taxes collected, is to be found only under the general title of Taxes and the Collection of Them, or under Revenue. The argument based upon these considerations is, therefore, entirely inadmissible, and we must look to the drainage acts for light upon the subject, and be governed by their provisions. Section 36 of the Act of 1909, if it had been retained, would have settled the question easily and most satisfactorily, but it was repealed by the Act of 1917, ch. 152, sec. 2, though we do not think it was intended to be repealed so far as the compensation of officers and employees of the drainage commission were concerned, but only in other respects, and that a repeal of the provision of that section, that officers and others performing service where compensation is not specially provided for, shall receive pay therefor for their work as in other like cases, was inadvertently (147) included in the repealing section of the later law. But we will treat it as wholly repealed by the Act of 1917, and even, in that view, there is plenty left to show an intent of the Legislature to make an allowance to the sheriff for the collection of assessments for maintenance, and that the same should be the percentage allowed in case of assessments for construction, under section 34 of the Act of 1909, as that is the closest analogy, the two services being clearly of a like kind, and not only that, but of the same kind, or, in other words, identical. As we have said, these assessments for maintenance, it is true, are sometimes called "drainage taxes," but this is a misnomer merely, for drainage assessments were clearly in the mind and contemplation of the Legislature, and sometimes they are so properly designated in the two acts. We cannot adopt defendant's

construction of Revisal of 1905, sec. 5345, which provides that sheriffs and tax collectors shall receive five (5) per cent on all taxes, licenses and privileges collected by them for State, county, township, school districts, *or other purposes whatsoever* (italics ours). The expression "or other purposes whatsoever" refers to taxes of a like kind, or public taxes proper, and not to these assessments. That section of the Revisal (5345) is to be found in chapter 110, entitled "Revenue," which refers to the revenue received from taxation for public purposes.

We are led to conclude that the sheriff is entitled to some commissions on the collection of drainage assessments by the consideration of the established policy of this State prevailing for many years, which is that officers and other persons rendering services to the State in any official, or even unofficial, capacity have been uniformly paid for such services, either by salary, fees or in some other form, and the State has not required that such services be rendered gratuitously, but has acted upon the just principle that not only is the laborer worthy of his hire, but that he should be paid a just compensation for his work. The sheriff is required to give bond for the collection and safe custody of funds derived from these assessments, and to make prompt settlement for the same. He performs the same work as he did in the collection of organization or construction assessments, and the statute provides (Act of 1909) that those overdue shall be collected and disbursed in the same manner, and by the same officers, as the State and county taxes. Section 29 of that act continues the control of the drainage commissioners for maintenance and repairs and authorizes the levy of an assessment for such purposes in the same manner and in the same proportion as the original assessments were made. It may be that in certain very exceptional cases the statutes do not provide specifically for compensation to an officer for particular services rendered, and too be-

(148) cause, as contended by plaintiff, his salary, if one is received, or his fees, or the pay for his other work, may have been regarded as quite sufficient compensation for the performance of all his official duties, but such cases, if they exist, are rare, and do not embody the general and uniform rule, but, as exceptions, they tend to prove it. Then again, section 13 of chapter 67, Laws of 1911, is brought forward as section 5369 of the Consolidated Statutes which provides that two per cent shall be allowed the sheriffs, "for collecting the drainage assessments as hereinbefore prescribed," and it refers not only to the assessments for construction, but to those for maintenance, and is a legislative construction of the drainage statutes as to the compensation of the sheriff. We are not bound by a legislative construction, as interpre-

tation of a statute is a judicial function and for the Court alone, but it can be called in aid by us and considered with the other facts. *Gill v. Comrs.*, 160 N.C. 176; *Abernathy v. Comrs.*, 169 N.C. 631; *Hannah v. Comrs.*, 176 N.C. 395.

This brings us to consider an important, and exceedingly relevant, passage in the plaintiff's brief, which appears to be in harmony with our view, though not a full concession of it, and which is stated alternatively therein to his first contention, and it is that the sheriff may be entitled to compensation at the rate of two per cent, though rejecting, as we do, the defendant's view, that these assessments are "taxes," which they are not in any proper sense, and entitle him to five per cent on the amount collected.

In his brief the plaintiff says substantially, and this is the passage to which we have referred, that in no event could the defendant have been entitled to a commission of more than two per cent, but if the Court should be of opinion that it was not intended by the Legislature to impose the duty of collecting these assessments for maintenance without providing compensation to the sheriffs and tax collectors, then the only reasonable theory is that the provisions of chapter 67, sec. 13, of the Laws of 1911, contemplated that but two per cent should be charged upon any drainage district fund collected, as well the maintenance assessments as the construction or bond assessments. This for the reason that the Acts of 1909 and 1911 provide that maintenance assessments shall be levied in the same manner and in the same proportion as original assessments were made, and while not so expressly provided, the inference is essential that they were to be collected by the same officers, and every provision for the collection of these original assessments requires that it be done by the sheriffs and tax collectors. This view that the two per cent only can be collected is supported by the fact that the Act of 1909, and the Act of 1911 nowhere make any distinction between the maintenance assessments and original assessments; and the theory finds further support in the fact that in bringing forward this section 13 of chapter 67, Laws 1911, the Leg- (149) islature of 1919, in Consolidated Statutes, sec. 5369, construes these fees of two per cent to sheriffs and tax collectors to be "for collecting the drainage assessments as hereinbefore prescribed," which includes the maintenance assessment for which provision is made in Consolidated Statutes, sec. 5349 preceding. We concur in this view of the plaintiff, as the alternative to plaintiff's contention in the first part of its brief, and in its arguments here, which first contention we must reject.

We believe that this is the correct solution of the question, as the sheriff's commissions, raised in the case, as that question is stated

by both of the parties (though its correctness is not admitted), and we accordingly adopt it. This view has the merit of being a fair and just one, and best accords with the intent of the Legislature in all the enactments upon the subject, when they are considered together, as they should be, being *in pari materia.*

This case was argued with *Drainage Comrs. v. Credle,* and *Same v. Brinn,* at this term, but as the latter involve different questions, they will be discussed and decided in separate opinions, being essentially different cases.

The judgment will be modified by inserting two per cent in the judgment for five per cent as provided therein, and as thus modified it is affirmed.

Plaintiff will pay two-fifths and the defendant three-fifths of the costs in this Court.

Modified and affirmed.

Cited: Hill v. Stansbury, 223 N.C. 195; *In re Application For Reassignment,* 246 N.C. 420.

SMITH-COURTNEY COMPANY v. BOARD OF ROAD COMMISSIONERS OF HERTFORD COUNTY AND J. M. ELY ET AL., CONSTITUTING THE SAID BOARD.

(Filed 5 October, 1921.)

Parties—Courts—Pleadings—Constitutional Law—Contracts.

Where a township road district has been reincorporated by statute, and included in a newly formed county road district, with a decrease in the taxes formerly allowed to be levied to such an extent as to be insufficient to meet the contract obligations already incurred by the former district to several creditors, and one of them seeks by *mandamus* to compel the collection of the taxes formerly authorized to be levied by the township district, the same to be applied to the payment of his debt alone, and not to be pro rated among them all: *Semble,* the effect of the later act was to impair the obligation of a contract, prohibited by section 10, clause 1, Article I, of the Constitution of the United States; but the case will be remanded for making all like creditors parties, so that they may be bound by the final judgment, as they are interested therein, and with such amendments to the pleadings as the trial judge may deem proper to be allowed.

CLARK, C.J., by opinion, concurring in result.

APPEAL by defendants from *Calvert, J.,* August Term,
(150) 1921, of HERTFORD.

Lloyd J. Lawrence for plaintiff.
W. D. Boone for defendants.

WALKER, J. This action was brought to compel the defendants, by a writ of *mandamus,* to levy the necessary tax to pay a debt to plaintiff of four hundred dollars, contracted and due by the former board of road supervisors of Murfreesboro Township for machinery, tools and equipment to be used, and which were used, by the board in the construction and improvement of the public roads of the said township, the board of road supervisors being authorized by statute (Public Laws of 1913, ch. 562) to contract the debt so due to the plaintiff. It is alleged in the case, and appears therefrom to be the fact, that there are claims of other parties due to them and contracted for the same purpose as was the claim of the plaintiff, the total of all the claims amounting to $11,000 or about that amount. It is further alleged that at the time of contracting the said debts the statute permitted a levy of taxes at the rate of fifty cents on $100 worth of property, and $1.50 on the poll, the original rate being thirty cents on the $100 worth of property and ninety cents on the poll, which by the Laws of 1919 was increased to fifty cents on the $100 worth of property and $1.50 on the poll, so that at the time the debt of plaintiff and those debts of the other creditors similarly situated were contracted, the limitation to the levy of taxes for the payment of the same was as above set forth, that is, fifty cents on the $100 worth of property and $1.50 on the poll. By an act passed 3 March, 1921, the Legislature abolished the township system for constructing and improving the roads of the county, and substituted the county system, thereby forming one entire unit of the county, and placing the control and supervision of the public roads in a county road commission, and fixed the tax limit for road purposes (construction and maintenance) at twenty-five cents on the $100 worth of property and seventy-five cents on the poll; and by section 26 of said act the Legislature authorized a special and additional tax not exceeding ten cents on the $100 worth of property and thirty cents on the poll in Murfreesboro Township to discharge the existing indebtedness.

The plaintiff contends that this reduction of the rate of taxation, from fifty cents on the $100 worth of property (151) and $1.50 on the poll, to twenty-five cents on the $100 worth of property and seventy-five cents on the poll, and of the special tax to ten cents on the $100 worth of property and thirty cents on the poll, impairs the obligation of the contract made with the township prior to the date of the reduction, and is, therefore, in violation of the Constitution of the United States forbidding the passage of a law by any of the States impairing the obligation of a contract (U. S. Const., Art. I, sec. 10, cl. 1); that as the later stat-

utes withdraw the means of fully enforcing the payment of the debt due to the plaintiff, it follows that the obligation to pay all of the debt, or to fully perform the contract in that respect, is impaired, at least, to that extent. While we will not enter upon a full or elaborate discussion of the constitutional question raised here, but leave it for the hearing on the merits if the case comes back to us, we may refer, at this time, to a few of the many cases decided by the Federal Supreme Court, which is the one of last resort upon this phase of the matter in controversy. It has been held by that Court that a legislature may, at any time, restrict or revoke at its pleasure any of the powers of a municipal corporation, including, among others, that of taxation, provided its action in that respect shall not operate directly upon the contracts of the corporation, so as to impair their obligation by abrogating or lessening the means of their enforcement. Legislation producing this latter result directly by operating upon those means, is prohibited by the Constitution, and must be disregarded. The prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the State, and to those of its agent acting under its authority, as well as to contracts between individuals. The courts, treating as void the legislation abrogating or restricting the power of taxation delegated to a municipality, upon the faith of which contracts were made with it, and upon the continuance of which alone they can be enforced, can proceed and by *mandamus* compel, at the instance of parties interested, the exercise of that power, as if no such legislation had ever been attempted. The Louisiana Act of March 6, 1876, was held to be invalid so far as it limited the power which the city of New Orleans possessed, when the bonds were issued upon which the judgment in that action was recovered, to levy a tax for their payment. *In re Wolff v. Mayor,* etc., of New Orleans, 13 Otto (103 U. S.), 358 (26 L. Ed. 395). Where a municipal corporation is dissolved and a new corporation is created, composed of substantially the same community, including substantially the same taxable property, within reduced territorial limits organized for the same general purposes and holding, by transfer, without consideration, the public property of the former, it is the successor of the old cor-
(152) poration and is liable for its debts. The obligations of municipal corporations, upon bonds duly issued by them, are secured by all the guarantees which protect the engagements of private individuals. Any legislative enactment which withdraws or limits the remedies for the enforcement of obligations assumed by a municipal corporation, where no substantial equivalent is provided, is forbidden by the Constitution of the United States. *Port of Mo-*

bile v. Watson, S.C. Rep. Ed. (116 U. S.), 289 (29 L. Ed. 620). Disincorporation of a municipality by legal proceedings does not void its legally subsisting contracts, but on the reincorporation of the same inhabitants, and of a territory including street improvements for which bonds were given, the obligation to pay them devolves upon the new corporation. A statute making a vote of taxpaying voters necessary to the assumption of a new municipality of a debt of its predecessor, which has been abolished, is an unconstitutional attempt to impair the obligation of the contract, if liability existed without such vote before the statute. *Shapleigh v. San Angelo,* 167 U.S. 646 (42 L. Ed. 310). *Mandamus* to compel the county authorities through whom taxes are assessed and collected to levy a tax to pay a judgment on township bonds cannot be denied on the theory that, because the Legislature of the State might, under its constitution, have vested in the township authorities the power to assess and collect taxes for corporate purposes, it could not vest such power in county officers. The exercise by a State of its right to alter or destroy its municipal corporations is ineffectual to impair the obligation of municipal contracts. County auditors and treasurers, who are the instruments employed by the State Legislature to assess and collect taxes, may be compelled by *mandamus* to levy a tax to pay a judgment on township bonds, although the corporate existence of the township has been abolished by the State Constitution, and its corporate agents removed. *Mandamus* to compel both county auditors and county treasurers to levy a tax to pay a judgment on township bonds is not a suit against the State, within the inhibition of the Federal Constitution, because such officers have been forbidden by the State Legislature to exercise any such power. *Graham v. Folsom,* 220 U.S. 248 (50 L. Ed. 464). The levy and collection of taxes by the city of New Orleans to satisfy outstanding indebtedness of the metropolitan police board, contracted on the faith of the exercise of the taxing power for its payment, do not exhaust the city's power in the premises, where the city has applied the taxes to other purposes, and has failed to turn them over, upon demand, to the board of its representative. The receiver of the metropolitan police board in the State of Louisiana, as representative of the interested creditors, is unconstitutionally deprived of the right of taxation by the city of New Orleans for the payment of their
claims, which right existed before the enactment of Louis- (153)
iana Acts 1870, No. 5, by the provisions of that act under
which the payment of the judgment recovered by such receiver against the city upon outstanding indebtedness of the board, contracted on the faith of the exercise of the city's power to levy taxes for its payment, may be indefinitely postponed until such time as

the city is ready and willing to make such payment. *State of Louisiana v. Mayor,* 215 U.S. 170 (54 L. Ed. 144).

The cases above cited will show the varying phases in which this question as to the impairment of the obligation of contracts has been presented, and will be of service in the further consideration of this case. The merger of an existing municipal corporation, owing debts, in another, or the abolishment of a municipal corporation owing debts and the legal effect upon its existing contracts, was presented and decided in *Broadfoot v. Fayetteville,* 124 N.C. 478; *U. S. v. Memphis,* 97 U.S. 284; *Mt. Pleasant v. Buckwith,* 100 U.S. 514. The debts of a municipal corporation are not extinguished by a repeal of its charter as is demonstrated by *Broadfoot's* case, *supra,* and the several cases cited therein, among which we especially refer to *Merriweather v. Garrett,* 102 U.S. 472; *O'Connor v. Memphis,* 6 Lea 730; *Wolf v. New Orleans, supra; Mobile v. Watson, supra; Amy v. Selma,* 77 Ala. 103. It was said in *Port of Mobile v. Watson, supra,* that "the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the Legislature, or if they are changed a substantial equivalent must be provided. Where the resource for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which withdraws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States, and is null and void." *Von Hoffman v. Quincy,* 4 Wallace (71 U.S.) 535; *Edwards v. Kearzey,* 96 U.S. 595; *Ralls County Court v. U. S.,* and *Louisiana v. Pilsbury,* 105 U.S. 733, 278 (26 L. Ed. 1220, 1090); *Louisiana v. Mayor,* 109 U.S. 285 (28 L. Ed. 936); *Comrs. v. Rather,* 48 Ala. 433; *Edwards v. Williamson,* 70 Ala. 145, and *Slaughter v. Mobile County,* 73 Ala. 134.

The proposition we have somewhat discussed received strong support and striking illustration in *Edwards v. Kearzey, supra,* which went to the United States Supreme Court from this Court, and in which our homestead exemptions were held to be of no avail against the full recovery of preëxisting debts, because they substantially withdrew from a creditor his right, and remedy, to have his contract with the debtor enforced, or placed an obstacle in the way of its proper enforcement, thereby impairing its obligation. It
(154) would seem, therefore, that the later statutes reducing the limit of taxation as it existed when this contract was made impaired its obligation, and, so far as they did so, were invalid, but

we will not finally and conclusively decide this question until all interested parties are before us.

We hold that this controversy cannot be finally and fully decided and settled without the presence of the other creditors for several reasons, and among them one is, that the sole plaintiff here is claiming that he is entitled to the full amount of his claim and not merely to a pro rata part of the tax to be levied, as provided by one of the statutes cited above, for the payment of all similar debts of Murfreesboro Township.

It was stated in the argument here that it would take five or six years to pay the existing debts if levies could only be made under the provisions of the last two statutes, which would amount to a stay law, and would impair the obligation of the contract. *Jacobs v. Smallwood,* 63 N.C. 113.

We would be deciding the case by piecemeal should we dispose of it without hearing from the other creditors, or taking such action and proceedings beforehand as would make the judgment binding upon them. We, therefore, remand the case to the end that the other creditors similarly concerned may come in voluntarily, or be brought in so that they may plead and be concluded by whatever judgment is finally rendered, and it will be so certified. The judge may order an amendment of the pleadings, or a repleader, as he may deem necessary, in order to protect the rights of all parties, and to afford all parties ample opportunity to be heard upon the issues involved.

We will not now consider the question concerning the poll tax and its application to special purposes, as it does not necessarily arise in this appeal. The property tax, it is conceded, has been substantially reduced from what it was when the debts due the plaintiff and others were contracted, and this is sufficient to show that the obligation in each of those contracts was impaired, as the means of enforcing them have been denied, or rather diminished, sufficiently to seriously prejudice the rights of those creditors.

Remanded with instructions.

CLARK, C.J., concurring in result: The statute sought to be enforced, ch. 347, Public-Local Laws 1921, entitled "An act to appoint road commissioners for Hertford County," under which the plaintiff asks a *mandamus* to levy this tax, specifies that its sole purpose is the construction and maintenance of the roads, and for that purpose authorizes a levy of 25 cents on the $100 worth of property, and 75 cents on the poll, and section 26 of said act further authorizes a special and additional tax, not exceeding 10 cents on the $100 worth of property and 30 cents on the (155) poll in Murfreesboro Township, to discharge the existing

indebtedness for roads in that township. The opinion recognizes the validity of this legislation upon general principles, from which I do not dissent, but it is proper to note, however, that so much of this statute which authorizes the levy of a tax on the poll "for road purposes" is invalid because in violation of an explicit provision in the State Constitution, which, as adopted in 1868, provides, Article V, section 2: "The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than 25 per cent thereof be appropriated to the latter purpose."

This provision of the Constitution remains unaltered. When there has been a levy for general purposes the validity of the poll tax has not always been brought in question, because, presumably, when collected the proceeds of the poll tax would be applied to the constitutional purposes to which it is restricted, *i. e.*, education and the poor. But this particular act is restricted to a specific purpose, therein expressed, that the tax is to be levied for the construction and maintenance of roads. So much of the act as levies a poll tax for such purposes is therefore unconstitutional and invalid. This, however, can be struck from the act without impairing the validity of the property tax. This course has been pursued in several cases.

As we have now declared a legislative policy of incurring an indebtedness of $50,000,000 for the construction and maintenance of roads, it is well to note that however laudable such purpose may be, the Legislature is forbidden by the Constitution to derive any funds for that purpose from the levy of a poll tax.

It is true that at common law, at a time when there was a monopoly of land ownership by the barons in England, there was inaugurated a system by which those who had no wheels or produce to require the use of roads were conscripted without pay to render labor to make the roads for those who had need to use them. When our Convention met in 1868, while we did not abolish the poll tax entirely, as nearly all the other States have done, we did restrict the State and county capitation tax to $2, and inserted as a further and just protection that the proceeds of the poll tax should be applied to the purposes of education and the support of the poor.

The question now presented, under the Constitution as now amended, whether if a *mandamus* issue to enforce collection of taxes under this statute, it shall embrace an order to collect a capitation tax for that purpose, has never heretofore been before this Court in any case.

(156) Under the Constitution as it stood before the amendment ratified in November, 1920, there was a requirement

that "the State and county capitation tax should never exceed $2," but there was also a provision that the "State and county capitation tax shall be equal to a tax on property, valued at $300 in cash." By reason of this requirement of an equation between the capitation tax and the property tax on $300 there were conflicting decisions whether when the tax on property exceeded that limitation the tax on the poll should also exceed it, and there were also conflicting decisions whether when there was such excess the tax on the poll could be applied for the benefit of bondholders and other purposes, or was restricted to "education and the support of the poor." In an unanimous opinion by Judge Connor, *R. R. v. Comrs.*, 148 N.C. 220, and *Perry v. Comrs., ib.*, 522 (Hoke, J.), it was held that the poll tax "could never exceed $2 on the head," and must be applied to "education and the support of the poor." And there were other cases to the same effect. On the other hand, in *Moose v. Comrs.*, 172 N.C. 419, it was held by a divided Court (Clark, C.J., and Walker, J., dissenting) that the limitation of $2 applies only where the levy is for the ordinary expenses of the State and county government, and only under such levy was the restriction to be observed that the poll tax should be applied only to "education and the support of the poor."

We also had decisions that inasmuch as the restriction to $2 on the poll, in its terms, applied only to the "State and county capitation tax," that cities and towns were under no such limitation, and instances were frequent where the total tax levied upon a laboring man who had nothing to be taxed except his head often amounted in the aggregate to $9 or $10.

These conflicting decisions have ceased to have any bearing because under the Constitution as now amended the "equation of taxation" between the poll and property has been stricken out, and the Constitution, Article V, section 1, now reads: "The General Assembly may levy a capitation tax on every male inhabitant of the State over 21 and under 50 years of age, which tax shall not exceed $2, and cities and towns may levy a capitation tax which shall not exceed $1. *No other capitation tax shall be levied.*" Section 2 of that Article of the Constitution which provides that "the proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor" remains unaltered.

It will therefore be seen that there is no equation of taxation under any construction of which the poll tax can now ever exceed $2 for State and county, or be applied to other purposes than for education and the support of the poor, nor can the cities and towns levy more than $1 as a capitation tax. The language of the Consti-

tution is now made plain, *"No other capitation tax shall be levied."*
There is no equation of taxation to authorize a judicial
(157) construction to the contrary. It is also clear from this language that no capitation tax can be levied upon women, or upon men except between 21 and 50 years of age.

It follows that the *mandamus,* if it shall issue in this case, cannot require the levy of any capitation tax for the maintenance and construction of roads. So much of the statute as provides therefor must be disregarded and stricken out. The valid portion of the statute which authorizes the levy of a property tax for that purpose is not affected by the invalid requirement of a poll tax.

In England, from which we derive so much of our legislation, a poll tax was twice levied for short periods over 500 years ago, and then it caused what was known as the "Jack Cade," and also the "Watt Tyler" rebellions. It was each time promptly repealed, and has never been collected since except for 2 or 3 years in the reign of William III., more than 200 years ago, when, again it was very promptly repealed.

The poll tax was not mentioned in the Constitution made at Halifax in 1776. In the Revised Statutes of 1835, the poll tax was 20 cents which was levied also on slaves, who were not taxed *ad valorem.* In the Revised Code of 1854 the poll tax was 40 cents, and it is current history that it was levied largely because slaves were not taxed according to their value as property.

The Constitution of 1868, in view of this steady growth of the poll tax in amount, placed a limit by providing: "The State and county capitation tax combined shall never exceed $2 on the head," and added a just provision that its proceeds should be applied to "education and the support of the poor." In Judge Connor's well considered opinion, *R. R. v. Comrs.,* 148 N.C. 220, 248, he emphasized these provisions, and adds: "This question can never arise again." It did, however, arise again, and a contrary view was taken by a majority of the Court in *Moose v. Comrs., supra.* The question is now settled, as already stated, by the amendment which, striking out the equation of taxation, restricts the amount of the capitation tax absolutely, and adds: "No other capitation tax shall be levied."

In *R. R. v. Comrs.,* 148 N.C. 253, it is said that our poll tax "is criticized by Hollander on State Taxation, 104, who points out that in this State 60 per cent of the taxes are paid by persons owning less than $500, with the result that the small taxpayer, if he pay the poll tax also, pays nearly double the rate of the larger taxpayers."

It was doubtless considerations such as these that procured the adoption of the amendment by which the equation of taxation was stricken out, and the total capitation tax, including that by municipalities, was restricted to $3 total, with unequivocal declaration that "no other capitation tax shall be levied" and retaining, unaltered at the same time, in the Constitution the (158) provision that "the poll tax shall be applied to education and the support of the poor."

It is not without significance that simultaneously with the adoption of the policy of appropriating $50,000,000 for roads there should be this constitutional protection extended to the "man with the hoe" — sometimes called "the forgotten man," for the same Legislature (1921) took notice of the constitutional provision authorizing the exemption of personal property "to a value not exceeding $300," and by ch. 38, sec. 72, p. 270 (6), enacted the exemption of that amount for the first time, though the authority had been in the Constitution for more than 50 years.

We must take notice of the evident intent of the Constitutional amendment and of the Legislature that no part of the appropriation for roads or any other purpose than "education and the support of the poor," shall be raised out of a capitation tax, which, besides, is absolutely limited in amount — even for education and the support of the poor — if levied by the State and county, to $2, and to a levy of $1 by municipalities.

Cited: Perry v. Comrs., 183 N.C. 394; *Coble v. Comrs.*, 184 N.C. 355; *Bd. of Ed. v. Bray*, 184 N.C. 487; *Duffy v. Greensboro*, 186 N.C. 472; *Whitley v. Washington*, 193 N.C. 243; *Pressley v. Asheville*, 199 N.C. 520; *Dixon v. Comrs. of Pitt*, 200 N.C. 219; *University v. High Point*, 203 N.C. 565; *Hood, Comr. v. Realty Inc.*, 211 N.C. 50; *Bank v. Bryson City*, 213 N.C. 167.

W. D. KELLY, IN BEHALF OF HIMSELF AND ALL OTHER CREDITORS OF E. C. MCLAMB, V. E. C. MCLAMB, HYMAN SUPPLY COMPANY, ET AL.

(Filed 5 October, 1921.)

1. Receivers—Appointment Before Judgment.

Where the plaintiff makes it properly to appear to the court that he is in imminent danger of loss by defendant's insolvency, or that he reasonably apprehends that the defendant's property will be destroyed, removed or otherwise disposed of by defendant pending the action, or that the defendant is insolvent, and it must be sold to pay his debts, or that he is attempting to defraud the plaintiff, a receiver for his property may be appointed before judgment. C.S. 861. Other instances pointed out by WALKER, J.

2. Same—Liens—Conditional Sales—Cost and Expenses—Equity—Law.

Where it appears that the defendant is insolvent and has left the State to avoid his creditors, including the plaintiff, and that a part of his property consisted of a cotton gin and planing mill and machinery purchased by him under a conditional bill of sale, duly recorded and constituting a first lien thereon, and the seller has acquiesced in an order appointing a receiver, and that he insure the property or employ a watchman to guard against its destruction by fire, the preservation of the property inures to the benefit of the seller holding the lien, and he may not successfully complain, either at law or in equity, of an order of court that he pay his proportion of the receivership cost and expenditure for the preservation of the property, especially as the receiver was appointed with his consent.

APPEAL by defendant from *Bond, J.*, at the February
(159) Term, 1921, of SAMPSON.

This action was brought to adjust certain liens of creditors on the property of their debtor, E. C. McLamb. It will give a clear idea of the case to set forth the allegations of the amended complaint, supplemented by certain facts not definitely stated therein. The complaint is as follows:

"The plaintiff, Walter D. Kelly, under leave of court first had and obtained, for his amended complaint and petition in the cause, alleges:

"1. He does hereby reiterate and reaffirm each and every allegation contained in his former complaint and petition in the cause, in the same manner and of like effect as if herein specifically set forth and declared.

"2. That this action was commenced on 24 November, 1920, the petition being filed on the same date, in which the appointment of a receiver was prayed for; and the plaintiff does further allege that at the time of the commencement of this action the defendant E. C. McLamb had fled the county, and, since said date, has kept himself concealed at some point unknown to the plaintiff, in order to avoid the service of process; that various summonses have been is-

sued against McLamb, and the sheriff of Sampson County has been unable to serve any of them or locate him.

"3. That heretofore, on 26 November, 1920, at 9 o'clock in the morning, after this action had commenced, and after the receiver, M. E. Britt, had entered upon the discharge of his duties as such, and while the said E. C. McLamb was hopelessly insolvent, which fact was well known to the defendant, the Bank of Warsaw, said bank caused to be filed and recorded in the office of the register of deeds of Sampson County a certain mortgage deed, under the terms of which the defendant E. C. McLamb undertook to convey to the Bank of Warsaw all of the landed property belonging to him in the county of Sampson, the same consisting of eleven tracts of land, and forming practically his entire landed estate; which mortgage deed recites that the same is made for the purpose of securing several notes aggregating $150,000, loaned to the said E. C. McLamb by the Bank of Warsaw. The mortgage deed, dated 19 November, 1920, was duly probated and filed for registration on the date above named, and now appears of record in Book 356, page 416, of the register's office of Sampson County.

"4. The plaintiff is informed and believes, and upon such information and belief alleges, that, at the time of the execution of the mortgage, E. C. McLamb was indebted to the bank in a sum not exceeding $14,000, and having taken and accepted notes, secured by a mortgage deed, which it had recorded, for $150,000, the Bank of Warsaw thereby now holds the pro- (160) ceeds of the notes and mortgage, amounting to $136,000, the property of the defendant E. C. McLamb, and now belonging to the receiver, M. E. Britt, to be administered by him for the benefit of the other creditors.

"5. The plaintiff further alleges that the defendant E. C. McLamb is the owner of $5,000, par value, of the capital stock of the Bank of Warsaw, which is now in possession of the bank, and that the stock is now a part of the assets of E. C. McLamb, and should be turned over to the receiver to be administered by him, together with the other property of McLamb, for the benefit of his creditors.

"6. The plaintiff further alleges that, at the time of the execution of the mortgage deed or immediately prior thereto, there was an agreement between McLamb and the Bank of Warsaw that in consideration of the execution and delivery of the mortgage deed the bank would assume and pay off all of the debts and liabilities of E. C. McLamb and save his creditors harmless; and that the mortgage deed and notes secured thereby were executed by E. C. McLamb and his wife pursuant to that understanding and agreement; and the plaintiff therefore alleges that in consequence of that agree-

ment, followed by the acceptance and registration of the mortgage deed above referred to, the Bank of Warsaw is now justly indebted to M. E. Britt, the receiver appointed in this cause, in the sum of $136,000, which amount should be paid in order that it may be pro rated among the various creditors of E. C. McLamb.

"Wherefore, the plaintiff demands judgment against the Bank of Warsaw in conformity with the foregoing allegations."

Upon the pleading, that is, the complaint and answer, and upon affidavits, Judge George W. Connor, on 3 December, 1920, entered an order, not excepted to, in which is the following clause:

"It further appearing to the court that the defendant E. C. McLamb was the owner of a valuable gin and planer mill in the town of Clinton, which property is now lying idle and is subject to fire, and upon which there are various recorded liens, it is further ordered and adjudged that the receiver be and he is hereby directed to insure said property in some standard insurance company for such amount as he may deem proper, in order that the rights of creditors may be safeguarded and protected; and the receiver will pay out the first moneys coming into his hands, it being understood that the costs of said insurance is to be hereafter placed against such creditors of the said E. C. McLamb as the court may deem just and proper; and the receiver, if he shall be so advised by counsel, is hereby authorized and empowered to employ a night watchman to guard said property during the continuance of this receivership, or until the property shall be sold under the future orders of the court."

(161) ADDITIONAL FACTS.

E. C. McLamb, one of the defendants, purchased a lot in the town of Clinton, and during the early part of the year 1920 he set up on the lot a cotton gin and planing mill. Certain parts of the machinery, including boilers, engines, planers, etc., were purchased from the defendant Hyman Supply Company, under conditional sale contracts, all of which are admitted to have been properly recorded in Sampson County, prior to the institution of this action, and at the date of the issuance of the summons in this cause, E. C. McLamb was indebted to the Hyman Supply Company in the sum of $7,471.76. The defendant McLamb became indebted to various and sundry parties in amounts aggregating about $150,000; some of the debts being secured and others being in the shape of notes and open accounts. Upon the petition of the plaintiff an order was entered by Judge George W. Connor, on 23 November, 1920, appointing M. E. Britt as temporary receiver of the mill property

above referred to, and the receiver thereupon took into his custody and possession all of the machinery, etc., upon which the defendant Hyman Supply Company held a lien.

On 28 January, 1921, the Hyman Supply Company moved the court for an order requiring the receiver to surrender to it all of the property referred to in the conditional sale contracts, or that the receiver be directed to sell the same and permit the Hyman Supply Company to bid in the property, its bid to be credited on its account against E. C. McLamb. The receiver filed an answer to the motion, and at Kenansville, N. C., on 30 December, 1920, Judge Connor entered an order making the receivership permanent, and ordering the receiver to sell all of the property, including the property upon which the Hyman Supply Company had a lien, and in the order it was expressly provided, as follows: "Any of the lien creditors may bid on said property, the lien creditors having the right to bid in the property covered by their respective liens, and apply such bid on the debts due them, and the balance, if any, shall be paid over to the receiver, to be held subject to the further orders of the court."

In the order of Hon. George W. Connor, judge, dated 3 December, 1920, the court having before it the pleadings, including the answer of the appellant, directed the receiver to insure the property, if possible, and if no insurance could be secured, to employ a night watchman to guard and protect the same, and this item of expense, together with the taxes upon the property as shown on the expense account of the receiver, is claimed by plaintiffs to be clearly such a liability as should be charged against the appellant, the Hyman Supply Company, whose property was protected thereby, and which was asked for by the attorneys representing the appellant.

M. E. Britt was also appointed a referee and directed to ascertain the amount of the various debts, the priority (162) of liens, etc., and at the same time it was adjudged that the lien of Hyman Supply Company was prior to all other claims. The receiver made sale of the property, after legal notice, on 26 March, 1921, at which time Hyman Supply Company, acting under the authority of the order of sale as made by Judge Connor, purchased all of the property covered by its conditional sales contract, for the sum of $7,400. Said sale was reported to the court and duly confirmed, and a bill of sale made to Hyman Supply Company by said receiver.

At May Term, 1921, the receiver and referee made a report showing that at the time of said sale E. C. McLamb was indebted to Hyman Supply Company in the sum of $7,471.76, that the bid of the Hyman Supply Company on the property was $7,400, so that

there is still a balance due said company by the defendant McLamb. The receiver also reported that other lien creditors had bid in certain property covered by their respective liens; that the total bids amounted to $26,500, all of the bids being made by creditors who held liens and who were acting under the order of Judge Connor, made at Kenansville, N. C., on 30 December, 1920.

The receiver presented to the court an itemized expense account, covering the costs of night watchman, commissions, etc., amounting in the aggregate to $1,164.14, and requested the court to charge the sum against the several purchasers at the sale in the proportion of their respective bids. The Hyman Supply Company filed exceptions to this report, and resisted the payment of any part of the costs and expenses of the receivership, because there was still a balance due it under its recorded contracts. The exceptions were overruled and judgment entered, directing the Hyman Supply Company to pay into the clerk's office a sum of money equivalent to 74/265 of said costs and expenses, amounting by actual calculation to the sum of $325.08. To this judgment the defendant Hyman Supply Company excepted and appealed.

All of the material facts necessary for a proper determination of the question at issue are practically admitted in the case on appeal.

Henry E. Faison and Fowler & Crumpler for plaintiffs.
Grady & Graham for defendants.

WALKER, J., after stating the material facts: This, it seems to us, was a typical case for the appointment of a receiver and the order of Judge Connor was eminently proper, and there appears to have been no serious objection to it, if any at all. We have held that a receiver will be appointed before judgment where plaintiff shows imminent danger of loss by defendant's insolvency (163) (*Bank v. Bridgers,* 114 N.C. 381; *Mahoney v. Stewart,* 123 N.C. 106), or where there is reason to apprehend that the subject of the controversy will be destroyed, or removed, or otherwise disposed of by defendant pending the action (*Ellett v. Norman,* 92 N.C. 519; *Thompson v. Silverthorne,* 142 N.C. 12); or where defendant is insolvent and all property must be sold to pay debts (*Machine Co. v. Lumber Co.,* 109 N.C. 576); or where it is alleged that defendant is attempting to defraud plaintiff (*Stern v. Austern,* 120 N.C. 107; *Pearce v. Elwell,* 116 N.C. 595). There are, of course, other cases where a receiver may, and will be, appointed by the court, as in the case of a trust, to completely execute or to facilitate

its execution (*Rosseau v. Call,* 169 N.C. 173), or where a foreign corporation is insolvent, the court may appoint a receiver to protect resident creditors and for other purposes (*Holshouser v. Copper Co,.* 138 N.C. 248; *Silk Co. v. Spinning Co.,* 154 N.C. 442), and there are still other instances where the power will be exercised, but those above enumerated will suffice here. The statute provides: A receiver may be appointed:

"1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court.

"2. After judgment, to carry the judgment into effect.

"3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

"4. In cases provided in chapter entitled 'Corporations' in the article 'Receivers'; and in like cases, of the property within this State of foreign corporations. The article 'Receivers,' in the chapter entitled 'Corporations,' is applicable, as far as may be, to receivers appointed hereunder." (C.S., vol. 1, sec. 860), and the cases applicable will be found well arranged in the notes to that section. In certain cases the court, in its discretion, may allow a bond to be given by any party who deems that he may be prejudiced by the appointment of a receiver, in lieu of such appointment. C.S. 861.

The very ground upon which this appointment was made was the danger of the loss or destruction of the property, and all of the parties were surely interested in its preservation, and equally, or at least proportionately, benefited by it. Can it be that in either law, or surely in equity, the party who reaps the benefit should not bear his just share of the burden? We clearly think not. The general subject of costs and expenses allowable to a receiver by court of chancery is fully discussed in High on Receivers (164) (1 Ed. of 1894), secs. 796 to 810. It is said there, in sec. 796: "The appropriate method of procedure is to have his compensation fixed by the court, to be allowed out of the assets in his hands, and the amount thus determined to be due him may be taxed as costs in the action." And again, in the same section, at p. 729: "If, however, the appointment of the receiver was proper in the first instance, even though plaintiffs do not ultimately prevail in the suit, it is within the discretion of the court to allow the receiver

payment for his services and expenses out of the proceeds of the litigation, and an appellate court will not interfere with the exercise of such discretion when it has not been abused." In *French v. Gifford,* 31 Iowa 428, Judge Miller states the rule in such cases very lucidly, as follows: "It is insisted by plaintiff's counsel that the compensation of the receiver should be paid out of the fund of which he had the custody and charge, and that he should be permitted to retain the same therefrom. Numerous cases have been cited to show that such is the uniform practice. Upon an examination of these cases it will be found that in every case there was no question made as to the legality or propriety of the appointment of the receiver; that, in each case, the receiver closed up the business and settled his accounts in pursuance of his appointment. The receivership, in each case, was for the benefit of those interested in the fund, and he was paid therefrom, which is only another method of apportioning the costs upon those entitled to the fund. The only case which has been brought to our attention, in which the order appointing the receiver was set aside, is the case of *Verplanck v. The Mercantile Ins. Co.,* 2 Paige 438, and in that case the chancellor ordered the receiver to turn over all the property, without allowing him any commissions therefrom. We think it would be an unjust and inequitable rule if, in all cases, the receiver should be entitled to his compensation from the fund in his hands, without reference to the legality of his appointment. Under the operation of such a rule, innocent persons might be made to suffer a great loss. The general rule as to costs, both at law and in equity, is that they shall be adjudged to the successful, and against the unsuccessful party. Rev. 3449. And they will be so adjudged, unless there exists some equitable consideration to justify a different disposition, or the case is otherwise provided for by law. In cases like the one under consideration, we may adjudge the costs to one or either of the parties, or apportion them." The Court accordingly directed that the fund be charged with one-third of the receiver's compensation, and the plaintiff with the remaining two-thirds. And this accords with our law. The appellant Hyman Supply Company unfortunately misunderstands, or misconstrues, the nature of the essential facts which clearly impose upon it the duty of supplying its share to
(165) the general fund for the payment or satisfaction of the costs and expenses. It has received a clear benefit by having the property protected to which it looked for the payment of its claims. The receiver insured the same, or kept a watchman to guard it, so as to prevent its destruction by fire, or depredations upon it by evil-minded persons. The receiver has, besides, sold the property

by agreement of the parties, and the proceeds have been applied to the payment of the debts, the plaintiff receiving the major part, having a prior lien. The receiver was required to give bond for the faithful discharge of his official duties, and to keep his accounts, making proper entries from time to time. There is no suggestion that he has not been energetic in the performance of his trust and faithful in all things, and there is not the slightest impeachment of him in respect to his dealings and transactions as receiver. Why, then, should he not be compensated by the parties? Is is certainly just and equitable that he should be, and the law usually follows equity in this respect and adjudges that the laborer is worthy of his hire. There is no objection to the amount of the costs and expenses or to any item of the account. The objection goes entirely to the right to recover anything of the appellant. We conclude that it is not only liable to contribute to paying the receiver, but that Judge Bond (acting in furtherance and final execution of Judge Connor's order, to which no exception was taken) has properly and equitably apportioned the total amount of costs and expenses to be paid, among the respective parties, and appellant should be content therewith.

The case of *Humphrey v. Lumber Co.*, 174 N.C. 514, is not applicable to this case, where the facts are different. The receiver here was appointed with the consent of the Hyman Supply Company and for the protection of its property, if he was not appointed at its request, and for its benefit, which benefit it received, and of which the supply company availed itself as appears in the record. If it voluntarily receives the benefit, it must bear the burden. In this respect, if not in others, our case essentially differs from the *Humphrey* case, *supra*. Not only should the supply company pay its fair proportion of the costs and expenses because it consented to the receivership and took benefit therefrom, but because the property on which it had a lien was exposed to great danger, E. C. McLamb having taken refuge in flight, leaving the property without any keeper, and in the throes of hotly contested litigation, thereby enhancing the danger of destruction by fire and idle intruders, and increasing the temptation to injure or destroy it. A receivership was needed more by the supply company, and it derived greater advantage therefrom, than any one else.

There being no error, we decline to reverse or modify the judgment.

Affirmed.

Cited: Ellington v. Currie, 193 N.C. 612; *Bank v. Country Club,* 208 N.C. 240; *Wood v. Woodbury & Pace, Inc.,* 217 N.C. 361; *Finance Corp. v. Lane,* 221 N.C. 194.

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UNION TRUST COMPANY v. J. F. WILSON.

(Filed 12 October, 1921.)

1. Pleadings—Demurrer—Admissions.

A demurrer to the complaint admits as true every material fact alleged therein that is properly pleaded.

2. Same—Allegations Aliunde—Speaking Demurrer.

A demurrer to a pleading upon the ground of the sufficiency of the allegations therein to constitute a cause of action must be confined to those allegations, and where it is necessary for statement of facts in the demurrer to be considered *aliunde* it is called a speaking demurrer, and will be overruled.

3. Same—Trusts.

Where the complaint alleges that the plaintiff is the holder in due course of a negotiable note sued on, acquired for value, before maturity, without notice of any infirmity therein, and it further appears from the complaint that it was held in trust to collect certain certificates of deposit issued by a bank and apply the proceeds to the note, a demurrer stating that in fact the plaintiff was not such owner of the note acquired in due course, etc., is bad.

4. Same—Pending Action.

A demurrer to the complaint stating that a similar action had formerly been commenced and was pending in another county, where such does not appear from the complaint as a fact, is bad.

5. Pleadings—Demurrer — Speaking Demurrer — Allegations Aliunde — Trusts—Actions—Parties—Principal and Agent.

The trustee of an express trust may sue alone (C.S. 449), and where the holder of a promissory note in due course, etc., sues thereon, who as it appears is a trustee of an express trust to collect certain certificates of deposit, and apply the proceeds to its payment for the benefit of himself and the holders of the certificates, a demurrer stating that the plaintiff is, in fact, suing as the agent of the holders of the certificates, and that they are in truth parties, is a speaking demurrer, and bad.

APPEAL by defendant from *Connor, J.,* at the June Term, 1921, of WAKE.

This action was brought to recover the amount of two negotiable

promissory notes executed by the defendant, each of them in the sum of $5,000 (dated 30 March, 1920), and payable to the order of the maker twelve months after their date, and endorsed by the defendant, the maker thereof, in blank and before maturity, and delivered to the Harnett County Trust Company. It is alleged in the complaint "that thereafter, before maturity, for valuable consideration and without notice of any defect or infirmity in or respecting said notes, the Harnett County Trust Company, of Lillington, North Carolina, purchased and became the holder in due course of said notes." It is further alleged that thereafter, for (167) value and before maturity of the notes, plaintiff became the *bona fide* holder, in due course, of the same by transfer from the said Harnett County Trust Company, and was at the commencement of this action the *bona fide* holder thereof in due course, for full value and without notice. That the said notes are past due and unpaid, and that defendant is indebted to the plaintiff thereon in the sum of $10,000, with interest from 30 March, 1920, for which sum plaintiff demands judgment.

The agreement referred to in the complaint states that the Harnett County Trust Company agreed with the plaintiff and the holders of certain certificates of deposit in the Harnett County Trust Company to the amount of $68,000, that the latter would assign and deliver to the plaintiff the said certificates, to be held in trust by it for the benefit and use of the parties named in the agreement, and when they are delivered to the trustee, the Harnett County Trust Company should transfer and deliver to the said trustee certain notes, particularly described in the agreement, which were acquired and held as aforesaid, in due course, for value and without notice, by it to a corresponding amount. That the trustee should collect the notes so delivered to him, with power to sue for the same, if necessary, and employ counsel at a reasonable rate of compensation for that purpose, and when all the notes are collected, or compromised and settled by the trustee, with the consent of the certificate holders, and after deducting necessary expenses incurred by him in the execution of his trust, including his fees and allowances as may be approved by the clerk of the Superior Court of Wake County, the trustee shall distribute the balance of the funds so collected by him to and among the certificate holders aforesaid. That the two notes, the subject of this action, were included in those acquired by the trustee in the manner above stated, the Harnett County Trust Company being the holder in due course thereof when they were transferred before their maturity to the trustee and having no notice of any defect or infirmity therein, or any equity in favor of defendant existing in respect thereto.

The defendant demurred as follows:

"1. Because it appears from the complaint and exhibits that the notes sued on in this action are the property of the Harnett County Trust Company that issued its time deposit certificate for said notes.

"2. That defendant has started his suit against said Harnett County Trust Company in the county of Franklin, said suit having been started on 5 February, 1921, and said action is now pending in said county of Franklin for the purpose of vacating and setting aside said notes for fraud and for the fact that said Harnett County Trust Company was not an innocent purchaser for value without notice and a holder in due course.

"3. That said complaint and exhibits show a combina-
(168) tion between said Harnett County Trust Company and the holders of its certificates of deposit, when not one cent has ever been paid by said trust company, nor have they surrendered their title to property in said notes if they have any, but it appears that plaintiff is only a collecting agent and attorney for said trust company.

"4. That the holders of said certificates of deposit are parties to this action by and through their agent and attorney, the plaintiff herein, when they have no cause of action whatever against this defendant.

"5. It appears that plaintiff company is not a holder in due course or an innocent purchaser for value without notice, but merely an agent to collect the Harnett County Trust Company claims if it indeed has any."

The court overruled the demurrer, and defendant appealed.

J. M. Broughton for plaintiff.
W. M. Person for defendant.

WALKER, J., after stating the case: It is an established principle, not now open to question, that a demurrer by a defendant admits as true every material fact alleged in the complaint, which is properly pleaded, *Crane Co. v. L. & T. Co.*, 177 N.C. 346; *Merrimon v. Paving Co.*, 142 N.C. 539, and this is equally true of a demurrer to an answer, or other pleading. The demurrer, in this instance, calls to its aid facts stated therein which do not appear on the face of the complaint, and is generally denominated a "speaking demurrer." In *Von Glahn v. DeRossett*, 76 N.C. 292, 294, Chief Justice Pearson so characterizes it, in this passage taken from his opinion: "The second ground of demurrer is subject to another objection. It is a 'speaking demurrer,' as styled by the books. That is,

in order to sustain itself the aid of a fact not appearing upon the complaint is invoked. Whether there be any fund left on hand at the expiration of the charter of the bank is a question of fact that cannot be inquired into upon demurrer, which raises only an issue of law in regard to the cause of action set out in the complaint." And to like effect is 6 Enc. of Pl. & Practice, p. 297, where it is said by the author, citing the authorities: "It is not the office of the demurrer to set out facts; it involves only such facts as are alleged in the pleading demurred to, and raises only questions of law as to the sufficiency of the pleading, which arise upon the face thereof. It is a fundamental rule of pleading that a demurrer will only lie for defects which appear upon the face of the pleading to which it is opposed, and must be decided without evidence *aliunde*, unless (as said in some cases) by consent of the parties. A speaking demurrer, that is, a demurrer which is founded on matter collateral to the pleading against which it is directed, is bad, and as (169) such will be overruled. It is also a well settled principle that when a pleading is demurred to resort cannot be had to other pleadings for the purpose of supporting or resisting the demurrer, but the demurrer must prevail or fall by the face of the pleading to which it is directed." 31 Cyc. 322, holds that "Only facts appearing on the face of the pleading demurred to will be considered on demurrer. New facts cannot be set up by the demurrant as a ground for demurrer. Such a demurrer is called a 'speaking demurrer,' and should be overruled. So the scope of the demurrer cannot be extended to cover facts not appearing on the face of the pleading demurred to." Illustrations of a speaking demurrer will be found in the following cases: *Express Co. v. Briggs*, 57 S.E. 1066; *Peake v. Ware*, 63 S.E. 581 (131 Ga. 826); *L. & N. R. Co. v. Holland*, 63 S.E. 898. Some of the other cases in this State are *Davison v. Gregory*, 132 N.C. 389; *Wood v. Kincaid*, 144 N.C. 393; *Kendall v. Highway Com.*, 165 N.C. 600; *Besseliew v. Brown*, 177 N.C. 65. We held in *Wood v. Kincaid, supra:* "A demurrer is an objection that the pleading against which it is directed is insufficient in law to support the action or defense, and that the demurrant should not, therefore, be required to further plead. It is not its office to set out facts, but it must stand or fall by the facts as alleged in the opposing pleading, and it can raise only questions of law as to their sufficiency. It is a fundamental rule of law that a demurrer will only lie for defects which appear upon the face of the alleged defective pleading, and extraneous or collateral facts stated in the demurrer cannot be considered in deciding upon its validity. A demurrer averring any fact not stated in the pleading which is attacked, commonly called a 'speaking demurrer,' is never allowable," citing 6 Pl. and Pr. 296

et seq.; Von Glahn v. DeRossett, 76 N.C. 292. We also held in *Besseliew v. Brown, supra* (opinion by Justice Hoke), that "Where the complaint in an action by the receiver of an insolvent corporation against its directors alleges a good cause of action for damages arising from their negligence in managing the corporate affairs, a demurrer may not be aided by allegations of facts not therein appearing, for such would be a speaking demurrer, condemned both under the common law and code systems of pleadings." A good statement of the law on this question will be found in *So. Express Co. v. Briggs, supra,* where it was said that a speaking demurrer is one that introduces some new fact or averment necessary to support the demurrer, and which does not distinctly appear on the face of the pleading against which it is directed. *Peale v. Ware, supra,* held that a demurrer negativing a fact material to the cause of action is faulty and should be overruled.

(170) If the demurrer in this case is examined in the light of the foregoing authorities, it will appear that it clearly comes within the condemnation of the rule we have stated and which has long been a settled one. The first ground of demurrer is untenable, as it does not appear from the complaint and exhibits "that the Harnett County Trust Company is the owner of the notes sued on in this action," but the contrary appears, the Harnett County Trust Company having parted with its interest, as alleged in the complaint, and for a valuable consideration, to the plaintiff as trustee for the certificate holders. The second ground of demurrer, in direct violation of the rule, sets up extraneous facts in support of itself, such as are not alleged in the complaint, but are *aliunde.* It does not appear from the complaint, nor otherwise, except by allegations of the demurrer, that defendant has brought an action in Franklin County to set aside the notes mentioned in this suit. We have already disposed of the remaining ground of objection, viz., that plaintiff is not an innocent holder. It is alleged in the complaint that he is, and the demurrer, in law, admits it.

The third ground of demurrer is equally untenable, because it states facts not alleged in the complaint, and cannot, therefore, be considered under the rule of the law as to speaking demurrers.

The fourth ground of demurrer contains an erroneous statement of fact, as the holders of the certificates are not parties to this action, the plaintiff suing alone, as the trustee of an express trust, and within the meaning of the statute (C.S. 449), the designation "includes a person with whom, or in whose name, a contract is made for the benefit of another." *Wynne v. Heck,* 92 N.C. 414; *Willey v. Gatling,* 70 N.C. 410; *Martin v. Mask,* 158 N.C., at page 443.

The last ground assigned in the demurrer must be held as in-

valid, because the demurrer admits, as a fact, the allegation in the complaint that the plaintiff is the holder of the notes, in due course, for value and without notice of any equity or infirmity attaching to them in favor of the defendant, who is the promissor in both notes, and it appears from the complaint, according to the allegations thereof, which are to be taken as admitted by the demurrer (*Bank v. Mfg. Co.*, 176 N.C. 318; *Ollis v. Furniture Co.*, 173 N.C. 542) that the plaintiff is not suing as agent, but as a trustee of an express trust, which includes within its meaning, as we have already stated, a person with whom, or in whose name, a contract is made for the benefit of another.

This disposes of all the grounds of demurrer adversely to the defendant, and, accordingly, there was no error in the judgment overruling the same.

Affirmed.

Cited: Cherry v. R. R., 185 N.C. 93; *Sandlin v. Wilmington*, 185 N.C. 259; *Real Estate v. Fowler*, 191 N.C. 618; *Bolich v. Charlotte*, 191 N.C. 678; *S. v. Trust Co.*, 192 N.C. 247; *Trust Co. v. Bank*, 193 N.C. 530; *Walker v. Walker*, 198 N.C. 826; *Hall v. Coble Dairies*, 234 N.C. 209; *Hayes v. Wilmington*, 243 N.C. 538; *Surplus Co. v. Pleasants*, 263 N.C. 590.

(171)

A. A. BUCHAN AND JOSEPH STRICKLIN v. JOHN L. KING, J. R. THOMAS, ET AL.

(Filed 19 October, 1921.)

Evidence—Books—Records—Race Horses.

Upon an action to recover damages for the false and fraudulent representations of the age of a race-horse, which induced the purchase by the plaintiff, a book entitled a year book, purporting to give the ages of race-horses and tending to establish the defendant's defense, may not be properly received in evidence, unless it is shown to be an authentic record and received and regarded by persons conversant with racing matters as official; and when such does not appear in the evidence, parol evidence of its contents is also properly excluded.

APPEAL by defendants from *Bond, J.*, at Spring Term, 1921 of LENOIR.

This action was brought to recover damages for a false and fraudulent representation as to the age of a race-horse, which in-

duced the plaintiffs to purchase the same. The jury returned a verdict for the plaintiff and assessed his damages at $250, and defendant appealed from the judgment.

No brief for plaintiffs.
Thos. C. Hoyle for defendants.

WALKER, J. There was evidence for the plaintiff tending to show that the horse, which was represented to be seven years old, was actually nine years of age, and contrary evidence for the defendant. There was also proof by the defendant that if the representation was made and was not true, the defendant acted upon the reasonable belief that it was true, having been handed a registry, at the time of his purchase, by the man who sold him the horse, wherein it appeared that the animal was but seven years old. The jury, notwithstanding this proof (which was competent as showing defendant's good faith in making his statement as to the horse's age) found against the defendant upon the issue of fraud. The court, over defendant's objection, permitted plaintiffs' witness, S. B. Harper, to testify that there was a book, entitled the Year Book, which purported to give the ages of race-horses; that he had seen this book, and it listed the horse in question by his name, "Ned P., Jr.," and stated that the horse was foaled in 1909, from which it therefore appeared that he was nine years old at the time of the sale by the defendant, J. R. Thomas, to the plaintiff. This witness did not say with assured accuracy how the book was compiled, or whether it was accepted and relied on by any official body of horsemen for the information it professed to contain. His testimony in this respect was not full or satisfactory, as will appear
(172) further on, and does not show the book to be an authentic record, and it will further appear therefrom that the sources from which its author, or authors, gathered the information, to say the least of it, were very questionable. Defendants objected to this testimony, because the witness could not speak of what he had seen in the book, but that the book itself was the only competent evidence of its contents and should be produced. His Honor in the beginning, when plaintiffs' first witness, Joseph Stricklin, who also referred to this book, was being examined, excluded all reference to this book, but admitted it when plaintiffs' witness, S. B. Harper, was testifying in rebuttal of defendants' evidence.

We hold that the book would be competent and relevant evidence under certain conditions and circumstances, which do not exist here, as will appear by the following authority: "Records published by authority of a recognized trotting association, if ac-

cepted and acted upon by persons conversant with racing matters as authentic and official, have been held admissible for the purpose of showing the speed of a horse or of others to whom he is related. So under statute in Iowa a printed copy of a herd book in which cattle are registered has been held admissible if it be shown to be a standard authority recognized by cattle breeders, it being regarded as an historical work on a particular subject. The admissibility of books kept to register cattle and other animals as coming within the exception to the hearsay rule relating to proof of pedigree is discussed elsewhere." 17 Cyc. 425(e). And see, further, *R. R. v. Sheppard,* 56 Iowa 68; *Kuhns v. Chicago, etc., Ry. Co.,* 65 Iowa 528; *Crawford v. Williams,* 48 Iowa 247. All the requisites noted in these authorities to the competency of the book are not found to be present in this case, and not even the majority of them, if any of them do clearly appear, and those said to be lacking in the case last cited (*Crawford v. Williams*) have not been shown here. But we are of the opinion that parol evidence of an entry in the book was not competent, and should not have been received for the reason that it does not appear that the book was made up and published in compliance with the essential requirements of the rule above stated. It was not shown that it was published by a recognized trotting association, and accepted and acted upon by persons conversant with racing matters, as authentic and official. This very question was decided in *R. R. v. Sheppard, supra,* where it was held: "(1) In an action to recover the value of a trotting horse, evidence of his pedigree, and that some of his blood relations have a *record* for speed, is competent as affecting his value, and when such record is published by authority of a recognized trotting association, and the publication is accepted and acted upon by those interested in and conversant with such matters, as authentic and official, it is not error to admit evidence of the horse's speed as shown by that record." There are other authorities to the same (173) effect.

The cases of *Morrison v. Hartley,* 178 N.C. 618 (opinion by Allen, J.), and *Miles v. Walker,* 179 N.C. 479, do not militate at all against this view. In the *Morrison* case the document was a letter, and in the *Miles* case it was a written sub-lease. They were not records or registers of important facts or events, such as that in this case, and were not the coöperative act of a body of men or association, and were not required to be published, accepted and acted upon by persons conversant with matters to which they relate, as authentic and official, and as reliable for reference in trade transactions or in racing. Those cases hold: "Where the contents of a letter are not directly in issue and it is not the purpose of the action to

enforce any obligation created by it, its contents may be shown by parol when relevant to the inquiry." *Morrison's* case, *supra*. The principle underlying the two cases just cited is elementary that where the writing relates to a matter collateral to the issue, but is or becomes relevant to it at any stage of the trial, its contents may be shown by parol. The party against whom it is produced may attack the testimony upon the ground that no such paper-writing ever existed, or that, if it did, its contents was not truly stated by the witness, or he may deny its relevancy to the issue, and rely upon its being collateral and immaterial. But that does not exclude the oral evidence in cases like those we have cited or which come within the rule they lay down.

It appears by the testimony of the plaintiffs' witness, S. B. Harper, that the alleged register or record was borrowed by him at the request of Stricklin and that he brought it to Stricklin, one of the plaintiffs, and so far as appears the latter has possession of it. If the parol evidence had been competent, the defendant could have answered it by requiring the production of the book by Stricklin, if he had taken proper proceedings to that end, or if a third party had the register, by a *subpœna duces tecum* issued to him or other appropriate procedure. But the parol evidence was incompetent because the book itself was not competent, and if plaintiffs wish to avail themselves of the book's contents, or any part thereof, they must in some way show the facts in regard to it which we have stated above, or something substantially to the same effect. S. B. Harper, plaintiffs' witness, testified: "I saw the year book; said book listed the horse, age of which was in controversy, as 'Ned P., Jr.,' and stated that he was foaled in 1909. I borrowed the book and brought it to Stricklin. There were no sworn statements in the book, but it claimed to give the record of race-horses and their age. I do not know where the information is secured from. I saw the horse driven around the track, and he was a nice horse and moved nicely." Defendants' witness, N. M. Reaves, testified: "The
(174) book referred to by Harper was what is known as the Year Book, and is just about on a par with a newspaper report. It is made up by men who go around and see the races and get their information as best they can from statements given them. They do not mean to misrepresent, but the information thus gathered is not always correct. They often make mistakes. The statements are not sworn to." While under this and other similar testimony, the reliability of the "Year Book" may be seriously questioned, as ably argued by Mr. Hoyle, it was not evidence under the present facts and could not be referred to for information as to pedigree and age by the witness.

If the book itself would not be competent, if introduced, without further evidence as to its nature, make-up and reliability, oral evidence of its contents cannot be introduced.

We were not favored with a brief from the plaintiff, which, if filed, would, we have not doubt, have aided us very much in and greatly facilitated our investigation of the case, which has been prolonged for the lack of it. It was necessary for us to ascertain if there was any legal ground upon which this oral evidence could be held as competent, and by an exhaustive and patient search among the best authorities on the subject, we have not been able to find any, but, as appears above, the authorities are the other way. We are greatly helped in our work here by the usually well-prepared briefs of counsel, which are the results of their deliberate thought upon and consideration of the questions involved, and we express the hope that they will give us the benefit of them, whether compelled by our rule to do so or not, and as a voluntary contribution to the correct decision of the case. We have been the more careful in the study of the plaintiffs' side of the case because of the absence of a brief, and have formed our conclusion definitely after a full investigation of the same.

This is an important case for the defendant Thomas, at least, as there is more involved for him than mere dollars and cents, his character having been gravely impeached by the verdict, finding that he was guilty of a fraud in a horse trade, and if he is unable finally to acquit himself of the charge, it will be a permanent record against him and a serious handicap to him in his future life. It is also important to the plaintiffs, so far as mere money can make it so, as they have recovered $500, the original price of the horse. The plaintiffs' note which they gave for the purchase price has been transferred to a purchaser in due course, for value and without notice, and they are entitled, therefore, to recover for the fraud, if any was practiced upon them.

The verdict will be set aside and a new trial ordered, because of the error in admitting the evidence as to the contents of the book.

New trial.

(175)

W. REID MARTIN v. D. L. McBRYDE.

(Filed 19 October, 1921.)

1. Reference—Findings—Courts—Evidence—Appeal and Error.

Where the trial judge, after reviewing the evidence, approves and adopts the referee's findings of fact thereon, it is sufficient, and his action will not be disturbed on appeal when there is evidence to support the findings so made.

2. Same.

Conclusions of law in the report of a referee are not based upon the evidence, but upon the facts found therefrom, and an exception that a conclusion of law was based on an erroneous finding of fact, which was approved and adopted by the trial judge, is not reviewable on appeal, when there is evidence to support such finding.

3. Actions—Partnership—Independent Business.

Where one of the partners is engaged in an independent business unrelated to that of the partnership, and has for such individual enterprise purchased goods, wares, and merchandise from the partnership, the principle upon which one partner cannot sue the other except for a settlement of partnership affairs has no application.

4. Attachment—Undertakings in Lieu of Property—Statutes.

Where attachment has been levied on the defendant's property necessary for the prosecution of his business, and upon his giving bond, he or his receiver is permitted by the court to continue operations, the giving of the bond is in lieu of the lien acquired in attachment, and analogous to the proceedings in discharge authorized by statute (Pell's Revisal, secs. 774 and 775); and he may not take advantage of the bond by continuing to ship his property thereunder beyond the jurisdiction of the court, and thereby repudiate it.

5. Same—Appeal and Error.

Where the court has adjudged that the defendant in attachment, who in the course of his business, has rapidly been shipping lumber beyond the State, continue therein upon giving a bond in substitution of the lumber attached, conditioned upon the payment of the debt, he or his receiver may not thereafter except to the order made for his benefit, and at his request.

6. Attachment—Appearance—Undertakings in Lieu—Benefits — Waiver —Pleadings.

An attachment debtor waives any defect therein by appearing and pleading to the merits of the action; and also by accepting the benefits of an order of court substituting at his request an undertaking in lieu of the property subject to the attachment.

APPEAL by defendant from *Bond, J.*, at May Term, 1921, of SAMPSON.

This action was brought to recover the sum of $3,663.90, alleged

to be due by account stated. An attachment was issued and levied upon certain personal property of the defendant, an itemized list of which was annexed by the sheriff to his return. The attachment was afterwards ordered by Devin, J., to be set aside (176) at the request of J. F. Parker, receiver, in order that the operations of the Garland Lumber Company could be resumed, under its contract with defendant, and it was further ordered that "the latter" keep in his possession at least 400,000 feet of lumber pending the further hearing of this cause on the return day thereof, "which lumber shall be subject to any liens which the plaintiff may legally assert against the same."

The plaintiff alleged on affidavit that McBryde was disposing of the lumber, or had already disposed of it, in disobedience of the former order of the court, whereupon Guion, J., ordered that defendant show cause why he should not be attached for contempt, and afterwards discharged the rule upon the defendant's filing a sufficient bond in the sum of $5,000, which should stand in the place of the lumber ordered to be held by the defendant for the purpose mentioned in the former order, and "shall be conditioned to pay any such lien judgment as plaintiff may recover against defendant herein."

The court appointed a referee to take and state the account. He made his report, which was set aside so that defendant might introduce further evidence, the notice to him of the hearing of the referee having been deficient. Thereupon Mr. Richard L. Herring was appointed referee for the same purpose, and he filed the following second and final report, as it is termed in the case:

To the Superior Court of Sampson County:

The undersigned, Richard L. Herring, referee, appointed in this cause by order of his Honor Guion, J., having formerly made a report 29 January, 1921, and said cause having been referred to said referee by order of Bond, J., at March Term, 1921, of the Superior Court of Sampson County, begs to report as follows:

On 5 April, 1921, at 12 o'clock noon, in the law office of Grady & Graham, Clinton, N. C., the plaintiff being absent in person, but represented by counsel, Henry A. Grady, and the defendant being present in person and also represented by counsel, Messrs. Q. K. Nimocks and E. S. Smith, the defendant proceeded to offer his evidence, which is contained in the typewritten report thereof herewith sent to the court, the plaintiff having heretofore by consent, at a former meeting, offered in evidence the same testimony that was offered before J. Abner Barker, referee, which appears in the file; and upon all of the evidence, pleadings, exhibits, and admissions of the parties, the referee makes the following findings of fact, it being

agreed by all parties that this report should be heard and passed upon at May Term, 1921, all parties waiving time:

First. That heretofore, prior to 1 January, 1915, the
(177) plaintiff and the defendant were engaged in the mercantile business at Garland, N. C., under the firm name and style of South River Supply Company; and on said 1 January, 1915, the defendant, D. L. McBryde, conveyed to the plaintiff, W. Reid Martin, all of his right, title and interest in and to said mercantile business, by written conveyance, filed with the referee and marked Exhibit "E."

The referee finds that said paper-writing was intended as a chattel mortgage, made for the purpose of securing the plaintiff for certain moneys advanced by him in the conduct of said business.

Second. That during the conduct of the business the said D. L. McBryde was operating a large sawmill and lumber plant near the town of Garland, which was not connected with the South River Supply Company; that he employed a number of hands and made settlement with said hands with metal pay checks, which were cashed at the store of the plaintiff at par; that it was understood and agreed between the plaintiff and the defendant that said pay checks should be received at the store of the plaintiff as cash, with the further understanding and agreement that the plaintiff should hold said checks in the same manner, and that the same should be collectible upon the same basis as if held by the original parties from whom they were purchased by the plaintiff, and in furtherance of this agreement the defendant executed a certain paper-writing in words and figures as follows:

1 APRIL, 1914.

W. REID MARTIN, Proprietor,
South River Supply Company,
Garland, N. C.

DEAR SIR: — I hereby authorize you to handle and accept metal pay checks that I issue to my laborers in exchange for their work, the same to be due and payable to you on my regular pay days, the same as if held by said laborers, and I hereby agree that all accounts and holdings of same due and collectible on the same basis as if held by the original parties to whom the checks are paid.

Yours respectfully,

D. L. MCBRYDE.

Third. That during the course of business the plaintiff purchased from the laborers of the defendant, under the agreement referred to in the second finding of fact, metal pay checks amounting in value to $5,404.05.

Fourth. That this action was commenced 13 October, 1916, and thereafter, on 17 October, 1916, J. F. Parker, re- (178) ceiver of the Commonwealth Land and Timber Company, came into court and made himself a party to this action, and upon affidavits filed by the said J. F. Parker and others, an order was entered by Devin, J., at Kinston, N. C., dissolving the warrant of attachment which appears in the file and providing as follows:

"And it is further ordered that the said D. L. McBryde proceed to resume operations under his said contract, as though said attachment had not been issued or served, and that he keep in his possession at least 400,000 feet of lumber pending the further hearing of this cause on the return day thereof, which lumber shall be subject to any liens which the plaintiff may legally assert against the same."

Fifth. That thereafter, on or about 9 January, 1919, a petition was filed in this cause, alleging that all of said lumber had been disposed of, in violation of the order entered by Devin, J., hereinbefore referred to, and thereupon his Honor, Guion, J., issued an order requiring the defendant to appear before him at the courthouse in Clinton, N. C., on Saturday, 8 February, 1919, and show cause why he should not be punished for disobeying the former orders made in this cause; and thereafter at the hearing of said motion said writ was vacated upon condition that the defendant file a good and sufficient bond in the sum of $5,000, payable to the plaintiff, which bond was filed by the defendant with W. L. Williams, Jr., B. F. McBryde, and E. S. Smith as sureties thereto, and contains the following provision:

"The condition of this obligation is such that whereas the plaintiff has sued the defendant herein for a certain alleged indebtedness amounting to $3,663.90, and claims a lien on certain lumber, as appears by the pleadings and papers herein: Now, therefore, if the plaintiff shall recover judgment against the defendant herein and shall be adjudged entitled to a lien on said lumber as security for the payment of said judgment, or any part thereof not exceeding the amount sued for, and if the defendant shall pay such judgment as the court may find and adjudge subject to such lien. then this obligation to be null and void, otherwise to be and remain in full force and effect."

Sixth. That at the time of the institution of this action D. L. McBryde was indebted to the South River Supply Company, on account of metal pay checks taken under the written contract hereinbefore referred to in the sum of $5,404.05, and in addition thereto

was personally indebted to said company for goods sold to him individually in the sum of $527.03, so that on 1 January, 1917, the

	Cash in bank	$ 19.63
(179)	Merchandise on hand	318.21
	Open accounts	28.81
	Personal account D. L. McBryde	527.03
	Metal pay checks account	5,404.05
	Total	$6,297.73

Seventh. That at the time above referred to, 1 January, 1917, the South River Supply Company was indebted to plaintiff Martin in the sum of $1,754.46 for money loaned to said company from time to time.

That the plaintiff has received from the cash in bank, merchandise on hand and open accounts, the sum of $366.65, which should be charged against him and deducted from his one-half interest in the business, so that the account between the two copartners should be stated as follows:

Total assets of the company	$6,297.73
Account due Martin for money advanced to company	1,174.46
Net worth of business	$4,543.27
Of this Martin is entitled to one-half	2,276.68.5
Of this McBryde is entitled to one-half	2,276.68.5
Total	$4,543.27
Amount due Martin, one-half of business	2,276.68.5
Less amount received from accounts and cash in bank	366.65
Balance	$1,910.03.5
Amount due Martin, one-half business	2,276.68.5
Amount due Martin for money advanced business	1,754.46
Total amount due Martin	$3,664.49.5

Eighth. That at the time of the institution of this action the defendant McBryde was in serious financial difficulties, there being many recorded judgments against him; that he was in fear of executions being issued on said judgments and his property seized by his creditors; that he was shipping lumber from Garland, N. C., to J. S. Kent & Co., of Philadelphia, Pa., as fast as the railroad facilities would permit,

(180) which had the effect of removing the property beyond the reach of the court and of hindering, delaying and defeat-

ing his creditors from collecting the amounts due them, and such was his intention.

Ninth. That the order requiring the defendant to keep in his possession at Garland, N. C., the 400,000 feet of lumber hereinbefore referred to, was consented to by all of the defendants to this action, and was made at the suggestion of defendant, J. F. Parker, receiver, and he is bound thereby.

Upon the foregoing findings of fact the referee makes the following conclusions of law:

1. That by reason of the written contract entered into between the defendant and South River Supply Company, he thereby created a valid lien upon the lumber, etc., cut at his mill, and subrogated the said South River Supply Company to any rights of lien that might have been asserted by his employees, to whom the metal pay checks were given, and to all other remedies that said employees might have asserted.

2. That by reason of the fact that the defendant McBryde, at the time this action was instituted, was financially embarrassed, and was shipping his assets beyond the State, etc., as found in finding of fact No. 8, the issuance of the writ of attachment herein was provident and proper, and the plaintiff thereby secured and was entitled to a valid lien upon all of the property seized by the sheriff, consisting of the 400,000 feet of sawed lumber described in the return of said sheriff.

3. That by reason of the fact that the amount due the South River Supply Company by D. L. McBryde on account of metal pay checks is in excess of the total amount due the plaintiff Martin, the plaintiff is entitled to assert the amount of his recovery as a lien against said 400,000 feet of lumber, and require the defendant McBryde to accept his open account as a credit on his one-half in the business.

4. That all of the defendants are bound by the order entered herein, requiring the defendant to keep 400,000 feet of lumber on hand to pay any judgment that may be recovered in this action by the plaintiff, which is adjudged to be a lien on the lumber seized by the sheriff, and by reason of the fact that the $5,000 bond filed herein was substituted in lieu of said lumber, that the defendant and the sureties on said bond are liable for the amount of the recovery adjudged in this action.

5. That the plaintiff Martin is entitled to recover of the defendant McBryde, as principal, and B. F. McBryde, E. S. Smith, and W. L. Williams, Jr., sureties, the sum of $5,000, the penalty of the bond filed herein, to be discharged upon payment to the plain-

tiff, W. Reid Martin, of the sum of $3,664.50 with interest thereon from 1 January, 1917, together with the costs of this action to be taxed by the clerk.

The date above named, 1 January, 1917, is an arbitrary
(181) date fixed by the referee, on account of the fact that the business was in process of being wound up at that time, said date being subsequent to the issuance of summons herein.

All of which is respectfully submitted this 23 April, 1921.

RICHARD L. HERRING, *Referee.*

The defendant filed nine exceptions to this report, each of which was based upon the following ground: "The defendant excepts to the findings of fact in the referee's report, for that it is contrary to the evidence taken in the case"; and he also filed five exceptions to said report, each of which was based upon the following ground: "The defendant excepts to the conclusions of law found in another article of the report, for that the same is not a correct conclusion of law based upon the evidence taken in the above cause, and that said conclusion of law was based upon erroneous finding of fact." The above exceptions to findings of fact and those to conclusions of law were, therefore, all alike in form and substance.

The defendant further excepted to said report because the referee failed to nonsuit the plaintiff at the conclusion of the plaintiff's evidence and again at the close of all the evidence. Bond, J., approved and confirmed the report of Referee Herring in all respects, and rendered judgment against defendant for the sum of $3,663.90 and costs, to include referee's fee of $50, and premium on attachment bond.

Defendant appealed and assigned the following errors:

"1. To the referee's denial of defendant's motion for nonsuit.

"2. To referee's denial of defendant's motion to vacate the attachment.

"3. To referee's denial of defendant's motion at the close of all evidence for nonsuit.

"4. To referee's denial of defendant's motion at the close of all evidence to vacate the attachment.

"5. To the refusal of the presiding judge to sustain the defendant's exceptions to the referee's findings of fact and conclusions of law, as more fully set out in the record.

"6. To the refusal of the presiding judge to allow defendant's motion of nonsuit and to vacate the attachment made before the referee, as above stated and renewed before the presiding judge at the hearing before him on exceptions to referee's report.

"7. To the judgment as signed, as appears of record."

Grady & Graham for plaintiff.
Q. K. Nimocks, E. S. Smith, and Murray Allen for defendant.

WALKER, J., after stating the case: It is useless to consider the exceptions filed to the referee's report as to the (182) facts, further than to say that the judge afterwards reviewed the evidence and findings of fact by the referee, and approved and confirmed the same, adopting them as his own. We have repeatedly held that, where this is the case, we will not review the judge's final decision in this respect, where there is evidence to support the findings. *Dorsey v. Mining Co.*, 177 N.C. 60, at p. 62; *Maxwell v. Bank*, 175 N.C. 180; *Southern Spruce Co. v. Hayes*, 169 N.C. 254, where this Court held: "As said in another case, *McCullers v. Cheatham*, 163 N.C. 63: 'The misfortune of the defendants (the plaintiff in the case at bar) in this case is that the referee has found all the essential facts against them, and when these findings were reviewed and approved by the judge, upon consideration of the report and exceptions, there being evidence to warrant them, we are precluded from changing the report in this respect, but must decide the case upon the findings of fact as made by the referee and approved by the court. . . . We will not review the referee's findings of fact, which are settled, upon a consideration of the evidence, and approved by the judge, when exceptions are filed thereto, if there is some evidence to support them.'" Turning to *McCullers v. Cheatham, supra*, we find that the following cases are cited there: *Boyle v. Stallings*, 140 N.C. 524; *Harris v. Smith*, 144 N.C. 439, and cases cited: *Thornton v. McNeely, ib.*, 622; *Frey v. Lumber Co., ib.*, 759; *Thompson v. Smith*, 160 N.C. 256. There was some evidence in this case to support the rulings of the referee and judge as to the facts.

Now as to the exceptions taken to the referee's conclusions of law. One ground of these exceptions is that they are not correct conclusions based upon the evidence. The conclusions of law are not based upon the evidence, but upon the facts found by the referee; and the other ground, that the conclusions of law were based upon an erroneous finding of fact, is but saying that the facts were erroneously found by the referee and judge, which we have shown is a matter not reviewable in this Court.

When the assignments of error are considered, they really present but two questions: First, was it error in the court to refuse the motion to nonsuit; and, second, should the referee and judge have vacated the attachment? There may be a third question, which we also will consider, though it is not definitely and sufficiently raised by

the defendant in his exceptions and assignments of error, and that is, could the plaintiff sue the defendant, the latter being his partner? as defendant alleges and, we think, erroneously.

1. The court did not err in refusing a nonsuit. This
(183) really involves the two questions as to the right of plaintiff to sue the defendant, and the attachment.

It is contended that the plaintiff could not sue the defendant, because they were partners and one can sue the other only for a settlement of the partnership affairs. But this, if correct generally, is not so with reference to the particular facts of this case. Here the plaintiff alleges his right to recover damages because he had, upon defendant's request, furnished to him "goods, wares and merchandise and feed supplies in order that McBryde could carry on the business in which he was then engaged, it being the operation of a lumber and mill plant." This is in no way connected with any partnership affair, but entirely separate therefrom, if any partnership existed, and altogether independent thereof. The following is settled, according to George on Partnership, 314(131):

"A partner may maintain an action at law against his copartner upon a claim due to the one from the other as individuals. The following classes of cases fall within the above rule:

"(a) Claims not connected with the partnership.

"(b) Claims for an agreed final balance.

"(c) Claims upon express personal contracts between partners."

And Ruling Case Law, vol. 20, p. 926, says: "The general rule prohibiting the bringing of suits by one partner against another until a balance is struck does not apply to all possible cases which might appear to be within its scope. The limitation may be removed by statute or agreement between the parties. Thus one partner may sue another at law on a promissory note executed by the partnership to him, where there is a statute providing that all contracts which by the common law are joint shall be construed as joint and several, and that in all cases of joint obligations of copartners and others, suits may be prosecuted against any one or more of them who are liable." The general rule, therefore, even as between partners, is not inexorable, but has its exceptions. The case of *Owen v. Meroney*, 136 N.C. 475 (opinion by the Chief Justice), as reported in 1 A. & E. Anno. Cases 834, is an apposite one. The substance of it, as stated in the headnote to 1 A. & E. Anno. Cases, *supra*, is as follows: "An action may be maintained by one partner against another to recover damages for the failure of the latter to comply with an agreement made by him as a condition precedent to the formation of the partnership." There is a valuable note to that case at

pp. 835, 836, in which, among other things, it is said: "Thus, an action will lie for a breach of promise to furnish money or property for carrying on the partnership. A partner may recover the damages suffered by him personally, unless ascertainment of such damages involves an examination of the partnership ac- (184) counts, when the only remedy is in equity." The note is amply supported by the citation of relevant authorities. And in *Newby v. Harrell,* 99 N.C. 149, this Court held: "While the general rule is that one partner cannot maintain an action against his copartner to recover money which might have been taken into account of the partnership, until after a settlement, he may sue before such settlement to recover for the wrongful conversion or destruction of the joint property, or for the loss or destruction of his individual property used in the business, resulting from the negligent use by the other partner."

If the plaintiff, who happens to be a partner, can recover on a promissory note given by the firm to him individually, or for damages suffered by him in the same way, and resulting from a breach of contract, or a tort, there is no conceivable reason why he cannot recover here for the sale of goods, wares and merchandise sold or supplied to defendant, even if the two were partners in the supply business (which is denied), because the goods were furnished to defendant personally for the express purpose of enabling him to supply his hands who were operating his mill plant, with which the plaintiff had no connection, except as bookkeeper. The debt due the plaintiff was, in no sense, an item in any partnership account, and the case in no view falls within the principle invoked by the defendant.

Now as to the lien of plaintiff, under the contract with the defendant set forth in the case. The judge did not discharge the attachment on the merits, but he was evidently proceeding, or at least in analogy to the proceeding for a discharge, as authorized by the statute (Pell's Revisal, vol. 1, secs. 774 and 775), and the bond required by the judge, and given by the defendant in place of the 400,000 feet of lumber, was so conditioned as to require the defendant "to pay any such judgment in the action as plaintiff may recover against him therein," in addition to the bond being held to secure any lien which plaintiff had on the lumber, for which the bond was a substitute, the object of all this being to release the property attached so that defendant or the receiver could use it in the prosecution of the business. It would be a clear perversion of the true intent and purpose for which the bond was allowed to be filed, as an accommodation to the defendant so that he might use the property attached or the lumber held in lieu of it, if we should hold other-

wise. We must decide according to the letter and spirit of the transaction, and not let the defendant take advantage of his own repudiation of his agreement, upon the faith of which he, or the receiver, secured the release of the attached property and afterwards of the lumber, so that the work of the mill might proceed.

(185) The referee, in his admirable report upon the facts and the law, has found as a fact that the defendant being involved in serious financial difficulties, and being much embarrassed, there being many recorded judgments against him, and while he was in fear of executions being issued against his property, was shipping lumber from Garland, N. C., to points outside the State as rapidly as possible, which had the effect of hindering, delaying and defrauding his creditors, and such was his intention. The defendant does not say in his exceptions that there was *no* evidence of those facts, but that they were found by the referee *contrary* to the evidence. We have already discussed the character of such an exception where the referee's findings have been considered and approved by the judge on exceptions filed to the referee's report. However, there was some evidence to support the findings.

Attention is called by the appellee to the fact that there was no exception taken to the orders of the court as to the lumber or the bond of $5,000, and also to the special condition of the bond requiring any judgment recovered to be paid. The attachment being regular and valid, and intended to bring the defendant before the court to answer in the cause, and the defendant having answered, and the receiver intervened for the purpose of discharging the attachment, for the special purpose just mentioned, and substituting security therefor, first, in the form of lumber, and, second, by bond in lieu thereof, it is apparent that it is too late now to claim that the same security, in the form of a lien on the lumber, was not transferred to the bond when it was given in place of that lien, and further that defendant has waived any defect in the attachment (if there was any, and we concur with the referee that there was not), by appearing and pleading to the merits, and further that the court did not vacate the attachment because of any defect therein, or because of insufficient grounds for issuing it, but simply at the request of defendant and the receiver that it be done, so that the prosecution of the mill business, then in the hands of the receiver, would no longer be interrupted. It was held in *Rocky Mount Mills v. R. R.*, 119 N.C. 693 (affirming order of Hoke, J., refusing to vacate an attachment), that "Where a defendant, brought into court on attachment process, subsequently entered a general appearance and filed an answer to the merits, a motion to dismiss the attachment on the

ground that it would not lie under the statute was properly refused as immaterial." In *Symons v. Northern,* 49 N.C. 241, Battle, J., said: "A defendant may come into court without process, and confess a judgment (*Farley v. Lea,* 20 N.C. 307), and we cannot perceive any reason why he may not come in, in the same way, and accept the plaintiff's declaration and plead to it. If this be so, why may he not appear and plead upon the defective process? The main object of the leading process is to bring the defendant into (186) court, and if he does not choose to object *in limine* to the manner in which he has been brought in, it would be wrong to allow him to do so after he has, by his acts, admitted himself to be there, ready to defend himself against the plaintiff's action." *Toms v. Warson,* 66 N.C. 417. And in *Price v. Sharp,* 24 N.C. 417, it was held that "In an attachment the defendant by accepting a declaration and pleading to the merits, waives all objections to any defects in the process." It, perhaps, may be useless to state that a lien is acquired by the levy of an attachment (*McMillan v. Parsons,* 52 N.C. 163), as such a proposition will hardly be gainsaid. C.S. 767. The lien of the original levy created by the statute was not destroyed or vacated, but is now represented by the bond of the defendants, a new form of security, to be sure, but only as a substitute for the old, upon which the plaintiff is entitled to judgment for the satisfaction of his debt. The report of Referee Herring was properly approved and confirmed by the court in its judgment, which will not be disturbed.

Having taken this view, it is unnecessary to discuss the question as to the alleged laborers' and mechanics' lien arising from possession of the metal checks.

We find no error.

Affirmed.

Cited: Hambley v. White, 192 N.C. 35; *Pugh v. Newbern,* 193 N.C. 260; *Threadgill v. Faust,* 213 N.C. 230; *Hoft v. Lighterage Co.,* 215 N.C. 693.

FANNIE CARTER v. SAM C. CARTER ET AL.

(Filed 19 October, 1921.)

1. Statute of Frauds—Vendor and Purchaser—Contracts—Parol Agreements—Payment of Purchase Price—Betterments.

A purchaser under a parol contract to convey lands, who has entered into possession thereof after paying the purchase price, and put valuable improvements thereon, may recover the purchase price from the vendor and the enhanced value of the lands by reason of the improvements, upon the vendor's refusal to convey the lands under the plea of the statute of frauds.

2. Same—Specific Performance.

A vendor of lands under a parol agreement may not keep the purchase price thereof, and retain the improvements placed thereon by the purchaser in possession, and repudiate the agreement under the plea of the statute of frauds, though the purchaser's suit for specific performance may not be successfully maintained. The legal and equitable remedies discussed by WALKER, J.

3. Pleadings — Dismissal of Action — Questions for Jury — Statute of Frauds.

Where the complaint in the suit is sufficient for the plaintiff to recover of the defendant the purchase price of lands that he has paid under a parol contract of purchase, and for the improvements he has placed thereon to the extent they have enhanced its value, it is error for the trial judge to dismiss the action upon the pleadings; and the matters controverted by the answer are for the determination of the jury.

APPEAL by plaintiff from *Cranmer, J.*, at February
(187) Term, 1921, of COLUMBUS.

This action was brought to recover the purchase money paid by plaintiff to the defendants upon a parol contract for the purchase of land which the latter have repudiated, and refused to convey to the plaintiff, and also to recover the amount by which the land was enhanced in value by certain improvements and betterments placed by the plaintiff upon the tract of land so sold to her, as will appear from the complaint, which is as follows:

"1. That the defendants were prior to .... October, 1919, the owners in fee simple of the following described tract of land:

"In Columbus County, State of North Carolina, adjoining the lands of ..... and others, and bounded as follows, viz.; Beginning at a stake, the second corner of lot No. 7, and runs north 45 degrees east, the line of lot No. 8, to the corner of Dunn Swamp the fork of it and alley bay; thence up said bay to a black gum bay by the public road, Marmaduke Powell's corner; thence with the road to lot No. 7; thence with it south 70 degrees east to the beginning, containing 43 acres, more or less, and being lot No. 9 of

the division of the land of James Dyson, deceased, excepting two acres already conveyed, and for a more perfect description reference is hereby made to said division and deed made by Priscilla Dyson, on 7 June, 1888, to Samuel Merritt, and recorded 13 July, 1888, in book N-N of deeds, at page 247, records of Columbus County, in the office of register of deeds, and which is hereby referred to and made a part of this deed, which see for further description of this land.

"2. That the plaintiff, in October, 1919, purchased from the defendants above named the tract of land described in paragraph one of this complaint at the price of $1,730, and paid to the defendants the whole amount of said purchase price, the defendants at the time they received said purchase price promised, agreed and contracted to execute to the plaintiff a deed for said tract of land.

"3. That this plaintiff immediately after she had purchased said tract of land and paid the whole amount of the purchase price therefor, erected a dwelling house on the land, which cost her $925, and also erected one tobacco barn thereon at the cost of $350, making a total of $1,275 which the plaintiff has spent in (188) making improvements on said tract of land, making a total, including the purchase price, of $3,025, which the plaintiff has expended on the tract of land.

"4. That the plaintiff took possession of said tract of land ... January, 1920, and has been living on the same, occupying the house she erected thereon as a dwelling.

"5. That on 5 March, 1920, the plaintiff had a deed in fee simple prepared from Sam C. Carter and wife, Lillian Carter, to the plaintiff, conveying to her the tract of land described in paragraph one of this complaint, and presented the same to Sam C. Carter and wife, Lillian Carter, and requested them to execute it in due form and according to law.

"6. That Sam C. Carter and wife, Lillian Carter, defendants above named, failed and refused to execute the deed, and both still refuse to execute the same to the plaintiff, in violation of their promise and agreement to convey the same.

"7. That the defendants are now cutting and removing timber from the tract of land, and are threatening to continue to cut and remove timber therefrom, to the plaintiff's great damage of $300.

"8. That the plaintiff has caused a summons to issue from the Superior Court of Columbus County in an action entitled as above.

"9. That the defendants are insolvent, as this plaintiff is informed, believes and so alleges.

"Wherefore, the plaintiff prays the court that an order be made restraining the defendants, their agents, servants and employees

from cutting and removing any timber from said tract of land, or in any manner committing acts of trespass thereon or from going upon said tract of land, and for such other and further relief as to the court may seem proper."

Donald McRackan and S. Brown Shepherd for plaintiff.
No brief for defendant.

WALKER, J., after stating the case: We are of opinion that there was error in the judge's ruling. The plaintiff had entered into a parol contract with the defendant by which it was stipulated that the defendant should convey to her a certain tract of land, containing 43 acres, more or less, and particularly described in the complaint, upon the payment by the plaintiff of the purchase money, which was $1,750, and which was duly paid by the plaintiff, believing that defendants would comply with their promise and convey the land, and that, relying upon the defendant's promise,
(189) the plaintiff entered into the possession of the land and erected valuable improvements thereon which reasonably cost $1,275. The plaintiff caused a proper deed to herself for the premises to be prepared, which was sufficient in form and substance to convey the estate promised by parol to be conveyed by the defendants to her, and defendants refused to execute the same, and now deny that the contract was ever made, pleads the statute of frauds and claims ownership of the land, and all this notwithstanding they have the purchase money in their pocket. We must be governed in our decision by the allegations of the complaint, on which our statement of the facts is based, the court having dismissed the action upon the pleadings, and certain alleged admissions which do not, in our opinion, affect the question, at this stage of the case, and when so controlled, we must hold that such a transaction does not look well for the defendants, and upon it the judgment of the lower court is not sustained by the law, and certainly not by equity.

We have solemnly adjudged in this Court, more than once, that where there is a parol contract to convey land, the full amount of the purchase money is paid, the vendee enters into possession and the vendor afterwards repudiates the contract by refusing to make a deed for the land, the purchaser may recover the price of the land so paid by him (*Improvement Co. v. Guthrie,* 116 N.C. 381), and further that where the vendor elects so to repudiate his parol contract by refusing to convey and sets up the Statute of Frauds, the purchaser may recover the amount paid by him for the land under his prayer for general relief, although the action be for specific per-

formance. *Wilkie v. Womble,* 90 N.C. 254 (cited in note, 19 L.R.A. 879); *Murdock v. Anderson,* 57 N.C. 77; *Ellis v. Ellis,* 16 N.C. 398. Under the old system, when the courts of law and equity were separate, it was held that the purchaser could not proceed in equity to recover the purchase price which had been paid by him, as he had a full and adequate remedy at law, that is, by an action for money had and received to his use by the vendor or for money paid under a contract, the consideration having failed by the conduct of the adverse party, but now the two systems are blended, and since 1868 that rule has become obsolete. *Murdock v. Anderson, supra; Wilkie v. Womble, supra.* But even under the former system, if from peculiar circumstances the remedy at law would be inadequate, the equity court would have interfered and given redress. *Ellis v. Ellis, supra.*

The general right of the purchaser to recover what he has paid on the purchase money, and the obligation of the vendor to restore what has been unjustly received by him on his repudiated promise results (says Smith, C.J., in *Wilkie v. Womble, supra*) from the annulling of the executory agreement for the sale of the land and will be enforced against the party so avoiding it. This was also held in *Beaman v. Simmons,* 76 N.C. 43, which was an action to recover back the purchase money paid on a repudiated or cancelled contract. And when the purchaser has entered into possession of the land, paid the purchase money and made improvements, on the faith of the vendor's parol promise to convey to him, which he refuses to do, and repudiates the contract by pleading the Statute of Frauds, the seller may recover not only the purchase money paid by him, but compensation for his improvements to the extent that they have enhanced the value of the land. *Ford v. Stroud,* 150 N.C. 362; *Pass v. Brooks,* 125 N.C. 129 (modified, but not on this point, in 127 N.C. 119); *Albea v. Griffin,* 22 N.C. 9; *Hedgepeth v. Rose,* 95 N.C. 41; *R. R. v. Battle,* 66 N.C. 541; *Tucker v. Markland,* 101 N.C. 422. The Court said in *Pass v. Brooks, supra,* 131: "The law will not allow the plaintiff to take possession of the lot without repaying the purchase money so paid to him, and without also paying for the valuable improvements put on the lot, by reason of said parol contract; this would be unjust and inequitable." We said in *Jones v. Sandlin,* 160 N.C. 150, at p. 154: "The general rule is that if one is induced to improve land under a promise to convey the same to him, which promise is void or voidable, and after the improvements are made he refuses to convey, the party thus disappointed shall have the benefit of the improvements to the extent that they increased the value of the land,"

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citing *Kelly v. Johnson,* 135 N.C. 647; *Reed v. Exum,* 84 N.C. 430; *Luton v. Badham,* 127 N.C. 96; *Albea v. Griffin,* 22 N.C. 9; *Hedgepeth v. Rose,* 95 N.C. 41; *Pitt v. Moore,* 99 N.C. 85. This Court, in *Joyner v. Joyner,* 151 N.C. 181, at p. 182, refers to *Albea v. Griffin, supra; Baker v. Carson,* 21 N.C. 381, and *Pitt v. Moore,* 99 N.C. 85, and says: "An examination of these cases, as well as *Luton v. Badham,* 127 N.C. 96, in which case many of the previous decisions of this Court are reviewed, will disclose that the basis of the relief granted in each of these cases was a parol agreement to convey certain land, or an interest therein, which induced an expenditure of money, in good faith, in its improvement and the enrichment of the land, the repudiation of the agreement to convey, and the attempt thereby to perpetrate a fraud." *Albea v. Griffin, supra,* decided that, "Although payment of the purchase money, taking possession, and making improvements, will not entitle the vendee to the specific performance of a parol agreement for the sale of land, yet he has, in equity, a right to an account of the purchase money advanced, and the value of his improvements, deducting therefrom the annual value during his possession," and the case of *Baker v. Car-*
(191) *son, supra,* was approved. See, also, *Wharton v. Moore,* 84 N.C. 479; *Barker v. Owen,* 93 N.C. 198 at 203.

We wish to be exactly just to the defendants, and this induces us to state that in the answer it is denied that defendants contracted with the plaintiff, as the latter alleges, but that they did contract to sell her, and did afterwards convey to her, a smaller tract of land on which the improvements were made, but we do not agree with the judge that no issues of fact or law were raised by the pleadings, or that the pleadings were in such a state that he could dismiss the action, without giving proper consideration to the plaintiff's equity, or even to his remedy at law.

The fact that plaintiff has received a deed for the land on the northwest side of the drain, and has no other deed, or other writing for any other part of the land, did not authorize a nonsuit, or dismissal of the action, because plaintiff does not allege that she had any other writing, but that by parol defendants agreed to convey *the land in question,* and that she paid the purchase money and was let into possession of the said land, under the agreement, and then made the improvements. If it turns out that plaintiff has received some land for the purchase money paid by her, she would only be entitled to recover the fair balance due, to be ascertained in the proper way.

It is not now required that we should consider the question relating to the injunction which was refused, as it is not relevant to

the controversy. We do not, however, see why plaintiff should be entitled to an injunction against the cutting of timber when it appears she is not the legal or equitable owner of the land.

We may add that when the allegations in the case are threshed out it may finally appear that plaintiff's allegations are not sustained, and that she is really not entitled to any return, either legal or equitable. But as there was a peremptory dismissal of the case, we are not dealing with the actual facts, but with plaintiff's allegations in her complaint.

The judgment will be set aside and the case submitted to a jury upon proper issues, unless a reference or other method of trial is agreed upon by the parties, and the case is accordingly remanded with directions for further proceedings therein not inconsistent with this opinion, and in other respects according to the course and practice of the courts.

Error.

Cited: Eaton v. Doub, 190 N.C. 22; *Rochlin v. Construction Co.,* 234 N.C. 445; *Hunt v. Hunt,* 261 N.C. 443.

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H. S. REID AND WIFE, V. OSCAR NEAL.

(Filed 19 October, 1921.)

1. Wills—Deeds and Conveyances—Rule in Shelley's Case.

The rule in *Shelley's* case is one of law and not of construction, and where the language of the instrument brings the disposition of land within its operation, the intent of the grantor or devisor does not control.

2. Same—Estates—Remainders—Defeasible Fee.

A devise of land to testator's daughter for life, and at her death to her "bodily heirs, if any, and if none, to return to my estate," does not come within the meaning of the rule in *Shelley's* case so as to give to the daughter a fee-simple estate, in disregard of the intent of the testator; and will be construed, nothing else appearing, as giving her the fee simple, defeasible upon her dying without issue; and upon the happening of this contingency, with remainder over to the heirs general of the testator.

3. Same—Testator's Intent—Interpretation.

When permissible from the language employed, a will should be construed with reference to the meaning of every word and clause, to harmonize them with each other, when the effect is not inconsistent with the general intent and purpose of the testator as gathered from the entire instrument.

4. Same—Remaindermen—"Estate."

Where the rule in *Shelley's* case is inapplicable to a devise of lands, and it appears from the interpretation of a will that it was the intent of the testator to give his daughter a fee simple, defeasible upon her dying without issue, in which event it was "to return to his estate," the limitation over to "his estate" is not void for uncertainty, the intent of the testator being that it return to his estate for distribution among his general heirs.

5. Wills—Estates—Remaindermen—Heirs at Law.

In accordance with the intent of the testator, as gathered from the words he has used in his will, the word "estate" may be interpreted to mean the quantity of interest to be taken, or the thing devised, or the circumstances or conditions in which the owner stands in regard to his property, or the person or persons to take it; and may refer to personal or real property, or exclude real property.

6. Wills—Residuary Clauses—Purpose.

The purpose of a residuary clause in a will is to provide for the ultimate disposition of legacies and devises which are void, or have lapsed, or have been refused; and, in the absence of an effective residuary clause, a lapsed or void legacy or devise will go to the next of kin, or to the heirs of the testator, as in case of intestacy.

APPEAL by defendant from *Connor, J.*, at July Term, 1921, of WILSON.

Submission of controversy without action. C.S., ch. 12, art. 25.

STATEMENT OF FACTS.

(193) H. S. Reid and wife, Laura Reid, and Oscar Neal, desiring to submit a question in difference, which might be the subject of a civil action, have agreed upon the following statement of facts, upon which the controversy depends, and present the controversy for submission to this court for determination:

1. Laura Reid is the daughter of Ishmael Wilder, and H. S. Reid is her husband.

2. Ishmael Wilder died domiciled in the county of Wilson, North Carolina, in February, 1917, having first made and published his last will and testament, by the third item of which he devised to his daughter, Laura Reid, certain lands, the following being a true and correct copy thereof, to wit:

"I lend to my daughter, Laura Reid, 59½ acres, the remainder of my land, to include the house where Joe Barnes now lives, to her during her natural life, and at her death I give it to her bodily heirs, if any, and if none to return to my estate." The said last will and testament after having been duly proven according to law, was ad-

mitted to probate and recorded in Book of Wills No. 6, page 1, in the office of the clerk of the Superior Court of Wilson County.

3. That no other item or part of said will deals in any manner with the lands devised unto Laura Reid, and there is no residuary clause therein.

4. That after the death of Ishmael Wilder the devisees caused the lands to be surveyed by J. T. Revell, surveyor, on 20 April, 1920, and the lands devised unto Laura Reid by the third item of said last will and testament are described as follows:

"Beginning at a stake, C. E. Brame's corner, and runs thence north 3 degrees east 283 poles to a stake, H. G. Wilder's corner; thence north 87 degrees west 33½ poles to a stake in Hinnant's line, H. G. Wilder's corner; thence south 3 degrees west 283 poles to a stake in Brame's line; thence 87 degrees east 33½ poles to the beginning, containing 59½ acres, as surveyed by John T. Revell."

5. That H. S. Reid and his wife, Laura Reid, have contracted and agreed to sell the said 59½ acres of land to Oscar Neal, and Oscar Neal has agreed to purchase the same and to pay therefor the sum of $10,000 upon the render to him of a good and sufficient deed conveying unto him the said lands in fee simple.

6. That H. S. Reid and wife, Laura Reid, have tendered unto the said Oscar Neal a deed, properly executed, conveying the said lands unto him and demanding the payment of the purchase price, according to the terms of the contract, but the said Oscar Neal declines to accept the said deed and pay the purchase price.

7. H. S. Reid and wife, Laura Reid, contend that under the terms of the will of Ishmael Wilder the said Laura (194) Reid is seized in fee simple of the said land. Oscar Neal contends that under the terms of the will of Ishmael Wilder the said Laura Reid is not seized of a fee simple estate therein and she and her husband cannot convey the same to him in fee simple.

Wherefore, the said parties submit to this court the determination of the question in difference between them, and if the said court shall be of the opinion that the said Laura Reid is seized of a fee simple estate in and to the said lands, then judgment shall be rendered by the said court requiring the said Oscar Neal to accept the said lands and pay the purchase price according to the contract; but if the court shall be of opinion that the said Laura Reid is not seized of fee simple estate in said lands, then judgment shall be rendered accordingly.

Judge George W. Connor rendered the following judgment:

JUDGMENT.

This controversy without action coming on to be heard before the undersigned resident judge of the Second Judicial District, in which the county of Wilson is located, upon the agreed statement of facts submitted, and it appearing to the court that the said agreed statement of facts is properly verified under the statute and, after giving the matter consideration, the court being of the opinion that Laura Reid is seized in fee simple of the lands devised unto her by the last will and testament of Ishmael Wilder:

It is therefore, upon motion of Connor and Hill, attorneys for H. S. Reid and wife, Laura Reid, ordered, decreed and adjudged that the said Oscar Neal accepts a deed tendered to him by the said H. S. Reid and wife, Laura Reid, and pay unto them purchase price agreed upon, to wit, $10,000, and the costs of this proceeding to be taxed by the clerk.

The defendant excepted and appealed.

Connor & Hill for plaintiffs.
E. J. Barnes for defendant.

ADAMS, J. In February, 1917, Ishmael Wilder died domiciled in the county of Wilson, having made his last will and testament, which has been duly proved and probated. Item three is as follows:

"I lend to my daughter, Laura Reid, 59½ acres, the remainder of my land, to include the house where Joe Barnes now lives, to her during her natural life, and at her death I give it to her bodily heirs, if any, and if none, to return to my estate."

(195) The plaintiffs contend that the devise over — "to return to my estate" — is void; that the word "estate" refers, not to persons, but to the condition or circumstances in which the testator stood with reference to his property — the nature and extent of his interest; that there is confusing uncertainty as to the persons who might succeed to the title upon the failure of the *feme* plaintiff's "bodily heirs," and that the devisee, Laura Reid, has an estate in fee simple under the rule in *Shelley's* case. It therefore becomes necessary to decide whether the rule in *Shelley's* case applies, and if it does not, to construe the devise under which the *feme* plaintiff claims title to the land.

This noted rule, a prolific source of litigation, is stated by Coke as follows: "When an ancestor, by any gift of conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word heirs is a word of limitation of the estate, and not a

word of purchase." 1 Coke 104. In Kent's Commentaries, as a citation of Preston's definition, the rule is given in this language: "Where a person takes an estate of freehold, legally or equitably, under a deed, or will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of any interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." 4 Kent Com. (215).

It is held with practical unanimity that the principle stated is not a rule of construction, but a rule of law. If the language used in a particular instrument brings the case within the operation of the rule, the intention of the grantor or devisor does not control.

In *Nobles v. Nobles,* 177 N.C. 245, Hoke, J., speaking for this Court, said: "The rule in question has always been recognized with us, and a perusal of these and other like cases will disclose that when the terms of the instrument by correct interpretation convey the estate in remainder to the heirs of the first taker as a class, 'to take in succession from generation to generation' to the same persons as those who would take as inheritors under our canons of descent and in the same quantity, the principle prevails as a rule of property both in deeds and wills, and regardless of any particular intent to the contrary otherwise appearing in the instrument."

This Court has had occasion from time to time to construe divers instruments in which the language used bears striking similarity to the language in the devise under consideration. Recourse to former adjudications may, in the present instance, serve to direct us to the correct conclusion.

In *Francks v. Whitaker,* 116 N.C. 518, the devise was in these words: "I give and devise (real estate) to my be- (196) loved son E. S. F., during his natural life, and after his death to his lawful heir or heirs, should he have any surviving him, but should he not have any lawful heir or heirs surviving him, then I give and devise the same to the children of my beloved son W. W. F." The Court held that the proper construction of the will is as if it read: "I give and devise to my beloved son E. S. F., during his natural life, and after his death to his issue, should he have any surviving him, but should he not leave issue, then I give and devise the same to the children of my beloved son W. W. F."

In *Bird v. Gilliam,* 121 N.C. 327, the devise was "to my daughter Mary during her natural life, and give the same to the heirs of her body, but if my daughter Mary should not have no lawful heirs of

her body, the said land at her death shall go back to my son William and the heirs of his body."

The Court said: "The rule in *Shelley's* case does not apply here. If there had been no words explanatory of the words 'heirs of her body,' in connection with the estate devised to Mary, she would, under the rule, have taken the fee. *Nichols v. Gladden,* 117 N.C. 497. But there were such explanatory words where the testator said, 'but if my daughter Mary should not have no lawful heirs of her body, the said land,' etc. Such explanatory words have been construed by this Court to mean issue. *Rollins v. Keel,* 115 N.C. 68. Mary, then, took only a life estate."

The case of *May v. Lewis,* 132 N.C. 115, is of similar import. There the devise was in the following words: "I loan unto my son, B. M., my entire interest in the tract of land, to be his during his natural life, and at his death, I give said land to his heirs, if any, to be theirs in fee simple forever; and if he should die without heirs, said land to revert back to his next of kin." The Court held that the son took a life estate, saying that "any words added to the limitation which carry the estate to any other person, in any other manner or in any other quality than the canons of descent provide, will take the case out of the operation of the 'rule,' and limit the interest of the first taker to an estate for his life."

Puckett v. Morgan, 158 N.C. 344, presents the case of a devise, the terms of which, excepting the last clause, are substantially identical with the language used in this case: "I leave to Martha Morgan, the wife of James Morgan, 48½ acres of land, known as the Rachael tract, on the east side, during her life, then to her bodily heirs, if any; but if she have none, back to her brothers and sisters." Martha Morgan died in 1894, leaving two daughters, one of whom was the plaintiff, who had intermarried with P. H. Puckett. James Morgan, the surviving husband of Martha, was in possession
(197) of the land claiming a life estate as tenant by the curtesy. Upon demurrer, the judge held that under *Shelley's* case Mrs. Morgan took an estate in fee, and that the defendant was entitled to the possession of the land during his life. But in the opinion of this Court Brown, J., said: "It is also manifest that the testator did not intend that his daughter should take an estate in fee, for in express words he devised her an estate for life only, and the context shows that he intended that her children should take at her death, and in the event of her death without children, then that her brothers and sisters should receive the property."

These precedents are maintained in the more recent decisions of this Court. *Clackledge v. Simmons,* 180 N.C. 535; *Wallace v. Wallace,* 181 N.C. 158. In the former case there was a devise of real

estate to the testator's daughter for life, and at her death unto the heirs of her body lawfully begotten, with a provision that in the event of her dying without heirs of her body, the land should go to the testator's heirs at law. Walker, J., citing numerous decisions bearing upon the question, concluded that the words "heirs of her body" should not be construed in their technical sense, as denoting an entire class of heirs to take in indefinite succession, but should be construed as meaning the children of the testator's designated child. Accordingly it was held that the first taker acquired a life estate and the children an estate in fee as purchasers. In the latter case, Elisha Wallace and his wife executed a deed conveying to C. A. Wallace a tract of land, to hold during his natural life, subject to the support and protection of the grantors during their lifetime. In the deed is this additional provision: "And then after the death of the above said C. A. Wallace, then said land to descend in fee simple to his bodily heirs, if any, and if none, to go to his next of kin." C. A. Wallace died without the birth of issue, and made his will devising the land for life to his widow Selina, "and at her death to the children of R. I. Wallace." The representatives and children of the deceased brothers and sisters of C. A. Wallace instituted a special proceeding for partition, making parties his widow and his surviving brothers and sisters. The widow and the petitioners contended that C. A. Wallace took an estate in fee simple, while the defendants insisted that he took only a life estate, and that upon his death they acquired title to the land by virtue of the limitation to the next of kin. In an opinion reviewing the authorities, Hoke, J., said: "We must hold that C. A. Wallace took only a life estate under the deed from his father, and that under the ulterior limitation to his next of kin the property belongs to his surviving brothers and sisters to the exclusion of the widow and his nephews and nieces."

The prevailing doctrine drawn from the decisions in this jurisdiction is crystallized in *Wallace v. Wallace* in (198) the following paragraph: "From these and other authorities it will be noted that in order to an application of the rule in *Shelley's* case (being contrary as it is to the expressed will of the grantor that the first taker should have a life estate only), the words 'heirs' or 'heirs of the body' must be taken in their technical sense carrying the estate to the entire line of heirs, and at this time and in this jurisdiction to hold as inheritors under our canons of descent, and if it appears by correct construction that these words are not used in that sense, but only as words designating certain persons or confining the inheritance to a restricted class of heirs, the rule does not apply, and the ancestor or first taker will be held to

have acquired only a life estate, according to the express words of the instrument."

But the plaintiffs insist that the instruments construed in these decisions may be differentiated, in that the ulterior devise in the instant case, limited not to a person or class of persons, but to "my estate" is void because indefinite and uncertain. The immediate question, then, is this: What is the proper legal construction of the words "if any, and if none, to return to my estate?"

It is true that the rule in *Shelley's* case is a rule of law and not of construction, but whether the ulterior devise is valid, or whether the limitation is to the "technical heirs" of the first taker, or to a particular class of heirs, is essentially a preliminary question as to the construction of the particular instrument under consideration; and the intent of the grantor or devisor is to be disregarded only where a proper interpretation of his language brings the particular case within the rule. *Puckett v. Morgan, supra; Blackledge v. Simmons, supra.* In construing this clause — "if any, and if none, to return to my estate" — the intent of the testator must be sought unless we hold as a matter of law that the clause is void upon its face. If the words referred to are susceptible of any construction which is consistent with the validity of the will in its entirety, we cannot declare them void without doing violence to one of the cardinal rules of construction. A will should be construed so as to give effect to every word and every clause, and to harmonize the several clauses, provided the effect is not inconsistent with the general intent and purpose of the testator as gathered from the entire instrument. 30 A. & E. (2 ed.) 664; Gardner on Wills, 373; *Satterwaite v. Wilkinson,* 173 N.C. 39.

It cannot be successfully urged that the word "estate" makes the last limitation void for uncertainty. This word has more than one meaning, and is susceptible of more than one construction. Anciently confined to land, it has been enlarged so as to embrace property of every description. Enumerated with words which are de-
(199) scriptive of personal or chattel interests, it may exclude real estate altogether. It may denote the quantity of interest, or the thing devised, or the condition or circumstances in which the owner stands in regard to his property. 3 W. & P. 2475 *et seq.* Also, it has been construed as meaning a person. *Bennett v. State,* 36 S.W.R. 948. Its legal signification must be ascertained from the context, or an examination of all the provisions of the instrument in which it appears. In *Downing v. Grigsby,* 96 N.E.R. 513, it is said that the ordinary meaning of the words "revert to my estate" is, "return to the aggregate of all the property which I may leave at my death."

It will be observed that in the last will and testament of Ishmael Wilder there is no residuary clause — in fact no clause, excepting item three — which purports to deal with the land in question.

If Laura Reid die without bodily heirs, or children, or "issue" (*Francks v. Whitaker, supra; Bird v. Gilliam, supra;* C.S. 1739), and effect be given to the ulterior limitation, in whom will the title vest? The office of the residuary clause in a will is to provide for the ultimate disposition of legacies and devises which are void, or have lapsed, or have been refused. In the absence of an effective residuary clause, a lapsed or void legacy or devise will go to the next of kin, or to the heirs of the testator, as in case of intestacy. *Johnson v. Johnson,* 38 N.C. 426; *Winston v. Webb,* 62 N.C. 1; *Robinson v. McIver,* 63 N.C. 645; *Twitty v. Martin,* 90 N.C. 643.

After a careful consideration of the authorities we conclude that effect must be given to the ulterior limitation — "and if none, to return to my estate"; that the testator gave to his daughter Laura a life estate with remainder in fee defeasible upon the failure of her "bodily heirs" (*Kirkman v. Smith,* 174 N.C. 603), and that the devise in item three should be construed as if it read: "I devise to my daughter Laura Reid 59½ acres, the remainder of my land, to include the house where Joe Barnes now lives, to her during her natural life, and at her death I give it to her issue, if any, and if none, to my heirs" — *i. e.,* in the absence of a residuary clause, to those who would have been entitled had the testator died intestate. It is obvious, then, that under the will of her father Laura Reid takes only a life estate, and that the plaintiffs cannot convey the land in fee simple. The judgment is therefore reversed.

Reversed.

Cited: Anderson v. Anderson, 183 N.C. 143; *Willis v. Trust Co.,* 183 N.C. 269; *Hampton v. Griggs,* 184 N.C. 18; *Zieglar v. Love,* 185 N.C. 42; *Thomas v. Clay,* 187 N.C. 784; *Shephard v. Horton,* 188 N.C. 788; *Yelverton v. Yelverton,* 192 N.C. 617; *Daniel v. Bass,* 193 N.C. 297; *Welch v. Gibson,* 193 N.C. 691; *Williams v. Best,* 195 N.C. 327; *Bradley v. Church,* 195 N.C. 663; *West v. Murphy,* 197 N.C. 490; *Cheek v. Gregory,* 197 N.C. 766; *Doggett v. Vaughan,* 199 N.C. 426; *Stevenson v. Trust Co.,* 202 N.C. 96; *Brown v. Mitchell,* 207 N.C. 134; *Richardson v. Cheek,* 212 N.C. 512; *Privott v. Graham,* 214 N.C. 200; *Bell v. Thurston,* 214 N.C. 234; *Edwards v. Faulkner,* 215 N.C. 588; *Barber v. Barber,* 217 N.C. 427; *Williamson v. Cox,* 218 N.C. 181; *Perkins v. Isley,* 224 N.C. 798; *Featherstone v. Pass,* 232 N.C. 352; *Marks v. Thomas,* 238 N.C. 546; *Fuller v. Hedgpeth,* 239 N.C. 376; *Clayton v. Burch,* 239 N.C. 390; *Tremblay v. Aycock,* 263 N.C. 629.

(200)

E. F. YOUNG, RECEIVER, v. Z. R. DAVIS.

(Filed 19 October, 1921.)

1. Statutes—Interpretations—Presumptions.

When there are two or more statutes on the same subject in the same or successive Legislatures, the presumption is against inconsistency, and they should be so construed as to harmonize with each other, and as a whole, in the absence of express repealing clauses, and each and every part allowed significance if this can be done by fair and reasonable interpretation.

2. Same—Conflict—Additional Remedies—Procedure—Pleadings—Judgment—Courts—Clerks of Court.

Ch. 156, Laws 1919, dealing with the procedure before the clerk as to service of process, the filing of pleading and rendering judgments by default, upon uncontested actions to recover upon bills, notes, bonds, and other forms of indebtedness, deals particularly with the class of actions, and is construed to be an additional remedy given, and not repealed by the provisions made applicable to the general procedure and remedies passed later at the same session of the Legislature, or by the amendment expressly referring to it, pass as ch. 96, Special Session of 1920; and ch. 156, Laws 1919, is in force as a permissive and selective method of procedure in the class of actions to which it refers.

3. Statutes—Interpretation—Codification of Laws—Legislature.

In the interpretation of statutes upon the same subject-matter at the same or a subsequent session, on the question of whether they have been repealed by a later act, the codification of the laws and its adoption by the Legislature thereafter, when relevant, may be considered by the courts.

MOTION to set aside judgment by default final, heard before his Honor, *Lyon, J.*, holding the courts of the Fourth District at Goldsboro, N. C., on 10 June, 1921, apparently by consent.

The facts more directly relevant to the inquiry and his Honor's judgment thereon are set forth in the record as follows:

It appears to the court, and the court finds from the record of the cause, and affidavits submitted, the following facts:

1. The summons in this cause was issued by the clerk of the Superior Court of Harnett County, 13 April, 1921, returnable 2 May, 1921, the last named date being the first Monday of May.

2. The summons was by the sheriff of Wilson County, together with a copy of the complaint, duly served on the defendant 20 April, 1921.

3. The complaint, duly verified, declared on a promissory note, and demanded judgment to the amount of the note, alleging that the plaintiff was the holder in due course of said note.

(201) 4. On 10 May, 1921, eight days after the return date of the summons, and on the second Monday of May, 1921,

judgment by default final was entered by the clerk of the Superior Court against the defendant for the amount demanded by the plaintiff.

5. The defendant, on 18 May, 1921, for good cause, requested an extension of time in which to answer the complaint. The defendant was informed by the Clerk of the Superior Court of Harnett County that the time to answer would be extended as requested, and for the cause assigned, but for the fact that judgment had already been entered in the cause.

The court finds further that the defendant could have, and would have, answered prior to 22 May, 1921, had judgment not already been entered and had the clerk of the Superior Court of Harnett County refused the application of the defendant for an extension of time in which to answer.

6. The court finds that the defendant has a meritorious defense; that the defense set up in the further defense of the answer sought by the defendant to be filed in this cause, and used in his motion as an affidavit, is a good and meritorious defense to the plaintiff's alleged cause of action.

The court is of opinion that chapter 156, Laws 1919, was repealed by ch. 96, Public Laws, Special Session, 1920, and is further of the opinion that the judgment entered by the clerk of the Superior Court in this case was premature, and for that cause irregular, and that the defendant is entitled to have his motion that the judgment be set aside and that he be granted leave to answer sustained.

It is now by the court, on motion of the defendant, ordered and decreed that the judgment heretofore entered in this cause by the clerk of the Superior Court of Harnett County be, and the same is hereby, set aside and declared of no effect. The defendant is permitted to file answer within ten days from this date.

From this judgment plaintiff appealed, assigning error the ruling of his Honor that ch. 156, Laws 1919, was repealed by ch. 96, Public Laws, Special Session 1920, and that the judgment of the clerk being therefore premature and irregular, defendant is entitled to have same set aside.

Ross & Salmon, James Best for plaintiff.
W. A. Lucas, Pou, Bailey & Pou for defendant.

HOKE, J. Chapter 156, Laws 1919, entitled An Act to Provide a More Speedy Determination of Uncontested Rights and Actions upon Bills, Notes, Bonds, and other Forms of Indebtedness, and

(202) duly ratified 7 March, 1919, makes provision in effect that in all such actions, summons may be returnable before the clerk on the first Monday in the month, and judgments by default rendered on the second Monday, provided such summons is issued more than ten days before any first Monday, a duly verified complaint is filed at time of issue setting forth a cause of action of the kind specified, a copy of same being "served on defendant at time of service," and the defendant shall neglect or fail to file a verified answer, raising material issues before said second Monday.

In chapter 304 of the same session, ratified 11 March, 1919, the Legislature made provision as to the procedure in civil actions generally, the first three sections of which are as follows:

"SECTION 1. The summons in all civil actions in the Superior Court shall be made returnable before the clerk at a date named therein, not less than ten days nor more than twenty days from the issuance of said writ, and shall be served as now provided by law.

"SEC. 2. The complaint shall be filed on or before the return day of the summons: *Provided*, for good cause shown the clerk may extend the time to a day certain.

"SEC. 3. The answer or demurrer shall be filed within twenty days after the return day, or, if the time is extended for filing the complaint, then the defendant shall have twenty days after the date fixed for such extension: *Provided*, for good cause shown the clerk may extend the time for filing the answer or demurrer."

The statute containing extended and further provisions affecting procedure not specially relevant to the questions presented.

At the Special Session 1920, ch. 96, the same Legislature enacted a statute which, in section 1 purports in express terms to amend "Chapter 304 of the Laws of 1919," and which makes extended provision affecting procedure in civil causes, providing among other things that the "Summons in all civil actions in the Superior Court shall be made returnable before the clerk at a date named therein, not less than ten nor more than twenty days from the issuance of the writ; that the complaint shall be filed on or before the return day of the summons (unless the time is extended) and that the answer or demurrer shall be filed within twenty days after return day (unless time is extended)," etc.

After making, as stated, additional regulations affecting procedure in the civil causes to which it may refer, this statute closes with the following repealing clause: "That all of that part of ch. 304, Public Laws of North Carolina Session 1919, not included and rewritten in this act, and all other laws and clauses of laws in conflict with this act are hereby repealed."

Upon this, a sufficient statement to a proper apprehension of the questions presented, we are of opinion that this (203) chapter 96 of the Special Session 1920, did not have the effect of repealing chapter 156 of the regular session of 1919, which in terms applied only to actions to enforce moneyed demands of specified kind, but the same is still in force as a permissive and selective method of procedure in the class of actions to which it refers. Speaking generally, it is recognized that in the construction of statutory law there is a presumption against inconsistency, and when there are two or more statutes on the same subject in the same or successive legislatures, in the absence of an express repealing clause, they are to be harmonized and each and every part allowed significance if this can be done by fair and reasonable interpretation. In further elucidation of the position it is said in Black on Interpretation of Laws, 328-329:

"Where a statute contains both a general enactment and also specific or particular provisions the effort must be, in the first instance, to harmonize all the provisions of the statute by construing all the parts together; and it is only when, on such construction, the repugnancy of the specific provisions to the general language is plainly manifested, that the intent of the Legislature as declared in the general enacting part is made to give away."

. . . . . .

"A substantially similar rule prevails in cases where the two conflicting provisions are found in different statutes relating to the same subject. It is an established rule in the construction of statutes that a subsequent act, treating a subject in general terms, and not expressly contradicting the provisions of a prior special statute, is not to be considered as intended to affect the more particular and specific provisions of the earlier act, unless it is absolutely necessary so to construe it in order to give its words any meaning at all. Hence, where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general, which, if standing alone, would include the same matter, and thus conflict with the special act or provision, the special act must be taken as intended to constitute an exception to the general act, as the Legislature is not presumed to have intended a conflict."

The principle so stated has been approved and applied in authoritative cases on the subject in this and other courts. *A. C. L. R. R. v. Brunswick*, 178 N.C. 254; *Rankin v. Gaston*, 173 N.C. 683; *Hannon v. Power Co.*, 173 N.C. 520; *Bramham v. Durham*, 171 N.C. 196; *Cecil v. High Point*, 165 N.C. 431; *Rodgers v. U. S.*, 185

U.S. 83; *Dahnke v. People,* 168 Ill. 102; *Stockett v. Bird,* 18 Md. 102.

(204) As more directly apposite to the facts presented, in *Bramham v. Durham,* it was held that "where there are two acts of the Legislature applicable to the same subject passed at different times at the same session, their provisions are to be reconciled in their interpretation if this can be done by fair and reasonable intendment; but to the extent they are necessarily repugnant the latter shall prevail."

And in the *Cecil* case, *supra:* "Statutes on the same subject matter should be construed together so as to harmonize different portions apparently in conflict and to give to each and every part some significance if this can be done by fair and reasonable interpretation."

Recurring to the facts it appears at the regular session the Legislature of 1919 enacted chapter 156, providing that an action could be instituted in a certain class of moneyed demands returnable in ten days to the first Monday in any month, and judgment could be entered on the second Monday thereafter on proper proof made and in case no verified answer raising material issues should be filed — ratified 7 March. Four days later, on 11 March, another statute, chapter 304, by the same Legislature was duly ratified, making provision as to return of summons within twenty days and answer within twenty days, etc., making extended provisions affecting procedure. This latter statute purporting to apply to "all civil actions in the Superior Court," and containing a repealing clause in general terms as follows: "That all laws and parts of laws in conflict with this act are hereby repealed." Under the decisions cited and others of like kind, and the principles they approve, we must hold that chapter 304, purporting to deal with civil actions generally, is not necessarily repugnant to chapter 156, which affords an additional and more speedy relief in the class of actions therein specified, to wit, the moneyed demands wherein no defense should be offered within the required time. The two acts are not therefore necessarily repugnant, but on the contrary it is clear, we think, that the one is an exception to the other, or rather the first affords an additional and more speedy method of relief in the stated class of suits. This in our view being the correct construction of the two acts of the regular session, the same Legislature at the Special Session enacted this chapter 96 making provision for the institution and mode of the procedure in civil actions generally. It begins by stating expressly that it purports to deal with this chapter 304 of the regular session. The general act provides for the issue of summons in twenty days, etc., in all civil actions, etc., and closes with the repealing clause as

stated: "That all that part of chapter 304 not included and rewritten in this act, and all other laws and clauses of laws in conflict with this act are hereby repealed." If the special chapter 156 of the regular session was not in conflict with chapter 304 of the same session, no more is it in conflict with this chapter 96, which (205) on the question presented here is in exact accord with the corresponding section of chapter 304, with the exception that the later act contains provision for "service by publication." A position that is emphasized by the fact as shown that in express terms it purports to deal only with chapter 304.

We are confirmed also in this view by the fact that the capable codifiers of Consolidated Statutes, and their learned assistants, have incorporated the two statutes of the regular session, 156 and 304, in their valuable work, where they appear in separate sections, 476 and 593, not as inconsistent, but as affording two recognized methods of procedure in civil causes and in the cases specified. The legislators at the time they passed the statute of the Special Session were no doubt fully aware that both these laws of the regular session were generally recognized as existent and had been so brought forward in the work referred to, and in restricting the effect of the act of the Special Session in terms to chapter 304, they thereby manifested a clear intent that the special act on moneyed demands in the cases and to the extent specified therein should be undisturbed.

For the reasons stated, we are constrained to differ with the learned judge in his ruling, and must hold that the judgment is in all respects regular and the order by which same was set aside is disapproved.

Reversed.

Cited: Armstrong v. Comrs., 185 N.C. 408; *R. R. v. Gaston County*, 200 N.C. 783; *In re Miller*, 243 N.C. 514.

LEON COOK v. CAMP MANUFACTURING COMPANY ET AL.

(Filed 19 October, 1921.)

1. Employer and Employee—Master and Servant—Dangerous Machinery—Safe Place to Work—Negligence—Evidence—Questions for Jury.

It was the sole duty of the plaintiff, an employee of the defendant, to keep its power-driven and dangerous machinery in repair, and under the defendant's rules, to notify those operating the engines to stop when he

was about to make repairs; and, also, when he had made them. There was a system of signals for starting and stopping the large engine operating the main machinery, but none as to an engine operating a smaller portion, which started without warning, and caused the injury to the plaintiff while in the course of his employment: *Held*, sufficient evidence to be submitted to the jury on the issue of defendant's actionable negligence, in not equipping the smaller engine with a similar system of signals to that of the larger one.

2. Same—Duty of Master—Delegated Authority.

Where the plaintiff was employed to work among dangerous machinery in repairing it while it was not running, it is the duty of the employer to warn him, while engaged in this duty, that the machinery was to be started again, and when an injury is thus proximately caused by the neglect of the employer or his agent, it is evidence of actionable negligence, from which the employer may not escape liability by having delegated this duty to another.

3. Same—Vice Principal.

The duty of the employer to furnish his employee a safe place to work among dangerous machinery and surroundings is one implied in the contract of hiring, and if he commits to any other employee or servant the duty of maintaining and keeping it safe, the agent delegated to perform this duty *pro hac vice*, stands in the place of the employer, who may not escape liability for damages because he has delegated this duty to another.

4. Employer and Employee—Master and Servant—Negligence—Rule of the Prudent Man.

It is not alone sufficient that the master has furnished his servant such machinery, tools, and appliances as are usually furnished for doing the work under dangerous conditions similar to those in which the servant is required to work, that are known, approved, and in general use, but he must further take such precautions for his servant's safety as an ordinarily prudent person charged with a like duty should and ought to have foreseen were necessary and proper under the circumstances.

STACY, J., concurs in the result; WALKER, J., dissenting.

APPEAL by plaintiff from *Bond, J.*, at March Term, 1921,
(206) of DUPLIN.

This was an action for personal injuries received by plaintiff at the sawmill operated by the Camp Manufacturing Company, but owned by its codefendant, through the alleged negligence of the defendants. On motion of the defendants a judgment of nonsuit was entered and the plaintiff appealed.

E. K. Bryan and George R. Ward for plaintiff.
Rountree & Carr, Stevens, Beasley & Stevens for defendants.

CLARK, C.J. It appears that the Carolina Timber Company owned the sawmill at which the plaintiff was working at the time of

the alleged injury, and the mill was being operated by its codefendant, the Camp Manufacturing Company. The plaintiff was employed to repair the machinery and chains and equipment attached to the fire-room and the big engine, but he was not operating any of the machinery. Whenever any part of the machinery which it was the plaintiff's duty to repair broke down or got out of order, the plaintiff had authority to stop the engine running it in order to make the repairs, and was also required to notify the operators of such machinery that it had been stopped for repairs, and it was the duty of those operating the machinery to see that it (207) was not thereafter started until notice from the plaintiff. This was the rule of the company under which the plaintiff was required to do his work.

The machinery in the sawmill proper was run by a big engine connected with which there were whistles to notify employees when the machinery was going to be stopped, and after being stopped, when it would be again started. There was a smaller engine in another room which ran the dust chain in which the plaintiff was caught and injured. There were no signals attached for starting or for stopping the machinery operated by the small engine. This dust chain carried fuel to the boilers which generated steam for running both engines. The plaintiff was compelled to rely upon the observance of the company's rule for his protection while repairing the engine and machinery.

On this occasion the plaintiff, on going into the room of the little engine which ran the dust chain, discovered that the pilot chain which in turn drove the dust chain, had been caught at some point in the dust house by an obstruction which stopped its moving, and thus had broken the pilot chain. He then went to the men who operated the engine, pulling the dust chain, and told them he had shut down the dust engine in order to go into the dust house to make the necessary repairs to the dust chain there, and in accordance with the rules of the company, he notified them not to start the engine and machinery connected with the dust chain until he had advised them that the repairs were complete and everything was ready for operation. He then went into the dust house, and finding a lightwood knot had been caught by the dust chain which stopped it, he, with the aid of another employee, began to remove the lightwood knot. He had just succeeded in doing this, and while in the act of stepping from astride the dust chain, the operators of the dust engine suddenly, without warning, started up the dust engine, which caused the dust chain to catch his foot, and winding around his foot and leg, it was only by grasping two posts he prevented himself from

being ground up. His helper ran into the engine room and had the power turned off. The evidence further shows that shortly after the plaintiff had caused the engine to be shut down and notified the operators not to start the same, one of them went out of the engine room to a lumber pile, and returning after a delay of some twenty or thirty minutes, was ordered by some one to turn on the power. He replied that the engine had been stopped for repairs to the dust chain, and asked if the plaintiff had come out of the dust house, and being erroneously told that he had, the power was turned on, causing the injury to the plaintiff as above stated.

Upon this evidence, the case should have been submit-
(208) ted to the jury:

1. It was the duty of the defendants, operating highly dangerous machinery, to have given the plaintiff a safe place in which to work. There was a system of signals for starting and stopping the machinery connected with the larger engine, and if a similar system had been used in regard to starting and stopping the machinery connected with the dust chain by running a wire to the room in which the engine operating the dust chain was located, or a similar or a small whistle had been put on the steam pipe leading to the dust engine, notice would have been given to the plaintiff, which would have enabled him to escape this injury. The circumstances in evidence as to the manner of the injury are *prima facie* evidence of negligence in not equipping the smaller engine with a signal such as was placed upon the larger engine, to give notice of its starting up. At least, this was sufficient evidence of negligence to have been submitted to the jury.

2. In *American Car Co. v. Rocha* (C.C.A.), 257 Fed. 297, it was held that where a plaintiff was at work under a car which had been raised from its tracks and blocked up, his employer owed him a positive duty to warn him before the car was moved, which could not be delegated to another employee so as to relieve itself from liability for its negligence resulting in plaintiff's injury. This judgment by the United States Circuit Court reviewed and affirmed the judgment to the same effect in the District Court. The appellant then moved in the United States Supreme Court for a *certiorari,* which was denied.

In *Collins v. Bonner,* 268 Fed. 699 (Court of Appeals D. C.), it was held that an employer under his duty to give the employee a safe place in which to work is negligent if the hoisting engineer in his employ starts an engine regardless of conditions whereby an employee is injured.

In *Ondis v. Tea Co.,* 82 N.J.L. 511, it was held, "When the place

assigned the employee to work is safe for him while the machinery, with which he is obliged to come in contact, but which he is not operating, is at rest, and which is liable to become of great peril to him, when such machinery is put in motion, and a method of warning him of such starting by another employee who is in control of the engine, has been the rule adopted by the company, the neglect of the latter to give the warning is to be imputed to the employer." This is an elaborate opinion, concurred in by all the Judges in that case, and is exactly on all fours with the case at bar.

The duty of the master to provide and maintain a reasonably safe place for the servant to work is implied in the contract of hiring, and if he commits to any other employee or servant the duty of maintaining and keeping a reasonably safe place for that purpose, then the agent to whom this duty is committed is (209) *pro hac vice* the representative of the master, who is liable to the same extent as if he had personally performed the negligent act. *Buchanan v. Furnace Co.*, 178 N.C. 646. To the same purport are *Evans v. Lumber Co.*, 174 N.C. 31; *Odom v. Lumber Co.*, 173 N.C. 134; *Patton v. Lumber Co.*, 171 N.C. 837; *Wooten v. Holleman, ib.*, 461; *Midgett v. Mfg. Co.*, 180 N.C. 24.

The evidence shows that under the rules under which the plaintiff was working when the machinery was set down for repairs, the persons to whom the master had committed the running of the engine should not start up until the plaintiff notified the operator that the machinery was ready for running. This rule was a representation to the employee that the employer would see to it that the machinery was not started while the plaintiff was repairing it. It was equivalent to a promise to that effect, the execution of which could not be shifted off to some other employee, and for damages sustained from a breach of the same, if so found by the jury, the employer would be liable.

3. The duty of the master is not fully performed by simply doing that which is usually done, or furnishing machinery and tools known, proved and in general use, but he must take such precautions in addition thereto as an ordinarily prudent person charged with a like duty should have and ought to have foreseen were necessary and proper under the circumstances. *Taylor v. Lumber Co.*, 173 N.C. 112; *Dunn v. Lumber Co.*, 172 N.C. 129; *Ainsley v. Lumber Co.*, 165 N.C. 122; *Kiger v. Scales Co.*, 162 N.C. 133.

It was also earnestly debated before us whether, the sawmill being highly dangerous machinery, the owner could relieve itself from liability for the negligence of its lessee, and also whether the lease by the owner to the lessee, both companies having the same identi-

cal stockholders and officers, was such a lease as would protect the owning company from being liable for the negligence of the operating company. As the case must go back anyway, it is not necessary to pass upon these propositions, as on another trial the evidence on these points may be more fully brought out, and possibly, if the parties are so advised, issues of fact may be submitted in regard thereto.

The judgment of nonsuit is set aside, and there will be a New trial.

STACY, J., concurs in result.

WALKER, J., stating the case for his dissent: In dissenting from the opinion of the Court, and the order directing a new trial, I find it necessary to restate the testimony to some extent, so that the salient facts may appear, as I find them in the record. They
(210) will be stated sufficiently to give plaintiff's case its full strength, and the benefit of all material or relevant facts. (The italics below are mine.)

The plaintiff testified as follows: "I went to the Camp Manufacturing Company, and Mr. Rowe came over here and offered me a job, and told me to go to Mr. Camp. Mr. Rowe had been down to see Mr. Camp. Mr. Camp wrote me, or the Camp Manufacturing Company did, and I was employed over there at the time. I then decided to accept the position with them and work for them. I had my conversation with Mr. John Camp about the employment. *I was employed by Mr. Camp, of the Camp Manufacturing Company.* I just had a letter from Mr. Camp, from him individually, about my employment. The letter wasn't signed individually, but it was signed Camp Manufacturing Company, and Mr. Camp dictated it. When I first went to work they paid me every two weeks, I believe. I got my pay envelope. It was marked on it from the Camp Manufacturing Company. They just handed me the pay envelope. My time was kept. *I never did get one with the Carolina Timber Company on it.* . . . I was injured on 13 July, 1918. I was coming around the end of the dust house, between the dust house and the mill, and I noticed that the big chain that fed the cross chain that went into the fireroom and fed the chain that went to the boiler had stopped; in fact, the main chain that pulled the dust from the dust house — to make it short, I noticed that the pilot chain that drew the large chain was broken, and in order to fix this boiler chain, I shut the little engine down, which was running. I did that because it pulls this dust chain, and the little pilot chain was

broken. Before I went on to fix that little chain, I had the engine shut down. I would think it was a part of my duty to shut down the engine, if I wanted to repair the chain. It would not look advisable for it to run all the time when it was not doing anything. I had authority to shut it down to overhaul this chain; that is, the little chain that pulls the big chain, and being a practical man, I knew there was some trouble in the back end of the house — somewhere in the main big line of chain that little pilot chain dragged. And so I stepped to the boiler-room door, and John Southerland and Henry Peterson were there. Henry Peterson was fireman and John Southerland was his helper. John Southerland was looking right at me, and so was Peterson. They knew positively something was wrong there, as they always know. I told them, I says 'John, don't start this engine up, because I am going to the rear of the dust house to see what the trouble is, and don't start it until I notify you, or come myself.' Henry Peterson was standing right there and heard it all. I meant it for both. Of course, Henry was the fireman. John was the operator of this engine, and he is the one that generally stopped and started it. John was the operator. He operated (211) it nearly all the time. So I went to the rear end of the dust house. Henry was fireman; John was his helper."

Witness further testified that after making the necessary repairs he started to step over the chain and was caught and injured, and on cross-examination he said: "John Southerland was helper to the fireman, who was Henry Peterson, and who looked out for the furnaces. He just pulled little chips from the head in the draw and let the dust run down, and kept it pushed down with a stick. He looked after the large boilers. Wallace was the belt-maker, and looked after the belts. John Southerland was helper to Henry Peterson; was not hired by me, and I don't know anything about him. John Southerland was dust-cutter; he went in the dust house and cut the dust, started the engine and stopped the engine whenever Henry told him he wanted dust, and whenever he thought they needed any dust. He was just Henry Peterson's helper — just dust-cutter. He would go in the house and start and stop the mill engine; he had to do that to cut his dust. When John wasn't there Henry Peterson did that. John was helping Henry Peterson. He was assisting Henry Peterson in operating the engine. My duties were to go around and see that everything was kept in running order. I was notified when there was anything wrong. *It was my duty to keep things running, to keep them in good condition.* I was not foreman. Mr. Rowe was foreman. John Southerland had certain things to do. Richard Wallace had certain things to do. Peterson had a certain job to do.

They were all doing certain jobs in and about operating and running the mill. *It was my duty to see that all these things were kept in fit — in good order.* I was not working in the same department with them unless something happened and I was called in. *I was overseer of the same things they were doing — looking after the same machinery they were running.*"

John Southerland, witness for plaintiff, testified: "I had been working there about two years off and on. Henry Peterson worked in the room with me. Henry Peterson's duties were — he was water carrier. My duties were to cut dust when he told me to, and every day or two, when the big mill stopped, I started up the dust engine and cut there — every morning piled up ashes out of the ash box, and did just anything he told me — whatever Henry Peterson told me to do. I know Mr. Cook. I was right there when Mr. Cook got hurt. Always when he stopped the engine he would come to us and tell us not to start it up until he notified us. He came in there and told us that day, says, 'I have stopped the engine'; he had to go back to the back end of the dust house, and says, 'Don't
(212) start it until I notify you.' Pretty soon after he went in there and went to work I went out to the green run (meaning the yard where the green lumber was piled). I stayed up there I reckon twenty-five minutes. When I came back the steam was getting kind of low in the furnace — burned up pretty well, and Mr. Henry told me to start up the engine and cut him some dust. I asked him was Mr. Cook gone, and he says, 'Yes, he has gone out,' and so I went ahead and started up the engine, and it run about four or five yards, and the belt commenced slipping on it, and would not pull, and so I prized it back and started it again, and I heard somebody holler, and I looked back in there and saw Richard Wallace run back in there, and I went there to see what the trouble was, and Mr. Cook was hanging in the chain, holding up there with his hands."

WALKER, J., dissenting from the opinion of the Court: The foregoing substantial statement of all the material testimony will suffice to present the plaintiff's case in its entirety, and at its best. I am thoroughly aware of the oft-repeated rule that, on a motion to nonsuit, evidence should be construed in the most favorable light for the plaintiff (*Brittain v. Westhall,* 135 N.C. 492; *In re Will of Margaret Deyton,* 177 N.C. 503; *Angel v. Spruce Co.,* 178 N.C. 621; *Spry v. Kiser,* 179 N.C. 417), and I will so deal with it. After doing so, I can find no evidence in the case upon which the plaintiff can ask for a verdict, as, in my judgment, there is nothing that shows any negligence on the part of either defendant.

The first assignment of error is the nonsuiting of plaintiff as to the Carolina Timber Company; and defendants contend there is no evidence against the Carolina Timber Company. The plaintiff offered in evidence a deed for the mill plant to the Carolina Timber Company, but did not see fit to offer any further evidence from the records or from witnesses who knew the relations between the Carolina Timber Company and the Camp Manufacturing Company.

It is clear from the testimony that Henry Peterson and John Southerland, who started up the engine, were fellow-servants of the plaintiff, and their act was the proximate cause of the injury.

The recognized rule in England, which generally prevails in this country, and affirmed by this Court, is declared to be: That the term fellow-servant includes all who serve the same master — work under the same control — derive authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it. *Kirk v. R. R.*, 94 N.C. 625; *Rittenhouse v. R. R.*, 120 N.C. 544; *Olmstead v. Raleigh*, 130 N.C. 243; *Hobbs v. R. R.*, 107 N.C. 1. There is no evidence showing that the place was unsafe; that the (213) machinery was defective; that the employees were incompetent, or that there was any other failure in the duty which the defendants owed to the plaintiff.

The statute denying the fellow-servant rule as a defense to railroad companies cannot apply in any event in this case. Defendant asserts that the effort of the plaintiff to make the Carolina Timber Company a defendant grows out of plaintiff's purpose to show the ownership of the railroad, and thereby forbid to the defendant, Carolina Timber Company, protection of the fellow-servant rule, and it is argued by defendants' counsel that the fact that the plaintiff is so persistent in the prosecution of the timber company, shows that he is convinced that the party causing the injury was a fellow-servant. It may be conceded that a lumber company, operating a logging road, comes under the provisions of this act if the injury occurs in the railroad operations. *Hemphill v. Lumber Co.*, 141 N.C. 487; *Bissell v. Lumber Co.*, 152 N.C. 123; *Wright v. R. R.*, 151 N.C. 529; *Bird v. Leather Co.*, 143 N.C. 283; *Liles v. Lumber Co.*, 142 N.C. 39. The Fellow-servant Act applies to all employees of a railroad company, whether working in the transportation or other departments. *Sigman v. R. R.*, 135 N.C. 101. But, as to lumber companies and other companies operating railroads, the act only applies when the party injured is operating in the transportation department. *Twiddy v. Lumber Co.*, 154 N.C. 237, approved in *Buchanan v. Furnace Co.*, 178 N.C. 647.

The fourth assignment is based upon the assumption that it was negligent not to have a whistle on the dust engine, when there was one on the large mill, the defendants contending that there is no evidence whatever that a whistle was necessary on the dust engine. This assignment of error is so vague that it is difficult to discuss it with reference to the testimony. The only reference to this matter appears on pages 30 and 31 of the testimony, as follows: "When the machinery connected up with the big engine was going to be started up, after being stopped, they had a system of blowing whistles before they started it. They had no such system of signals in regard to the dust engine and machinery connected with it. . . . They could have installed a system of whistles for the dust-chain machinery. Just had a smaller whistle than the one that started the big engine; run a wire across and tack onto the boiler and pull it, or have a wire to the engine, either one — just small, the same way they had of starting the big engine upstairs." All that this means is that the sawmill proper had a whistle and blew it when the mill was about to be started, and that the dust engine, which was a subsidiary piece of machinery or equipment for the purpose of regu-
(214) lating the sawdust by discharging it into the furnace, did not have such a whistle. It might have been said with equal truth that there was no such whistle attached to the pump-engine or any other subsidiary machinery which was operated from time to time when needed. There was no evidence that such a whistle was in customary use or was necessary as a means of safety, and before the plaintiff can establish this as negligence he would have to show that such equipment was an up-to-date equipment in general use, and that the defendant had negligently failed to put it into use here.

But the important and vital question to be considered is, whether there is any evidence, when it is favorably construed for the plaintiff, which justifies us in reversing the studied and deliberate ruling of the court below and ordering that the case must be submitted to the jury.

This is not a case where the owner of the mill, and its machinery, had appointed some one as vice-principal, or his representative, to supervise the operation of the same, who was guilty of negligence causing the injury, which will be implied to his principal. The facts, while there was very much evidence in the case, are few and simple.

The plaintiff, Leon Cook, himself either stopped the machinery or gave the order to stop it, so that he might go in and repair the pilot chain and remove any obstruction which hindered the effective operation of the machinery, such as the lightwood knot in the chain

at the lower sprocket. The plaintiff (as he himself alleges), "in the performance of his duty, got astride of said chain, which, being idle at the time was slack, and with the assistance of a helper, removed the obstruction; and at the time the plaintiff was in the act of stepping clear of the dust chain, the defendant negligently started the dust engine, and plaintiff was caught therein and injured." But who directly and negligently caused the injury? It was not the defendants, but the fellow-servant of the plaintiff who received the request from him not to start the machinery until he came back, or in other words, the fireman and his helper. We have shown that they were the plaintiff's fellow-servants by the highest authority (*Kirk v. R. R., supra*), a case decided thirty-five years ago, and which has been frequently cited and approved since that time. That case is identical, in principle, with this one. The engineer, Harris, was ordered not to move his switch engine until work, or inspection required to be done underneath the cars, was finished, and he was notified of the fact by the yardmaster. In spite of this order, the engineer did move the train before the work was completed and the plaintiff's arm was cut off. The railroad company was acquitted of all liability by this Court, and owing to the contrary ruling below, there was a new trial. The yardmaster and the engineer represented the railroad company as much in that case, as did the fireman and (215) helper in this one, and yet it was held that there was no liability because the plaintiff and those two men were fellow-servants. The fellow-servant law, as to railroad companies, has been repealed since that case was decided, but the principle it established is as firmly entrenched as ever, and is applicable wherever the doctrine of fellow-servant is still applicable.

The employer, in this case, could not have supplied anything, whistle or what not, which would have been more effective than the means then at hand to avert the injury. If there had been a whistle, or the most approved contrivance in that respect, the result would have been the same, if the fireman had been negligent, as he was here, and failed to blow it, and give the proper warning to Cook to get out. The question is not whether there was a whistle, but whether the means available at the time were sufficient to prevent the resultant injury. If the direction had not been given to start the engine the plaintiff would have escaped without any harm being done to him, there being ample means at hand to prevent it. The parties at the mill were abundantly able to save the plaintiff from any injury, and he would not have been hurt if it had not been for the negligence of his fellow-servant who started the machinery, or caused it to be started. Leon Cook had finished his work and was in

the act of leaving the place, when the machinery was put in motion. The mistake was made by the fireman, or his helper, in supposing that Cook had already left and was in no danger, and this mistake would still have been made had every piece of machinery been supplied with a whistle. What caused the injury was not the want of a whistle, but the reliance of the fireman, or helper, upon his own mere supposition, to which he carelessly trusted, that Cook had left the place of danger, instead of having certain knowledge that he had left before giving the order to start the machinery.

The fellow-servant doctrine has no force or effect if it does not apply to this case, and the fireman and his helper were surely fellow-servants of Cook within the rule stated in *Kirk v. R. R., supra.*

Finally, the situation could not have been saved by anything the employer could have done. There is no suggestion that the fireman or helper was of a careless habit and known by the employer to be so. It was just the false reliance of the fireman or his helper upon mere supposition as to where Cook was, instead of upon actual knowledge, and the result would have been the same if there had been a whistle on the smaller engine, as the fireman and his helper would still have acted upon the same supposition, for they were told not to start the machinery, in any event, until Cook re-
(216) turned, or, to use his words, until he came back. In the *Kirk* case, *supra,* the engine had not only a whistle but also a bell to give signals, by a blast of the one or the ringing of the other, and the engineer used neither, but violated instructions by moving the train. That case and this one are clearly analogous, as there he moved the train without receiving notice from the yard master, while here the fireman and his helper started the machinery without notice from Cook, the plaintiff, and caused the injury.

No one questions the principle that the master must furnish a reasonably safe place for the servant to do his work (*Marks v. Cotton Mills,* 135 N.C. 287), and that this is a primary duty devolving upon the master which he cannot without liability therefor delegate to another. But that question does not arise here, as plaintiff himself undertook to do the work and to provide for his own safety, in his own way. He trusted too much to the fireman and helper, and is himself solely responsible, in law, for the consequences. Of course the timber company cannot be liable unless the Camp Manufacturing Company is liable. But there is nothing to charge it with liability, either upon the evidence or under the principle laid down in *Logan v. R. R.,* 116 N.C. 940, and cases citing it, which will be found in the annotated edition of 116 N.C., marginal page

940, at pp. 952-953, and in Shepard's N.C. Citations (1 ed.), at p. 172, and issue of June, 1921 (Advance Sheets), p. 46.

It further appears that the *Logan* case, *supra*, does not apply here, as it was distinctly put upon the ground that the North Carolina Railroad Company was a *quasi*-public corporation, and could not, therefore, lease its road and discharge itself from liability for neglect of the duties it owed to the public. It exercised, at least in a *quasi*-sense, a public franchise, granted to it by the State in its sovereign capacity, and could not disable itself to perform its public duties by a lease without responsibility for injuries to others caused by the negligence of the lessor in operating the road.

My conclusion is that the nonsuit was proper, and that the judgment should be

Affirmed.

Cited: Lacey v. Hosiery Co., 184 N.C. 22; *S. v. Lumber Co.*, 186 N.C. 124; *Blackwell v. Mfg. Co.*, 186 N.C. 779; *Dellinger v. Bldg. Co.*, 187 N.C. 848; *Michaux v. Lassiter*, 188 N.C. 134; *Sears, Roebuck & Co. v. Banking Co.*, 191 N.C. 506; *Crisp v. Fibre Co.*, 193 N.C. 85; *Arrington v. Lumber Co.*, 196 N.C. 821; *Farr v. Power Co.*, 198 N.C. 250; *Ford v. R. R.*, 209 N.C. 111.

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CLAY CROOM v. GOLDSBORO LUMBER COMPANY, A CORPORATION.

(Filed 19 October, 1921.)

1. Married Women—Separate Property—Services—Statutes — Contracts —Actions.

Since the Martin Act, C.S. 2507 and 2513, the separate earnings of a married woman belong to her, and she may sue and recover them alone; and where the evidence tends only to establish the fact that the employer was to pay them each a certain and different amount for services, the husband may not recover the whole upon the theory that the amount he was to receive was augmented by what she was to receive for her separate services.

2. Verdict—Issues—Instructions.

The answer to an issue should be interpreted in the light of instructions thereon; and an affirmative answer to an issue as to plaintiff's employment may not be increased by an amount claimed to be due by defendant to plaintiff's wife, when the issue as to the amount found on a separate issue has been confined by an instruction to that due the plaintiff alone.

3. Contracts—Employer and Employee—Master and Servant—Services—Indefinite Agreements.

A contract for services to be rendered must be certain and definite as to the nature and extent, the place where and the persons to whom it is to be rendered, and the compensation to be paid; and evidence that the plaintiff had been employed by the defendant to render certain services at a fixed price, to be increased at a future time, without more, is too indefinite as to the increase of price to be enforceable, there being no sufficient evidence of the coming together of the minds of the parties to make a binding contract upon the subject-matter.

4. Contracts—Employer and Employee—Master and Servant—Breach—Services—Measure of Damages.

Where the employer has, in breach of his contract, discharged his employee before the time of his employment had expired, the damages recoverable by the latter, in his action, is the value of the unexpired term as measured by the compensation agreed to have been paid him therefor, less whatever sum of money he may have since received for his services from other sources, or which he reasonably may have received, considering, in his favor, whatever expense he may have incurred in obtaining other employment, or arising from the breach of the contract sued on.

APPEAL by plaintiff from *Bond, J.*, at February Term, 1921, of LENOIR.

The plaintiff alleges that in December, 1917, he was employed by the defendant to do certain work during the year 1918, for which he was to receive $16 a week, fuel and house rent free, together with an increase in wages to be fixed in the following April; that he entered upon and continued in the defendant's service until May, 1918, when he was wrongfully discharged, and that he has suffered damages in the sum of $500. Denying the material
(218) allegations of the complaint, the defendant alleges that the plaintiff was employed by the day; that for stated periods he rendered no service; that, careless and neglectful of his duties, he caused the defendant financial loss, and thereby forced the defendant to discharge him from its service.

The issues were answered as follows:

"1. Did the defendant employ the plaintiff under the agreement as alleged in the complaint? Answer: 'Yes.'

"2. If so, did the defendant wrongfully and in breach of its agreement discharge the plaintiff, as alleged in the complaint? Answer: 'Yes.'

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

"4. What was the unpaid part of the wages for the year as fixed by the contract? Answer: '$495.'

"5. What was the house and fuel fairly and reasonably worth

that defendant was to furnish plaintiff for the balance of the year after plaintiff's discharge? Answer: '$60.'

"6. What amount of money did the plaintiff earn and receive for the service after his discharge to the end of the year? Answer: '$562.75.'

"7. What was the additional expense, if any, incurred by plaintiff Croom in necessary support of himself and family for balance of the year after his discharge? Answer: '$246.' "

After the jury had answered the remaining issues, his Honor answered the third issue as an inference of law, each party reserving the right to except. His Honor held that the plaintiff was entitled to judgment only for the difference between the amount of the unpaid wages for the year fixed by the contract and of the reasonable worth of the house rent and fuel, to wit, $555 (the sum of the answers of the fourth and fifth issues), and the amount earned by the plaintiff after his discharge, to wit, $562.75 (the answer to the sixth issue); and that as the latter exceeds the former, the plaintiff could recover nothing more than nominal damages for the defendant's breach of its contract. Accordingly, judgment was entered in favor of the plaintiff for $1, as nominal damages, and the cost of the action. Having entered exceptions the plaintiff appealed.

Rouse & Rouse for plaintiff.

Thomas D. Warren and Cowper, Whitaker & Allen for defendant.

ADAMS, J. In his complaint the plaintiff alleges that by the terms of the contract he was to be paid $16 a week in part compensation for his services. On the trial there was evidence for the plaintiff tending to show that he was to be paid $15 a week for his personal services and his wife $1 a week for certain (219) services to be rendered by her. His Honor charged the jury that the plaintiff could not recover the amount claimed to be payable on account of the wife's services, and that the plaintiff's wages, if allowed by the jury, could not exceed the rate of $15 a week. To this instruction the plaintiff excepted.

Subject to definite restrictions, the right of a married woman to make an executory contract is governed chiefly by the provisions of C.S., ch. 51. It is not necessary, however, to discuss the meaning or purpose of the several statutes affecting the contractual rights of married women, inasmuch as the contract declared on was executed after the enactment of sections 2507 and 2513, which are controlling in the question under consideration. The practical effect of section

2507 — the Martin Act — is to constitute a married woman a free trader as to all her ordinary dealings, and to invest her with the privileges of suing and being sued alone. *Price v. Electric Co.*, 160 N.C. 450; *Lipinsky v. Revell*, 167 N.C. 508; *Royal v. Southerland*, 168 N.C. 406; *Kirkpatrick v. Crutchfield*, 178 N.C. 348. Section 2513 is as follows: "The earnings of a married woman, by virtue of any contract for her personal service, and any damages for personal injuries, or other tort sustained by her, can be recovered by her suing alone, and such earnings or recovery shall be her sole and separate property as fully as if she had remained unmarried."

Counsel for the plaintiff, while advertent to these statutes, urge two objections against their application:

First, that the contract was made with the plaintiff, and the agreement to pay $1 to the wife merely enlarges the amount to be paid to the plaintiff, in view of the implied intention of the parties that the wife, during the plaintiff's temporary absence, should give personal attention to the performance of duties devolving upon him; and in the second place, that as the plaintiff has declared on the defendant's agreement to pay the plaintiff $16 a week, the answer to the first issue indicates that the plaintiff was employed as alleged. We are of opinion that the first objection cannot prevail. The relevant statement in the case on appeal is this: "The evidence of the plaintiff tended to establish the fact that he was to be paid $15 per week and his wife was to be paid $1 per week for certain services to be rendered by her." Nowhere does it appear that the defendant agreed to pay both these amounts to the plaintiff, and in the absence of evidence to this effect the intendment of the law is in conflict with the plaintiff's contention. Nor is the second objection available to the plaintiff. His Honor instructed the jury that the plaintiff, if allowed damages, should be allowed wages only at the rate of $15 a week, and the answer to the first issue must be in-
(220) terpreted with reference to this instruction. *S. v. Murphy*, 157 N.C. 615; *Richardson v. Edwards*, 156 N.C. 590; *Donnell v. Greensboro*, 164 N.C. 332. The first exception is therefore overruled.

The second exception also is untenable. It is directed to the question whether there was sufficient evidence of the defendant's agreement to pay the plaintiff increased wages. The allegation is that the plaintiff was to receive certain compensation "with a raise in wages, to be fixed in April following." There was evidence tending to show that his wages were to be increased in April, and that in May the wages of one employee who had continued in the defendant's service were increased from $2 to $3 a day, and the wages of another about

33⅓ per cent. But the *quantum* or measure of increase in the plaintiff's wages was neither alleged nor proved. The court held that the evidence was not sufficient to show an enforceable agreement by the defendant to increase the plaintiff's wages, and the plaintiff duly excepted.

One of the essential elements of every contract is mutually of agreement. There must be neither doubt nor difference between the parties. They must assent to the same thing in the same sense, and their minds must meet as to all the terms. If any portion of the proposed terms is not settled, or no mode agreed on by which they may be settled, there is no agreement. 13 C.J. 264. A contract for service must be certain and definite as to the nature and extent of the service to be performed, the place where, and the person to whom it is to be rendered, and the compensation to be paid, or it will not be enforced. 6 R.C.L. 644. The evidence as to the wages is equally indefinite if it be considered as tending to show an agreement to make a future contract. "Unless an agreement to make a future contract is definite and certain upon the subjects to be embraced therein it is nugatory. Consequently, the acceptance of a proposition to make a contract, the terms of which are to be subsequently fixed, does not constitute a binding obligation. The reason for this rule is that there would be no way by which the court could determine what sort of a contract the negotiations would result in; no rule by which the court could ascertain what damages, if any, might follow a refusal to enter into such future contract on the arrival of the time specified. Therefore, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as a result of future negotiations." 1 Elliott on Contracts, sec. 175. "If no breach of the contract can be assigned which can be measured by any test of damages from the contract, it has been said to be too indefinite to be enforceable." 1 Page on Contracts, sec. 28; *Elks v. Ins. Co.*, 159 N.C. 626. In the absence of allegation and proof as to what the increased wages should be, there is no accurate test by which the (221) plaintiff's damages could be measured.

Exceptions three, four, five, and six present but one question, and may be considered together. The court no doubt submitted to the jury the fifth issue and the seventh with the twofold purpose of presenting the conflicting views of the parties as to the measure of the plaintiff's damages, and of determining the entire controversy by one verdict. Upon the trial the plaintiff contended that in answering the third issue as a conclusion of law the court should deduct from the answer to the sixth issue the answer to the seventh,

leaving the net amount of the plaintiff's earnings after his discharge to be deducted from the value of his contract as found in response to the fourth and fifth issues; and the defendant contended that the answer to the seventh issue was immaterial and should be disregarded. His Honor held with the defendant, and these exceptions challenge the correctness of his Honor's ruling.

In 20 A. & E. (2 ed.) 37, it is said: "Where the action is brought subsequent to the expiration of the term of employment, the decisions are practically unanimous to the effect that the measure of damages is *prima facie* the wages for the unexpired portion of the term, this amount to be diminished by such sums as the servant has earned, or might have earned by a reasonable effort to obtain other employment in the same line of business. This proposition is cited with approval in *Smith v. Lumber Co.*, 142 N.C. 26. In *Hendrickson v. Anderson*, 50 N.C. 247, an overseer, employed upon a special contract for a year, was discharged during the year, and brought suit to recover the entire stipulated sum. This Court said: "The question necessarily arises, What is the amount of the damages which he (the plaintiff) ought to be allowed to recover? The proper answer would seem to be the amount which he has actually sustained in consequence of the defendant's default. It would seem to be a dictate of reason that if one party to a contract be injured by the breach of it by the other, he ought to be put in the same condition as if the contract had been fully performed on both sides. He certainly ought not to be a loser by the fault of the other; nor can he be a gainer without introducing into a broken contract the idea of something like vindictive damages. The true rule, then, is to give him neither more nor less than the damages which he has actually sustained." This case has been approved in *Brinkley v. Swicegood*, 65 N.C. 628; *Oldham v. Kerchner*, 79 N.C. 112; *Markham v. Markham*, 110 N.C. 356; *Smith v. Lumber Co., supra.*

In several jurisdictions the doctrine of constructive service has been repudiated, and in its place has been adopted the method of suing for damages for breach of the contract of employment. But the trend of judicial opinion, in analogy to the constructive service idea, seems to be toward regarding the contract price as a
(222) material, if not the controlling, element for consideration in the estimation of damages, both in jurisdictions in which the doctrine of constructive service has been repudiated and in those in which it has been retained. 6 L.R.A. (N.S.) 82. In *Smith v. Lumber Co., supra,* Walker, J., says: "If the doctrine of constructive service is illogical, in view of the right of the master to have the damages diminished by showing that the servant engaged in other busi-

ness, and consequently was not ready to perform the service, it does not follow that the rule itself as to damages is not a sound one, for other cogent reasons may have been assigned in its support. The employee, by no fault of his own, loses his wages, which are fixed by the contract, and their amount should be the true measure of his damages under the ordinary rule obtaining in the case of other contracts" (pp. 35-36). In jurisdictions in which the contract is held to be the measure of damages for breach of a contract of employment, it is only *prima facie* so, and where other employment, or the duty to seek other employment, is taken into consideration, the measure of damages suffered by an employee because of a wrongful discharge is the actual injury sustained, or the loss of the value of the contract. *Perry v. Simpson,* 37 Conn. 520. Here, then, two questions arise: (1) What was the value of the plaintiff's contract with the defendant? (2) In what amount has the value of the contract been impaired by the defendant's breach?

As shown by the answer to the fourth and fifth issues, the jury found the value of the contract to be $555. To what extent has such value been impaired by the breach? Evidently to the extent of the plaintiff's actual loss. The measure of his loss is the difference between the value of the contract and the net amount earned after his discharge.

It has been suggested that the plaintiff, after his discharge, enjoyed advantages not provided in the original contract. He seems also to have received better wages; and if this question was in fact raised upon the trial, we must assume that it was considered in connection with the issues submitted to the jury. It will be observed that the expenses incurred by the plaintiff after his discharge were not elective, but necessary as well as additional to those he would have incurred had the defendant performed the contract. Shall the plaintiff's loss, caused by his wrongful discharge, become the defendant's asset? It would be inequitable to say that the plaintiff shall not abate to the extent of additional and necessary expenses, the amount earned by him after his wrongful discharge. *Van Winkle v. Satterfield,* 23 L.R.A. 855; *Pennsylvania Co. v. Dolan,* 51 Am. St. R. 300. We hold, then, that the answer to the seventh issue should be deducted from that of the sixth, and the remainder, $316.75, should in turn be deducted from the value of the contract, represented by the sum of the answers to the fourth and fifth issues, and that the answer to the third issue should be $238.25, with (223) interest from the termination of the period of the plaintiff's employment, to wit, 1 January, 1919. 6 L.R.A. (N.S.) 91; *Bond v. Cotton Mills,* 166 N.C. 20; *Chatham v. Realty Co.,* 174 N.C. 671.

The judgment entered upon the verdict, as herein modified, is affirmed.

Modified and affirmed.

Cited: *Dorsett v. Dorsett,* 183 N.C. 356; *Richardson v. Libes,* 188 N.C. 113; *Hinnant v. Power Co.,* 189 N.C. 125; *Bldg. Co. v. Greensboro,* 190 N.C. 505; *Bryant v. Lumber Co.,* 192 N.C. 611; *Thomas v. Watkins,* 193 N.C. 632; *Thomas v. Realty Co.,* 195 N.C. 595; *Dodds v. Trust Co.,* 205 N.C. 156; *Burton v. Styers,* 210 N.C. 233; *Sides v. Tidwell,* 216 N.C. 483; *Buford v. Mochy,* 224 N.C. 242; *Coley v. Dalrymple,* 225 N.C. 70; *Carlisle v. Carlisle,* 225 N.C. 467; *Hutchins v. Davis,* 230 N.C. 72; *Kirby v. Bd. of Ed.,* 230 N.C. 626; *Williamson v. Miller,* 231 N.C. 728; *Lochner v. Sales Service,* 232 N.C. 75; *Smith v. Barnes,* 236 N.C. 178; *Goeckel v. Stokley,* 236 N.C. 607; *Owens v. Kelly,* 240 N.C. 773; *Thomas v. College,* 247 N.C. 615; *McCraw v. Llewellyn,* 256 N.C. 216; *Young v. Sweet,* 266 N.C. 625.

A. WARD v. LIDDELL COMPANY.

(Filed 19 October, 1921.)

1. Contracts, Written—Warranty—Actions—Vendor and Purchaser—Evidence—Nonsuit—Trials.

In an action upon the warranty of a written contract for the sale of cotton gins, requiring a written demand upon the seller within ten days, etc., with provision that the contract was complete and excluding all other written or verbal agreements respecting the subject-matter, the plaintiff may not recover thereon after waiting ninety days before making any claim whatever, whether written or oral, and upon evidence of this character a motion as of nonsuit is properly granted.

2. Contracts, Written—Parol Evidence—Express Warranty.

A written contract for the sale of cotton gins, signed by the purchaser, and stating that it was the entire agreement between the parties, in the absence of allegation of fraud, excludes parol evidence alone that they did not gin a specified number of bales of cotton a day according to the verbal representations of the sales agent, to the damage of the purchaser, the plaintiff in an action upon the express warranty.

3. Same—Implied Warranty.

An express warranty in an executed contract of sale, subject to a few well recognized exceptions inapplicable to the case at bar, 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.

APPEAL by plaintiff from *Connor, J.*, at the May Term, 1921, of WAKE.

Civil action to recover damages for breach of warranty in the sale of two cotton gins.

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

Robert C. Strong for plaintiff.
Cansler & Cansler and Murray Allen for defendant.

HOKE, J. The written contract of sale executed between the parties contained a warranty as follows: (224)

"The machinery specified in the within contract is warranted by Liddell Company to be of good material, well made, and with proper management capable of working well for the purposes intended. In case of original defects in any machine or part of machine, Liddell Company agree to make good the defect by supplying a new machine or a new part, provided notice of such defect shall be given, in writing, within ten days from the time said machinery is set up and ready for operation; but continued possession or use of said machinery, after expiration of said ten days, without such written notice, shall be conclusive evidence that the above warranty is fulfilled to the satisfaction of the undersigned, who agrees not to thereafter make other claim upon Liddell Company on account of said warranty: *Provided*, that in case any casting shall be replaced by Liddell Company without charge, except express charges, upon like written notice of ten days; but on any claim for replacement of defective casting, the defective pieces shall be presented to Liddell Company or the agent through whom the machinery was ordered, and shall clearly show the defects. Defects or failure in one part shall not condemn or be ground for claiming renewal, or for the return of any other part."

This contract also contains stipulation "That when this order is accepted, it is understood that the same shall be held to be the entire contract between us, and no agreement, verbal or otherwise, other than set forth herein forms any part of this contract."

The evidence of plaintiff tends to show that it was three months after the gin was set up and in operation before plaintiff made complaint of any defects in the gin, written or otherwise, and this being true, we are of opinion that the cause has been properly nonsuited. It is contended for the appellant that these gins, if properly constructed, and with the machinery and power there operated by plaintiff should have ginned twenty-two to twenty-five bales of

cotton per day, whereas they could never turn out more than twelve bales per day and to plaintiff's great loss. And appellant offered to introduce testimony (excluded on objection of defendant) to the effect that defendant's agent who was there at plaintiff's place and saw the plant and machinery at the time of the contract and as an inducement thereto gave express assurance that the gins would turn out as much as twenty-two or twenty-five per day. As to any implied contract or warranty embodied in this position of appellant, in *Fertilizer Works v. Aiken,* 175 N.C. 398, it was stated to be the general rule that subject to a few recognized exceptions (not presented on this record) "that an express warranty in an executed contract of sale will exclude one that is ordinarily implied, (225) where the two are of the same general nature or refer to the same or closely related subjects or qualities in the things sold."

And as to the evidence offered tending to show express assurances of an output of twenty-two to twenty-five bales a day, that is incompetent further by reason of the express provision "that the written instrument contains the entire contract between the parties and none other written or verbal shall form any part of the contract." *Bland v. Harvester Co.,* 169 N.C. 418; *Machine Co. v. McClamrock,* 152 N.C. 405. Unless indeed the verbal assurances relied upon, offered in avoidance of the contract, and available to a claimant on that issue are such as to permit the inference of fraud, and there is no allegation or claim of fraud presented. See *Machine Co. v. Feezer,* 152 N.C. 516.

On the record, our decisions pertinent to the precise questions involved are clearly in affirmance of his Honor's ruling and the judgment of nonsuit must be affirmed. *Farquhar Co. v. Hardware Co.,* 174 N.C. 369; *Mfg. Co. v. Lumber Co.,* 159 N.C. 507; *Allen v. Tompkins,* 136 N.C. 208.

Affirmed.

Cited: Shuford v. Yarborough, 197 N.C. 150; *Petroleum Co. v. Allen,* 219 N.C. 463; *Terry v. Bottling Co.,* 263 N.C. 11.

N. E. BRADFORD v. BANK OF WARSAW.

(Filed 26 October, 1921.)

1. **Deeds and Conveyances—Principal and Agent—Repudiation of Agency—Title to Lands.**

Where defendant claims title to land because taken by plaintiff in his own name when, in fact, he was acting for defendant, to whom it should have been conveyed, but there is evidence that the defendant had repudiated such agency, the verdict of the jury in plaintiff's favor, under a correct instruction of the court, settles this question adversely to the defendant.

2. **Deeds—Tenants in Common—Limitations.**

To ripen title to lands under a deed from a tenant in common adverse possession for twenty years is necessary, and this applies to one to whom the alienee of a tenant has attempted to convey the entire estate. C.S. 430.

3. **Deeds and Conveyances—Registration—Color—Title—Common Source.**

An unregistered deed is not color of title when the parties to an action for the recovery of land are claiming under the same source.

4. **Deeds and Conveyances—Tenants in Common—Partition—Evidence—Instructions—Appeal and Error.**

The claim of title to the lands in controversy under a division thereof by tenants in common does not arise in the Supreme Court, on appeal, when the trial judge has charged the jury, without exception taken, that there was no evidence to show a legal division between the tenants in common.

5. **Tenants in Common—Parol Division—Limitation of Actions—Adverse Possession.**

To bar the rights of a tenant in common to land under a parol division of the land, the possession must be adverse, open, and notorious, etc., for twenty years.

6. **Same—Deeds and Conveyances—Collection of Rents—Ouster.**

The deed of a tenant in common to his part of the land allotted to him under a parol agreement for a division, and the collection of rents by himself and those claiming under his deed, for less than twenty years, will not bar the other tenants in common, or those having acquired title under registered deeds, of their rights, and the statute as to seven years under "color" has no application.

HOKE, J., dissenting: WALKER, J., concurring in the dissenting opinion.

APPEAL by defendant from *Lyon, J.,* at April Term, 1921, of WAYNE. (226)

This was a petition for sale for partition of a small lot in Goldsboro, and the defendant bank pleaded sole seisin. The jury responded to the issue that the plaintiff was owner of an undivided three-fifths interest in the premises, and from the judgment thereon the defendant appealed.

D. H. Bland for plaintiff.
Stevens, Beasley & Stevens and Kenneth C. Royal for defendant.

CLARK, C.J. The plaintiff and defendant claim under a common source of title, and the court so charged the jury, to which there was no exception. The defendant admits in its brief that Needham Kennedy was in possession of the land at the time of his death, and mentions his heirs by name. The plaintiff contends that he has shown a better title to the three-fifths interest in the land from this common source. *Mobley v. Griffin*, 104 N.C. 112. It is not denied that the defendant has a good title through the conveyances from the two daughters of their two-fifths interest in said lot.

The plaintiff put in evidence the deed to Needham Kennedy, dated 12 January, 1870, and registered in January, 1876, covering the property. It was in evidence that he died about 1905, leaving 5 children: Fannie Aldridge, Ida Darden, Bryant Kennedy, William Kennedy, and Levi Kennedy.

The plaintiff also put in evidence deeds to J. J. Ham from William Kennedy, Bryant Kennedy, and Levi Kennedy, each conveying their undivided interest in said lot, all of them dated 14 July, 1916, and registered in Wayne, 24 August, 1916, and a conveyance from J. J. Ham to plaintiff covering the grantors' rights as conveyed in the three above deeds, dated 17 and registered
(227) 24 October, 1917. The plaintiff testified that the deeds covered the lot in question and that there is no evidence that Needham Kennedy left a will nor that his widow is living.

The defendant offered in evidence a deed from Fannie Aldridge and husband to her sister Ida Darden, dated 12 March, 1910, registered 22 March, 1912; and also a deed from William Kennedy to Ida Darden, 24 January, 1910, registered 12 April, 1921; and a mortgage, 21 March, 1910, from Ida Darden to Matthew Aldridge, 21 March, 1910, and registered the same day, and a deed dated 10 May, 1912, from M. W. Aldridge, mortgagee, to A. J. Brown, registered 11 June, 1912, and a deed dated 27 March, 1915, from Daisy Brown and J. D. Brown and wife, dated 27 March, 1915, and registered 1 May, 1916, all purporting to convey the entire interest. Said J. G. Brown and Daisy Brown were the only children of A. J. Brown, who died in 1913. Daisy Brown testified that the defendant Bank of Warsaw had a mortgage on this property and she and her brother made a deed to the bank in settlement of their father's debts.

The court charged the jury that it was agreed and admitted that both parties, the plaintiff and defendant, derived their title from

Needham Kennedy, who owned the land. The court also charged the jury, in part: "There has been something said about a parol division of the land between the 5 children of Needham Kennedy. There has been no evidence in the opinion of the court offered to show that there has been a legal division of the land and the partition deeds that have been offered were only registered here this week, but the deed from Ham to the plaintiff was registered soon after its execution. You will remember the date of the deed and the date of its registration. It is the first deed that goes on record that covers the title."

The defendant also set up as a further defense that the plaintiff bought in the title of the three heirs under whom he claims while acting as agent for the bank in attempting to sell the land and that discovering what he supposed to be a defect in the title, he took a conveyance of the interests of the three heirs under whom he now claims. On this point the court charged the jury: "If you find from the evidence that the plaintiff here bought this land from Ham and that Ham bought it from William, Bryant and Levi, and that at the time the plaintiff took his deed from Ham he was not the agent of the defendant Bank of Warsaw and was not acting for them, that they had repudiated the contract of purchase when the deed was made to him, and if you shall find that the deeds were made to Ham by these three parties and their wives and registered at the time the evidence tends to show that they were registered, the court charges you that the plaintiff would be entitled to recover whatever interest in this land these three parties — William, Bryant and Levi — had and the court charges you that there being only 5 children they own three-fifths of the land. The court charges (228) you that if he was the agent of the Bank of Warsaw, for getting the title, then the title would go to the Bank of Warsaw, but if you find that he was not its agent at the time you will answer the issue two-fifths or three-fifths, whatever you find it to be." To both of the above instructions the defendant excepted. There was voluminous evidence as to the alleged agency on both sides, and the plaintiff testified to the rupture of the agency, and the severance of a connection between them prior to the time that Ham acquired the title under which he claims.

The defendant also excepted that the court erred in refusing to charge the jury as follows: "If you find from the evidence that during the year 1910 Ida Darden received a deed to the premises in fee simple from Matthew Aldridge; and that the same was recorded in March, 1912; and if you still further believe from the evidence that the said Ida Darden executed a mortgage on the premises to Mat-

thew Aldridge, and that the said mortgage was duly recorded in March, 1910; and that in May, 1912, the said Aldridge foreclosed and sold said property to A. J. Brown by deed duly recorded in June, 1912, and that in March, 1915, his heirs conveyed said premises to the Bank of Warsaw by deed recorded in May, 1916; and if you further believe that the said Ida Darden, the said A. J. Brown, and said J. G. Brown and Daisy Brown and the said Bank of Warsaw possessed the said property, either themselves or by their agents, under said deeds and conveyances for a period of more than 7 years before the commencement of this action, and that the said possession was open, notorious, continuous, adverse, and under claim or right of color of title, then it would be your duty to answer the issue 'No.'"

This prayer for instruction was properly refused. The defendant claims under a mortgage recorded in March, 1910, and a deed on foreclosure thereof to A. J. Brown recorded in June, 1912, and under the deed to the defendant recorded in May, 1916. These were at most merely color of title and there was not 7 years possession thereunder prior to the conveyance registered in 1916 of the true title under which the plaintiff claims the three-fifths interest. It has been held in all our cases from *Cloud v. Webb*, 14 N.C. 317, down to *Gill v. Porter*, 176 N.C. 451, that 20 years adverse possession is required to vest the title between tenants in common. See cases collected under C.S. 430. And the same is true where one tenant in common attempts to convey the whole estate, *Alexander v. Cedar Works*, 177 N.C. 137.

The defendant put in evidence certain deeds of partition which were not registered until the trial. As to these deeds it is sufficient to quote from *Buchanan v. Hedden*, 169 N.C. 224: "The defend-

(229) ants did not contend that they had been in adverse possession long enough to ripen their title without color and as the deed under which they claim title was not registered, and as both parties derived title from the same source, there was no color of title. *Janney v. Robbins*, 141 N.C. 406; *Gore v. McPherson*, 161 N.C. 638; *King v. McRackan*, 168 N.C. 621." The headnote to that case sums up the proposition correctly thus: "An unregistered deed is not color of title when the parties to an action for the recovery of land are claiming under the same source."

The only request to charge was, as above set out, that the defendant claiming title under a possession, beginning with the mortgage in 1910 by one tenant in common for 7 years had acquired title to the entire tract which was refused.

The defendant made no exception to the charge that there was

"No evidence offered to show that there has been a legal division of the land," and hence the assignment of error on that ground, if there were anything in it, is not before us. The entire defense was stated in the refused prayer, except the issue as to the plaintiff being estopped by his alleged agency from the defendant "to cure its defect in title," which the jury negatived.

The defendant's sole claim of title is a conveyance by one of the daughters of her "interest" for $75 to her sister in 1910, and a later mortgage by the other daughter alleged to cover the entire tract (though the deed was not set out), and an alleged possession thereunder for 7 years under a conveyance to the purchaser under that mortgage and under another mortgage by said purchaser to the defendant bank, and the release by the mortgagor to said bank, and collection of rents thereunder as a substitute for actual possession. This was certainly not good under our uniform decisions requiring not less than 20 years possession under a registered deed from one tenant in common (or his grantee) as against the conveyance of the title by the other three tenants in common of their three-fifths to the plaintiff registered in 1916.

The tract in question is a lot in "Negro Town," a suburb of Goldsboro, 42 feet by 210 feet, which was hardly capable of actual partition, and no adverse possession against the other three tenants in common (who were residing in another state) is shown by residence thereon of one tenant in common in 1910 and by a mortgage from her and payment of rent after foreclosure to the defendant bank.

A conveyance by one tenant in common, though duly registered and continuous, open, notorious, and adverse possession for less than 20 years under such registered deed would not bar the title of the other tenants. Certainly, therefore, the alleged oral conveyance by an oral partition (which the judge charged was not shown and the defendant did not except), and possession beginning with a mortgage by one tenant, even though it might cover the (230) whole tract, for 7 years cannot bar the other tenants and the plaintiff claiming under registered deed from them.

It would be an anomaly indeed if an alleged oral partition and the residence by one tenant in common on said lot and a chain of mortgages and the payment of rent to the defendant under a possession for 7 years — not even shown to be adverse — should give title to the defendant when nothing less than 20 years adverse possession would confer title, even under a registered deed, as against the other tenants and their grantee holding under a duly registered conveyance of their interest.

Where there is an oral partition, *20 years* possession, adverse and continuous, will bar, *Rhea v. Craig,* 141 N.C. 602, cited and approved in *Collier v. Paper Corporation,* 172 N.C., p. 74. This last case affirmed the ruling of Stacy, J., in the trial court below. In *Gilchrist v. Middleton,* 107 N.C., p. 681, it is said: "The sole reception of the profits of land by one tenant in common is not an ouster, and will raise no presumption of an ouster against his fellows until he has enjoyed the exclusive profits of such rents for 20 years, and the *grantee of a tenant in common,* though he may hold possession under a deed purporting to convey the whole, stands, in this respect, *precisely in the position of his grantor. Linker v. Benson,* 67 N.C. 150; *Caldwell v. Neely,* 81 N.C. 114; *Page v. Branch,* 97 N.C. 97." This has been cited since with approval in many cases, among them, *Hilton v. Gordon,* 177 N.C. 344.

Upon full consideration of all the exceptions, we find

No error.

HOKE, J., dissenting: I am unable to concur in the present disposition made of defendant's appeal. This, a proceeding in partition, is, in effect, an action to recover three-fifths interest in a lot in the city of Goldsboro under deeds from three of the children and heirs at law of Needham Kennedy, deceased, Bryant, Levi, and William, duly proven and registered in Wayne County, in July and August, 1916. The two other children and heirs at law being Fannie, wife of Matthew Aldridge, and Ida, wife of John Darden.

The action was instituted and the summons in the cause bears date 15 March, 1920, and defendant resists a recovery on allegations with evidence tending to show that at the time plaintiff acquired his deeds from these three Kennedy children he was in charge and control of the property as agent of the defendant, and the title relied on by him was obtained in fraud of defendant's rights and in breach of plaintiff's trust and duties as agent.

(231) Second, that defendant and those under whom it claims have been in the open, exclusive, adverse, and continuous possession of said property, asserting title thereto for more than 7 years next before action brought.

The allegation and issue as to plaintiff's agency and breach of trust was submitted to the jury and resolved against the defendant. On the position as to title by adverse possession, the court, in effect, ruled that on the entire evidence, a 7 years adverse possession was insufficient to mature title in defendants, but that 20 years is required for the purpose, to which ruling defendant excepted. There was judgment for plaintiff, and defendant appealed. On defendant's

exception as to the statute of limitations the facts in evidence permit the inference if they do not require the finding.

"That Needham Kennedy died in 1898, owner and in possession of certain property, including that in dispute. He was survived by five children: Ida Darden, Fannie Aldridge, Levi Kennedy, Bryant Kennedy, and William Kennedy; and by a widow (the stepmother of the children), who died in 1908. After the death of the widow the children made arrangements for the division of the property, whereby William and Bryant (who lived in New Jersey) were to receive money, and Ida, Fannie, and Levi were to divide the property, Ida to get the lot now in controversy (designated "A"), and Fannie and Levi to get other lots (designated "B" and "C," respectively).

Accordingly, on 17 June, 1909, Bryant conveyed "A" to Ida in fee; on 24 January, 1910, William also conveyed "A" to Ida in fee; and during 1910, Levi conveyed "A" to Ida in fee; the deeds from Bryant and William were probated and delivered on the dates named, but were not recorded until 12 April, 1921. The deed from Levi was lost and never recorded. The arrangements were completed on 21 March, 1910, in the office of Col. A. C. Davis, an attorney and notary, by the exchange of the following deeds for the following property: from Fannie Aldridge and husband, Matthew Aldridge, to Ida Darden for "A"; from Fannie and Matthew Aldridge to Levi Kennedy for "C"; and from Levi Kennedy and wife and Ida Darden and husband to Matthew Aldridge for "B." The deeds to "B" and "C" were immediately probated. All three parties had gone into possession of their respective lots after the death of the widow; and they remained in possession. Levi later sold his lot.

The deed for "A" from Fannie and husband to Ida was probated 22 March, 1912. To secure a sum due him, Ida gave Matthew Aldridge a mortgage on "A" dated and recorded 21 March, 1910. Ida received the rents from "A" from her stepmother's death until 20 May, 1912. On that day Matthew sold the property under mortgage to Capt. A. J. Brown, the deed being recorded 11 June, 1912.

Captain Brown, and after his death his heirs, received the rents of "A" from that date until 27 March, 1915. On (232) that day the Brown heirs conveyed the lot to Bank of Warsaw, the defendant, by deed recorded 1 May, 1916. The bank has received the rent from the property from then until the present.

From these facts it appears that under a deed from Fannie Aldridge, made pursuant to the parol division of the estate, there has been continuous possession of the land in controversy, open, adverse, and in the assertion of ownership in Ida Darden and her

grantees, including defendant, for eight years before this suit was entered.

Second, that Ida Darden, while in undisputed and exclusive possession, asserting title, executed a mortgage to Matthew Aldridge for the land in dispute, and the grantees of Aldridge possessed the land under the same for more than seven years before suit was entered.

Third, that Matthew Aldridge, said grantee, pursuant to powers in the deed, conveyed the land in dispute to A. J. Brown, and Brown and his descendants and grantees, including defendant, possessed the same in assertion of ownership for more than seven years before suit was entered.

Fourth, and it appears further that this occupation and possession in assertion of title by Ida Darden and her grantees under deeds purporting to convey the entire property in dispute was had in pursuance of a parol division of the real and personal property of Needham Kennedy in which the three grantors of plaintiff, children of Needham, took part, and that these three grantors, as early as 1910, had executed to Ida Darden deeds for the land in controversy, two of them not being registered, however, until 1921, and the other lost, and it is under these and a similar deed from Fannie Aldridge, the other daughter, and her grantees, that the possession and occupation of the defendants has been continually maintained.

It is very generally held that in case of tenants in common an occupation in assertion of ownership and sole reception of the rents and profits will not of itself mature a title in the occupant as against his cotenants for any period short of twenty years. It is said that after that period of time an ouster of the cotenants will be presumed, but no shorter time will suffice. *Adderholt v. Lowman,* 179 N.C. 547; *Dobbins v. Dobbins,* 141 N.C. 210. And in this jurisdiction it has been insistently held that the position is not affected because the occupation of one of the tenants is under a deed purporting to convey the entire property whether that deed is from one of the other cotenants or a stranger. *Boggan v. Somers,* 152 N.C. 390; *Clary v. Hatton,* 152 N.C. 107; *Caldwell v. Neely,* 81 N.C. 114; *Covington v. Stewart,* 77 N.C. 148; *Cloud v. Webb,* 14 N.C. 317.

(233) As pointed out in *Roper Lumber Co. v. Richmond Cedar Works,* 165 N.C. 83, this position requiring 20 years occupation by one tenant in common under a deed conveying the entire interest has been carried very much further in this State than elsewhere, our decision holding that the title of a cotenant will not be destroyed by occupation for any period short of 20 years,

though the claimant may have known that the occupant was asserting sole ownership under a deed purporting to convey the entire property. But the ruling is fully established here, and we have no disposition to question it.

In all of these decisions, however, the tenant in common, occupant of the property, was endeavoring to assert title against a cotenant who had in no way acquiesced in or recognized the occupant's claim of sole ownership, and none of them, so far as examined, would uphold the position on the facts presented in this record, where the claimants have joined in a division of the property awarding the sole ownership to the tenant in possession and assuredly so where they have made deeds to such in recognition of the division as made.

The ruling involved in these North Carolina decisions, as shown, rests upon the position that an ouster will not be presumed against a tenant in common by mere occupation for any period short of twenty years, though such occupation is under color of title and to the knowledge of the claimant, but all the authorities here and elsewhere are to the effect that there may be an actual ouster of one tenant in common by another. *Mott v. Land Co.*, 146 N.C. 525-526, citing *Covington v. Stewart*, 77 N.C. 148; Tyler on Ejectment, p. 882. The test in such cases is whether the occupation of the tenant in possession, asserting title, has become hostile to cotenant, and both the reason of the thing and the authorities appertaining to the subject are to the effect that a conveyance of a grantor to a grantee and occupation in assertion of ownership under it will constitute a hostile holding. *Kirkman v. Holland*, 139 N.C. 185-189; *Trustees v. Bank of Asheville*, 101 N.C. 483. And it has been directly held that possession with assertion of ownership pursuant to a parol partition of land will amount to a disseizin and the occupation will be considered as hostile to the title of the others taking part therein. *Collier v. Paper Corporation*, 172 N.C. 74; *Boston & Worcester R. R. v. Sparhawk et al.*, 46 Mass. 469; *Russell v. Tenant*, 63 West Va. 623; *Justice et al. v. Lawson*, 46 West Va. 163.

True, in the North Carolina case referred to, the possession was for 20 years and more, but that was only ruled on in view of the ruling that a parol partition acquiesced in and acted on for 20 years becomes valid, and it was fully recognized that it created at the inception a possession hostile to the parties concerned and all others.

The court below seems to have been influenced by the consideration that the deeds pertinent to the question were (234) not registered till after those of plaintiff, and that the parol partition was invalid, and this is referred to in the principal opinion

as a reason for the decision. But neither the deeds nor the partition are relied on or referred to as controlling the title, but the question here is, What effect should they be allowed on the nature of defendant's occupation — did they show that the possession of Ida Darden and those claiming under her was hostile to the plaintiff, who has bought from the cotenants, and all of whom took part in the parol partition and have made deeds in recognition of the title of their sister under whose deed defendants claim and have had possession, asserting title for more than 7 years?

We are cited by counsel for appellees to *Janney v. Robbins,* 141 N.C. 406, and other cases to the effect that an unregistered deed is not to be considered color of title as against a claimant under a registered deed from same source — under the restricted facts there appearing the cases so hold; but, as we have endeavored to show, defendant here is not relying on these unregistered deeds either for title or for color. Defendant has color both under the deed from Matthew Aldridge and wife and from the mortgagee deed — under which it claims, and the unregistered deed of the three tenants as stated and referred to and relied on only as they may affect the character of defendant's possession and as showing that his occupation and claim of ownership was of a hostile character — assured and acquiesced in by plaintiff grantors, and so amounting to an ouster.

In my opinion, if the facts referred to and presented in the record are accepted by the jury, the defendant should be declared the sole owner, and for the error in refusing to submit this view of the case there should be a new trial of the issue.

WALKER, J., concurring in dissenting opinion.

Cited: Eaton v. Doub, 190 N.C. 18; *Cook v. Sink,* 190 N.C. 626; *Stallings v. Keeter,* 211 N.C. 300; *Winstead v. Woolard,* 223 N.C. 818.

J. W. KIMBROUGH v. WALKER D. HINES, DIRECTOR GENERAL, AND THE ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 26 October, 1921.)

1. Railroads—Government Control—Personal Injuries—Negligence—Federal Decisions—Federal Law—Dismissal of Action.

Under the recent opinion of the U. S. Supreme Court, in *R. R. v. Ault*, a recovery may not be had against a railroad company while under government operation for damages for a personal injury negligently inflicted upon an employee; and where the company and the Director General of Railroads have both been made parties defendant, the action will be dismissed, on appeal, as to the former.

2. Same—Appeal and Error—Judgments.

Where a railroad company and the Director General of Railroads have both been joined as parties defendant in an action to recover for a negligent injury, and issues have been submitted as to each, and adverse verdict rendered as to each, there can be no prejudice to the Director General in dismissing the action as to the railroad company and affirming it as to the Director General, and the same may be done under the provisions of C.S. 658 and 1412.

3. Appeal and Error—Dismissal as to One Party—Joint Judgment—Distinction Between Courts of Equity and Law Abolished.

Under the provisions of our statutes abolishing the distinction between courts of law and courts of equity, a joint judgment may be affirmed on appeal as to one defendant and dismissed as to another, when this may be done without prejudice.

4. Appeal and Error—Second Appeal—Same Facts.

On this appeal the facts are substantially the same as in the former appeal in this case, and as the trial court has followed the directions of this Court as to the law, no error is found.

WALKER, J., dissenting in part.

APPEAL by defendants from *Connor, J.*, at March Term, 1921, of WAKE. (235)

This was an action for personal injuries sustained at a grade crossing in Selma, N. C., on 27 January, 1919, by the alleged negligence of the defendants. From verdict and judgment the defendants appealed.

Douglass & Douglass, R. W. Winston, and J. M. Broughton for plaintiff.

Murray Allen for defendants.

CLARK, C.J. This case was before us at Fall Term, 1920, *Kimbrough v. Hines*, 180 N.C. 274, and a new trial was granted in an opinion by Walker, J. It appears from the transcript in this case

that the trial judge has substantially observed the directions in every respect laid down in that opinion, and therefore we do not deem that it is necessary to repeat the law applicable to the facts, which are identical with those presented on the former appeal.

This action was brought against Walker D. Hines, Director General, and the Atlantic Coast Line Railroad Company. The judgment is against each of the defendants. Since this case was tried the U. S. Supreme Court, in the opinion in *R. R. v. Ault*, filed 1 July, 1921, have held that where such actions as this have been brought against the Director General, joining as a party the railroad company, which was being operated under General Orders No. 50, that the action cannot be sustained as against the railroad company. The
(236) plaintiff in this case now submits that a modification of the judgment should be ordered reversing the judgment, and dismissing the action as to the Atlantic Coast Line Railroad Company.

The issues in this case affecting the liability of the Director General and the railroad company were separate and distinct, and had the trial judge stricken out all allegations in the complaint and the issues, relating to the railroad company, there would have remained a perfectly alleged cause of action against the Director General. The nature of the evidence would in no respect have been changed, and the verdict of the jury would have been the same. The Director General has no ground to insist that the judgment against the railroad company should not be reversed and the action dismissed as to said company.

C.S. 658, reads thus: "Upon an appeal from the judgment or order, the appellate court may reverse, affirm, or modify the judgment or order appealed from in the respect mentioned in the notice of appeal and as to any or all other parties, and may, if necessary or proper, order a new trial."

C.S. 1412, provides in part as follows: "In every case the Court can render such sentence, judgment, and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon." Under the technical rules of the common law a different rule prevailed, but the court of equity always followed this procedure, which was adopted by this State when the distinction between law and equity was abolished. One court having taken place of both law and equity, a joint judgment may be affirmed as to one defendant, and dismissed as to another. This has been the uniform course and practice since the blending of the two forms of procedure, and is expressly authorized by our statutes, above quoted. *Newberry v. R. R.*, 160 N.C. 156; *Hollingsworth v. Skelding*, 142

N.C. 246; *Long v. Swindell,* 77 N.C. 185. The same practice has been followed in the courts of the other states which have adopted the modern system of practice.

Every objection which could be presented by the Director General is presented before us by this record as fully as it would be if the judgment as to the Atlantic Coast Line Railroad Company were not dismissed in pursuance of the decisions of the U. S. Supreme Court in *R. R. v. Ault, supra,* and the appeal as to the Director General has been in nowise prejudiced by the reversal of the judgment and the dismissal of the action as against the railroad company. Indeed, in *Ault's* case the Court recognized this course, for while reversing the judgment as to the railroad company as an unnecessary and improper party, it proceeded to review and discuss the appeal as to the Director General on the merits and reversed that appeal on an entirely different ground.

The judgment against the Atlantic Coast Line Railroad Company is reversed and set aside and the action as regards that company is dismissed. In the appeal by the Director General we find (237)

No error.

WALKER, J., dissenting: I concur with the other judges that the defendant railroad company is not liable under the recent decision of the United States Supreme Court in *Mo. Pac. R. R. Co. v. Ault,* appearing in the Advance Opinions of that Court, at p. 647, No. 16, 1 July, 1921, and that, therefore, said defendant has properly been dismissed from the case with its costs.

I also agree with my brethren that judgments under our code of procedure may be joint or several, and, therefore, may be rendered against one or more of the defendants, and may also adjust matters in controversy as between plaintiffs and defendants, or between plaintiffs, or between defendants, so elastic is our present system, be it said to its great credit, in extolling its virtues and its simple and practical methods of dealing with all matters of litigation, and its provisions should be most liberally construed in order to effectuate justice as speedily as possible instead of delaying, or even defeating it, by dilatory pleading and practice, which was the fault of the old common-law system intended to be remedied. For example, the pleadings are sufficient if they state, in a plain and concise manner, without any unnecessary repetition (Pell's Revisal, sec. 467), the essential facts of the case, *Blackmore v. Winders,* 144 N.C. 215; *Brewer v. Wynne,* 154 N.C. 467; *Stokes v. Taylor,* 104 N.C. 395; *Warren v. Boyd,* 120 N.C. 58; and, likewise, in the in-

terest and furtherance of this more liberal and sensible procedure, it is provided that:

"(1) Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves.

"(2) It may grant to the defendant any affirmative relief to which he may be entitled.

"(3) In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper."

It was right to proceed further against the Director General. These latter exceptions of the defendant as to the judgment were properly denied, which brings us to the merits of the case.

Plaintiff brought this action to recover damages for personal injuries sustained at Selma, N. C., 27 January, 1919, as the result of a collision at a public crossing between the automobile which
(238) he was driving and a train on the line of the Atlantic Coast Line Railroad Company, which was being operated by the United States Railway Administration. There was testimony on behalf of plaintiff tending to show that the train was running at a speed of thirty or forty miles an hour; that no signal of approach to the crossing was given by whistle or bell; that the view of the track was cut off by a string of cars on a spur track, and that these cars extended two or three feet into the public road. Plaintiff testified that he looked and could not see down the track in the direction from which the train was coming, because his view was obstructed by the cars on the spur track.

There was testimony on behalf of the defendant tending to show that the cars on the spur track did not obstruct the plaintiff's view of the train, as the end of the car next to the crossing was some distance therefrom; that notice of the approach of the train had been given by blowing the whistle and ringing the bell, and that the speed of the train did not exceed ten or twelve miles an hour. The defendants pleaded the plaintiff's contributory negligence as a defense, and contended at the trial that the failure of the plaintiff to stop before entering upon the track, when it was his duty to do so, was, as matter of law, the proximate cause of his injury, as the facts with regard thereto were not questioned.

The case was before the Court at the Fall Term, 1920, and a new trial was ordered. In the opinion of the Court (180 N.C. 274) it is stated that the decision of the motion for a judgment of nonsuit

would be reserved. This motion should be allowed upon the facts as they now appear.

"The failure of a person about to cross a railway track, on a highway at grade, to look and listen for an approaching train, or stop for such purpose, when the view of the track is obstructed, or where there is noise which he may control, is negligence *per se*, which will bar a recovery for an injury resulting from a collision with a train at such crossing." *Blackburn v. Railroad*, 34 Oregon 215, citing numerous cases in support of this position at p. 222; *R. R. v. Bower*, 266 Fed. 965. In *Chase v. Maine Central R. R. Co.*, 167 Mass. 383, it is said to be a general rule "that, if there is anything to obstruct the view of a traveler on a highway at a crossing at grade, it is his duty to stop until he can ascertain whether he can cross in safety." See, also, *Shatto v. R. R.*, 121 Fed. 678; *R. R. v. Holden*, 93 Mo. 417; *Ely v. R. R.*, 158 Pa. 233. Contributory negligence under our statute is a matter of defense, and the burden of proof is placed upon the defendant to establish it unless it is proven by testimony offered in behalf of the plaintiff." *Cook v. Furnace Co.*, 161 N.C., p. 41. Where the facts are admitted, or not disputed, contributory negligence is a question of law for the court, *Ovens v. Charlotte*, 159 N.C. 332; *Neal v. R. R.*, 126 N.C. 634. Where the facts necessary to constitute contributory (239) negligence are established by the evidence of plaintiff, motion for judgment of nonsuit should be sustained. *Keller v. Fiber Co.*, 157 N.C. 575. Defendant may avail himself of the plea of contributory negligence on a motion to nonsuit upon evidence introduced by plaintiff. *Wright v. R. R.*, 155 N.C. 325; *Fulghum v. R. R.*, 158 N.C. 555; *Exum v. R. R.*, 154 N.C. 408; *Coleman v. R. R.*, 153 N.C. 322; *Mitchell v. R. R.*, 153 N.C. 116; *Neal v. R. R.*, 126 N.C. 634.

Plaintiff was thoroughly familiar with the crossing, having passed over it on the morning of the accident on his way from Raleigh to Pine Level. He knew the lay of the ground at the crossing, and that he was approaching the crossing, and says he slowed down. In describing the condition at the crossing, and the circumstances of the accident, plaintiff testified that as he approached the crossing he saw a long string of box cars on the connection track which extended two or three feet into the highway; that these cars entirely obstructed his view to the south, the direction from which the train was coming; that when he was within twenty feet of the crossing he "slowed down" his Ford automobile and brought it down practically to a stop, but did not stop. He described the situation with which he was confronted as looking like a "death trap." Plaintiff

further testified, "I said I came very near to a stop. I was practically right at the railroad track. I was ten feet back from the railroad when I slowed up, and when I went through I put my foot on low gear. That Ford car would run under low gear not over four or five miles with all the gas I could give it. As well as I remember, I gave it all the gas I could."

On cross-examination plaintiff testified that he did not stop before going on the track; that if he had stopped behind the box cars the train would have passed on by, and he would not have been injured. He says: "When I slowed down, I put my hands on the emergency brake. I was practically at a stop when I reached the edge of those box cars; I was in low gear and speeded up to go on through. I said in my direct examination that I gave all the gas I could when I started to go through there, and that I was ten feet from the crossing when I slowed down and put my hands on the emergency. That nearly stopped my car; by pulling a little harder I could have stopped it. If I had heard the train I could have stopped almost immediately. I did not have a starter on the Ford. If I had stopped there behind that car I could also have stopped my engine; yes, stopped any noise the engine was making. I did not stop. When a Ford is in low gear it makes more noise than at any other time. Yes, I started off from a point ten feet. I started in low gear, and I went nearly to the crossing with the engine making more noise than
(240) when I came nearly to a stop; they make more noise when you put them in low gear. Of course, when I went in low I speeded up my engine; the more you speed the engine the more noise you make." On redirect examination plaintiff testified that he thought there might be a shifting engine there, and that is why he slowed down.

Richard Britt, witness for plaintiff, testified that just before plaintiff reached the crossing he put his automobile in low gear and speeded it up.

The motions of defendants for a nonsuit, on the ground that plaintiff was guilty of contributory negligence, should have been allowed.

Defendants excepted to the following instructions: "It was the duty of the defendants to keep their premises at and near crossings free from obstructions which would prevent the plaintiff from seeing a train on the railroad approaching the crossing from a point on the highway at which he could stop his car in time to avoid a collision."

The court later instructed the jury that a failure to perform this duty would be negligence on the part of the defendants. It is not the

unqualified duty of defendants to keep the premises free from obstructions. The duty could not be greater than to exercise the care of a prudent person in this respect.

The jury were also instructed as follows: "It being admitted that Selma is a thickly settled town, that near the public crossing there is an intersection of the Atlantic Coast Line Railroad with the Southern Railroad tracks passing over the crossing, and that the public highway is much frequented by travelers, it was the duty of the defendants not to run its train in approaching the crossing at a rapid and reckless speed without giving reasonable and timely notice of its approach. A failure on the part of the defendant to perform these duties, or any one of them, would be negligence on their part. . . . Now, gentlemen, there is no evidence here that there is any ordinance in the town of Selma prescribing the rate of speed at which they should pass, but I instruct you inasmuch as Selma is an important town and thickly settled, and that there are many tracks there, and there was an intersection of the Southern and Atlantic Coast Line, I instruct you that the defendant owed a duty to the public not to cause its locomotives to go through that town at a rapid and excessive rate of speed, and if, under all the facts and circumstances, you find that the speed was dangerous and reckless and not safe, then there would be negligence in that regard."

This instruction entirely disregards the fact that the burden of proof was on plaintiff to satisfy the jury by a preponderance of evidence that the train was being operated at a reckless speed. A finding "under all the facts and circumstances" is clearly insufficient.

The jury were further instructed: "If, however, you find from this evidence that there has been negligence on the part of the defendant, then it would become your duty to further consider the evidence and ascertain whether or not such neg- (241)
ligence as you may find was the direct and proximate cause of the injury which you may find that the plaintiff sustained, because, notwithstanding the fact that the defendant may have been negligent, unless that negligence caused the injury to the plaintiff, the defendant would not, in law, be liable to the plaintiff. For instance, suppose the railroad company had been negligent in obstructing his view of a train approaching from the south, but that he had been injured by a train coming from the north, as to which there was no negligence, then, of course, his injury, not having been caused by the negligence of the railroad, the railroad company would not be liable to him." This instruction must have been exceedingly confusing to the jury in considering the relation of cause to negli-

gence on the part of defendant, and the causal connection between the two.

The court then instructed the jury as follows: "It was the duty of the defendants operating the locomotive and cars on the railroad to give reasonable and timely notice of the approach of the trains to the public crossing by ringing the bell or blowing the whistle, or by doing both, if under the circumstances and conditions existing at the time such was reasonably necessary to give such notice." This instruction was not supported by the evidence. There is nothing in the record to show the existence of circumstances requiring both the ringing of the bell and blowing of the whistle.

The court later instructed the jury that failure in performance of this duty would be negligence on the part of defendants. Considered together, these instructions are erroneous. An instruction not warranted by the evidence is erroneous, although correct as an abstract proposition of law. *King v. Wells*, 94 N.C. 344.

The following instruction was then given: "I instruct you, gentlemen of the jury, that if you find from the evidence that the signals were not given, that is, the bell not rung, *and* the whistle not blown, then there was negligence on the part of the defendant in that respect, and if you so find, it would then be necessary for you to further consider this issue."

It has been thoroughly settled by us that it is not the absolute duty of a railroad engineer to blow the whistle and ring the bell, as that depends upon the exigencies of the occasion. Sometimes it will be sufficient to blow the whistle *or* ring the bell — and again, it may be the part of prudence, at times, to do both. *Edwards v. R. R.*, 132 N.C. 99. The particular charge here was that if they found that the *signals* (in the plural) were not given, that is, that the bell was not rung *and* the whistle not blown, which clearly implied, as the duty was expressed conjunctively, that both such signals must be given, and the jury must have so understood it.

(242) The jury were further instructed: "It becomes necessary for you to further consider the evidence and determine whether any such negligence as you find the defendant to be guilty was the proximate cause of the injury." It seemingly was error for the court to say to the jury that the facts recited in these instructions constituted negligence on the part of the defendants. The issue reads, "Was plaintiff injured by the negligence of defendant?" etc., and it would naturally impress the jury that they were being instructed by the court to answer the issue "Yes" if they found the facts as recited in the instructions.

The court instructed the jury as follows: "Our Supreme Court

has held that there is no absolute duty upon the driver of an automobile, on approaching a railroad crossing, to stop his car before going upon the crossing, but they have said that the rule being that a traveler must conform his conduct to that of a prudent man situated as the jury may find the plaintiff to have been immediately as he approached the crossing, that it is for the jury to say whether, under all the facts and circumstances as they then appeared to him as a prudent man, that he should not only have looked and listened, but he also should have stopped his car. So it is necessary for you to consider and determine whether or not, in view of all the facts and circumstances as you find them to have been at the time that Mr. Kimbrough approached that crossing, whether as a prudent man he should have stopped that car. Unless you find, gentlemen of the jury, that the plaintiff was negligent, as I have instructed you, without further consideration, you will answer the fifth issue 'No.'"

This instruction restricted the jury's consideration of this question to the elements of contributory negligence recited by the court. It prohibited consideration of other elements of negligence on the part of plaintiff, especially speeding up to go past the cars, permitting his engine to run with such noise as to interfere with his hearing, and others, and it excluded consideration of the combination of circumstances relied upon by defendant as contributory negligence; and there is this other defect, that his Honor failed to give the converse of this proposition, and nowhere in his charge does he instruct the jury that upon finding certain facts they will answer the issue of contributory negligence "Yes," as he then said: "If, however, you find that he was negligent, you must proceed to the further consideration of the evidence and determine whether or not the negligence which you may find that the plaintiff was guilty of contributed to his injury." *Jarrett v. Trunk Co.*, 142 N.C. 466.

Proximate cause upon facts admitted or found by the jury is a question of law. "If plaintiff failed to stop when it was his duty to stop, it is clear that such neglect of duty contributed to his injury, and it was error to leave this question to the jury." (243) *Kimbrough v. Hines*, 180 N.C. 274.

The court had previously instructed the jury that if plaintiff "failed to exercise proper care within the rule stated, it is such negligence as will bar recovery, provided, always, it is the proximate cause of his injury." This instruction is also subject to the objection that conduct of plaintiff, which of itself would bar his right to recover, was submitted to the jury on the question of proximate cause.

The court also instructed the jury as follows: "The defendant says that if you find that notwithstanding the fact that they failed

to give any signal, that notwithstanding that there was an obstruction that interfered with his view, and notwithstanding the fact that it was running the train too fast, still there would have been no injury if Mr. Kimbrough had looked and listened and stopped his car, and that, therefore, you should find that his negligence in so doing was a contributing cause of his injury."

The defendants' contention was that, if the matters recited in this instruction were found to be true, and plaintiff failed to look and listen and failed to stop, his conduct was contributory negligence as matter of law, and that the jury should have been so instructed.

Defendants noted an exception to the following instruction: "If his view is obstructed or his hearing an approaching train is prevented, and especially if this is done by the fault of the defendant and the company's servants fail to warn him of its approach, and induced by this failure of duty, which has lulled him into security, he attempts to cross the track and is injured, having used his faculties as best he could, under the circumstances, to ascertain if there is any danger ahead, negligence will not be imputed to him, but to the company, its failure to warn him being regarded as the proximate cause of any injury he received." It is patent that this instruction falls with the decision of this case on the former appeal (180 N.C. 274), in that it totally ignores plaintiff's duty to stop, if prudence on his part required it. If proximate cause is a question for the jury, the court erred in this instance in taking it from them.

It would not do to confine plaintiff's duty in the premises merely to two, or even three, recited facts, because the jury must be allowed to consider the situation in its entirety, and all the facts and circumstances connected with it, and then to say whether an ordinarily prudent man would have acted as plaintiff did on this occasion, or pursued a safer course, one which he himself says was open to him, and which, if he had adopted it, would have prevented the injury to him. Nor is it true that the failure on the part of the defendant to warn of the train's approach was, as matter of law, con-
(244) clusively negligent, for whether so or not may depend very much upon all the facts and circumstances of the situation at the time, and the jury may well have found upon the evidence that the plaintiff was grossly imprudent in taking so great a risk, but should have waited for only a few moments and until he was better informed as to the safety or danger of crossing before "leaping in the dark" and taking his life into his own hands.

Even if this instruction may have been correct in the abstract,

it was error to give it in this cause, under the facts and circumstances as now presented.

Defendants assign as error the following instruction to the jury: "I instruct you that the defendant had the right to put cars on that connection track, but that they had no right to leave the cars on the track extending up to the main line so as to obstruct the view of the traveler upon the highway approaching the crossing, as I have instructed you. If, however, you find that there was a breach of duty in that regard, this establishes negligence on the part of the defendant in respect to that matter." The record is entirely lacking in evidence that the defendants, or either of them, left these cars on the track extending up to the main line so as to obstruct the view of the traveler on the highway. The record is silent as to when and by whom the cars were put in such position, if it is granted that they were at any time so close to the crossing, which defendants denied, and it is error to give an instruction which is not supported by the evidence. *Griffin v. R. R.*, 137 N.C. 247; *King v. Wells*, 94 N.C. 344. It was also error to instruct the jury that the facts recited, taken by themselves, constituted negligence on the part of defendants. Besides, the recited facts did not constitute negligence, as matter of law, but whether so or not was for the jury to decide.

The defendants contended that it was the duty of the plaintiff to stop his automobile and to stop the noise of his engine before attempting to drive across the track, and that this duty was imperative if his view of the track was totally obstructed, and whether this, or the obstruction of the string of cars, was the proximate cause of the injury the jury should have been left perfectly free to determine.

The declarations of the plaintiff made after the accident were incompetent, not being *pars rei gestæ*. Evidence substantially the same was held to be incompetent in *Bumgardner v. R. R.*, 132 N.C. 438. See, also, *Smith v. R. R.*, 68 N.C. 107; *Williams v. Tel. Co.*, 116 N.C. 558; *Rumbough v. Improvement Co.*, 112 N.C. 751; *Egerton v. R. R.*, 115 N.C. 645.

The evidence admitted, after objection by defendant, as to the shifting engines not ringing their bells while running at Selma, was clearly incompetent and irrelevant, and prejudicial. That did not even tend to prove that the engineer on the train in question did not ring his bell or blow the whistle. Similar evi- (245)
dence was held to be incompetent in *Ice Co. v. R. R.*, 126 N.C. 797. This was manifest error. The Court, in that case (*Ice Co. v. R. R., supra*), as appears from the headnote, said: "The evidence did not throw any light on the question directly before the jury, and

was calculated to divert and mislead their minds to an unsafe verdict," citing *Grant v. R. R.*, 108 N.C. 462, at 470; *Henderson v. R. R.*, 144 Pa. St. 461.

There are other assignments of error which need not now be noticed.

The dominant and overshadowing error in the case is the refusal of the learned judge to nonsuit the plaintiff upon the evidence and at its close. The train was late, and naturally running at a high speed to make up for lost time. Plaintiff was injured about 11 o'clock, on 27 January, 1919, while he was returning from Pine Level. He knew that a train was "due to pass there not until 11 o'clock," so that he should have known, according to his own testimony, that he was crossing the track at a dangerous time. He testified: "As I came up on the track the engine was there." And again: "As I came up it looked like a death trap, and the engine was right over me. When I got upon the track they hit me." These excerpts are sufficient to show that he drove into the train and that he knew how dangerous his act was, as he called it a "death trap." There could not have been a more threatening situation, and one that should have warned a man with the least sense of prudence to desist, rather than risk his life by his daring act. A few moments loss of time was nothing as compared with the chances he was taking. It was nothing short of recklessness upon his own version of the facts. The more careless the plaintiff proves the engineer to have been, the more and more reckless was he. There was evidence that the bell was rung, for the witness, R. P. Oliver, testified that he could hear it distinctly, and that he could see the train, and he was in no way connected with the plaintiff or the railroad company, but was an indifferent and impartial witness. There was other evidence of the fact. The witness, L. M. Batton, testified that he was at Selma that morning and heard the train coming and heard it blow, the crossing or the station blow, but thought it was the crossing blow, being unusually loud, which attracted his attention. J. T. Adams heard the train, and also heard the whistle blow, and saw Kimbrough pass at the rate of 15 or 20 miles an hour. L. B. Early testified that he saw the train, and Kimbrough could have seen it if he had looked. The conductor stated that the train consisted of twelve cars, and it was running 15 miles an hour, and that it made a good stop. There was much other testimony to the same general effect. The fireman testified that he rang the bell for the road crossing where plaintiff was hit by the train, and had rung the bell from the railroad
(246) crossing to the road crossing. The conductor on this train stated that he blew the station and crossing signals, and

that plaintiff's car just darted out. He described minutely the different blasts of the whistle for station and crossings. He and the automobile were running at the same speed and came together on the crossing. He took every precaution at those places to prevent any accident, and that he did everything in this instance that could be done to avoid an accident. He used the distress signal and applied the emergency brakes, which were the Westinghouse, usual and approved type, and in good order. So that there was strong evidence for the defense that no precaution against accident was omitted by the engineer and fireman. The evidence was not all one way.

But omitting the defendant's testimony, if the plaintiff had used the care not only of an ordinary prudent man, but of a man of the slightest prudence, the accident could not and would not have occurred.

In *Railroad Co. v. Houston*, 24 L. Ed. (U.S.) 542, the Court held that negligence of the railroad company was no excuse for negligence on the part of a traveler crossing its track; and that he must take the consequences when he carelessly walks or drives into a place of *possible* danger. He must use his sense of hearing and sight, and all other available precautions. If he goes upon the track instead of waiting for an expected train to pass, he is guilty of culpable negligence, and so far contributes to his injury as to deprive him of the right to complain of others, and the consequences of his reckless mistake and temerity cannot be cast upon the company. "No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequences of failure. Upon the facts disclosed by the undisputed evidence in the case we cannot see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant." It has been well and truly said that a traveler about to use the tracks of a railroad must take no chances. Which of the tracks would or should be used for its various trains was, of course, a matter for the exclusive determination of the railroad company. It was held in *Rich v. R. R.*, 31 Ind. App. 10, that a traveler using a railroad track has no right to confine his precautions to his knowledge of the schedule and customs of the company, but must take due care against the approach of "extra trains," and even "wild trains," those which are expected as well as those not expected to use the track. He must look out for all trains, and any other rule, it was said, would measure his con-

duct by the altogether too liberal rule of chances and risks,
(247) and would impose upon the railroad company too rigorous and burdensome responsibilities, regardless of the inconvenience to the public arising from operating its trains under any such handicap. *Abernathy v. R. R.*, 164 N.C. 91-95, and cases; *Ward v. R. R.*, 167 N.C. 148; *Treadwell v. R. R.*, 169 N.C. 694.

No one can predict when a train will pass any given point. The tracks are in constant use and must needs be, not merely for any private use of the railroad, but to serve the public, who have the right to prompt service. The railroad company cannot itself know at what times it may have to use its tracks; and, therefore, must be free to use them at all times. If they are tardy in the performance of their public duties, or delay performance, their patrons are swift to demand compensation if loss ensues. They are hedged in on all sides by these conflicting interests, and must serve as best they may an exacting public. They should be held to the strict discharge of these duties, it is very true, but to enable them to comply with the public demands, they must, and should, have the free and unrestricted use of their tracks, so far as is consistent with a proper regard for the rights of others, when carefully exercised, but not when done so carelessly and even recklessly as here in this case. One train was due at 11 o'clock a.m., the accident occurred at 11:05 or 11:10, as testified. Another train, the one into which the plaintiff actually ran his car, was overdue several hours, and perhaps unavoidably so. The plaintiff knew these facts, for he stated that one of these trains was not due until 11 o'clock. There was no urgency which required him to cross at the very time that he did. If he had waited but two or three minutes he would have crossed in safety, and unscathed, but instead he risked his life to save a little time, which, so far as appears, at least, was comparatively valueless. He did not leave his car and look toward Selma for the train. He could have seen far enough in that direction to have done so and returned to his car and driven across the track, out of any danger, before any train could possibly have reached him, and if he had done so, he would have seen the train coming and averted the disaster. But he was lacking in every essential of care and precaution, and suffered the terrible consequences of his gross negligence. Any man of the least degree of prudence would have taken better care of himself.

I do not agree that the case as now presented is the same as the one on the first appeal, but *materially* different. I had grave doubt when I wrote the opinion in the first appeal as to whether the plaintiff should not have been nonsuited at that time, but preferred to give him the benefit of the doubt and allow the facts to be more

fully developed at the new trial. Instead of improving his case, I think the plaintiff has made it worse for himself by the added facts and the new version of those in the record before.

My conclusion is that he should fail in his suit, because of his plain and palpable negligence, which, as matter of (248) law, proximately caused the injury. It may be said that, at the least, the negligence of both the railroad company and himself were concurrent, which also would bar his recovery. "Where the negligence of both plaintiff and defendant concur and continue to the time of the injury, the negligence of the defendant is not in the legal sense the proximate cause of plaintiff's injury." *Hamilton v. Lumber Co.*, 160 N.C. 47.

It was held in *Neal v. R. R.*, 126 N.C., marg. p. 634 (Anno. Ed.): "Where the evidence on the part of the plaintiff (the defendant having introduced none) is demurred to, and, if true, establishes negligence on the part of the plaintiff and of the defendant, concurrent to the last moment, a judgment as of nonsuit sustaining the demurrer is proper."

I dissented in *Perry v. R. R.*, 180 N.C. 290, which had several features in common with this case, and they are so much alike that what I said in my dissenting opinion there (concurred in by Justice Brown) is applicable here, though this is a much stronger case against this plaintiff than were the facts there against Perry and his companions. I now strongly affirm what I then said, and also adopt what was written by Justice Brown in the first appeal of this case as my own view, though I think the case as now presented much stronger than it was when he so ably discussed the questions which were then involved. I refer to both opinions for further argument, without repeating what is there said. I also refer to *Coleman v. R. R.*, 153 N.C. 322, where Justice Brown gave the opinion of this Court, which was unanimous, and which so clearly states the principle governing here as to the duty of the plaintiff under the menacing circumstances.

If the plaintiff had acted as any prudent man would have done, and not have rushed, or rather jumped, with his car, under a quick driving low pressure upon the crossing, he would have passed over it without the least difficulty and in perfect safety, and, as I have said, he would have reached the other side unscathed. It was his rashness that brought the trouble upon him, which naturally followed his act. The fault was all his own, and he should bear the loss of which he was the guilty author, and proximately so.

This opinion, it will be observed, is mostly predicated on the assumption of defendant's negligence primarily, this concession being

made for the sake of argument, and the negligence which bars plaintiff's recovery is held to be his own, first, as contributing proximately to his injury; and if not, then, second, as so concurring with that of defendant as to operate a bar to his alleged right. The care of plaintiff must have been exercised, according to our authorities, before he had taken a position exposing him to peril or before he has entered into the zone of danger. *Coleman v. R. R.*, 153
(249) N.C. 322. A traveler is not permitted to drive blindly upon a railroad track and impute any resultant injury he receives to the railroad company, when he is the principal cause of his own misfortune. It was held in *Coleman v. R. R., supra:* "A railroad crossing is itself a notice of danger, and all persons approaching it are bound to exercise care and prudence; and when the conditions are such that a diligent use of the senses would have avoided the injury, a failure to use them constitutes contributory negligence. By stopping, looking, and listening before reaching a railroad right of way at a public crossing, and at a place where the view is obstructed by houses, the plaintiff has not performed his duty, or exercised the care required before crossing the track; and it appears that the right of way extended some sixty-five feet from the track, with an unobstructed view, and that by stopping thereon before reaching the track the plaintiff could have seen, or have become aware of, the approaching train in time to have avoided the injury complained of, in failing to do so he is guilty of contributory negligence, the proximate cause of the injury, and his action is barred thereby." If the plaintiff had stopped and gone near to the track he would have had an unobstructed view of the approaching train, and would have avoided the injury.

My conclusion is that the action should have been dismissed.

Cited: Bagging Co. v. R. R., 184 N.C. 74; *Williams v. R. R.*, 187 N.C. 354.

J. W. WILBON v. HOWARD AND BARNES.

(Filed 26 October, 1921.)

Appeal and Error—Verdict—Exclusion of Questions of Law Presented.

Where the question of law presented on appeal is as to whether one partner may be an independent contractor of the firm so as to exclude liability of the other, and the verdict of the jury has excluded the ques-

tion of independent liability as a matter of fact, without error committed by the court, the answer to this issue, so found, excludes the question of law presented for decision on appeal.

APPEAL by defendant, J. B. Barnes, from *Connor, J.*, at March Term, 1921, of WAKE.

Civil action instituted by J. W. Wilbon against George W. Howard and J. B. Barnes to recover damages for injuries sustained by plaintiff in a collision between a buggy in which he was riding and an automobile truck driven at the time by one Bill Lawrence.

The defendant, J. B. Barnes, alone appeals from the judgment below, and the sole question presented is whether or not the driver of the truck, admittedly the agent of Howard, was also the agent of the appellant at the time of the injury. Howard & (250) Barnes were partners in the business of buying and selling tobacco; but it is contended that Howard alone was responsible for the hauling of the tobacco and that, with respect to this work, he was an independent contractor in his relations to the partnership firm.

Upon the single or dual agency of the driver, the evidence was conflicting, and the question was, therefore, submitted to the jury with the following result:

"1. Was the plaintiff injured by the negligence of the defendants, or of either of them, as alleged in the complaint? Answer: Yes.

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

"3. Was the driver of the truck the agent of both defendants as partners at the time plaintiff received the injuries, as alleged in the complaint? Answer: Yes.

"4. What sum, if any, is plaintiff entitled to recover of defendants, or either of them, as damages? Answer: $4,500."

From a judgment on the verdict in favor of plaintiff and against both defendants, the defendant, J. B. Barnes, appealed.

Douglass & Douglass for plaintiff.

J. R. Baggett, and Manning, Bickett & Ferguson for J. B. Barnes.

STACY, J. Counsel for appellant in this case have filed an interesting and elaborate brief, with citation of authorities, in support of the position that a member of a copartnership may become an independent contractor, with respect to a given piece of work, in his relation to the partnership firm of which he is a member. *Chicago Hydraulic Press Brick Co. v. Campbell*, 116 Ill. App. 322, and *Burns v. Michigan Paint Co.*, 152 Mich. 613, 16 L.R.A. (N.S.) 816

and note. It is contended that such was the position of Howard in hauling the tobacco — the partnership extending only to the buying and selling of the tobacco — and that he alone should be held liable for the negligence of the truck driver who was engaged in this work at the time of the plaintiff's injury. There was evidence pro and con on this point, but we think it is settled by the jury's answer to the third issue. The crucial fact has been found against the appellant's contention. Hence, the legal questions, debated before us, do not seem to be presented on the record. We have found no error, and the judgment below will be upheld.

No error.

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W. H. FRANCK v. WALKER D. HINES, DIRECTOR GENERAL, ET AL.

(Filed 26 October, 1921.)

1. **Railroads—Director General of Railroads—Government Control—Negligence—Evidence—Questions for Jury—Trials.**

Where there is evidence that the plaintiff was a passenger on defendant railroad company's "shuttle train" for carrying employees to and from work, that the coaches were frequently overcrowded, and that plaintiff, in consequence, was struck by a "switch target," placed six and one-half feet from the center of the track, as he was standing on the car step holding to the grab irons, and to the contrary, that his injury was caused by his attempting to board the moving train under the circumstances: *Held*, sufficient for the determination of the jury upon the issues of negligence, contributory negligence, and damages. *Gilliam v. R. R.*, 179 N.C. 508, cited and distinguished.

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

A motion to nonsuit upon the evidence will be denied when it is sufficient to sustain the plaintiff's action, though his witnesses may have given contradictory testimony at the trial.

3. **Railroads—Director General— Parties — Government Control — Joint Judgment—Dismissal—Appeal and Error.**

In this action against a railroad company and the Director General of Railroads, under Government control, to recover for a personal injury to an employee alleged to have been negligently inflicted, the case is dismissed, on appeal, against the railroad and continued as to the Director General, under the authority of *Kimbrough v. R. R.* and *Wyatt v. R. R.*, at this term.

APPEAL by defendant from *Daniels, J.*, at May Term, 1921, of CUMBERLAND.

FRANCK *v.* HINES.

Civil action to recover damages for an alleged negligent injury to plaintiff while a passenger on defendants' "shuttle train," which was a mixed train composed of an engine and several cars and used in carrying workmen from the city of Fayetteville, N. C., to Camp Bragg and back, a distance of several miles.

There was evidence tending to show that 9 May, 1919, the plaintiff boarded the train in the city of Fayetteville while it was down near the water tank, some distance from the Norfolk Southern station; that the coaches and platforms were at that time crowded with passengers, and that the plaintiff was standing on the step of the car, holding to the grab irons, when he was struck by a switch target as the train started with a sudden jerk. It was permissible for passengers to get on the train at the coal chute, the ice plant, the water tank, and they "would stop first at one place and then another," and wherever they stopped "people would crowd on the cars." There was also evidence tending to show that (252) the switch target was only six and one-half feet from the center of the track.

On the other hand, there was evidence, elicited on cross-examination, tending to show that plaintiff undertook to get on the train while it was in motion, and was struck by the switch stand in his effort to board the moving cars.

Upon the issues of negligence, contributory negligence and damages being answered in favor of the plaintiff, and from a judgment rendered thereon the defendants appealed.

Averitt & Blackwell and Bullard & Stringfield for plaintiff.
Rose & Rose for defendants.

STACY, J. Defendants rely chiefly upon their motion for judgment as of nonsuit, and they contend that the case at bar falls squarely under the decision of this Court in *Gilliam v. R. R.*, 179 N.C. 508, where we had occasion to consider another accident which occurred on this same "shuttle train." But we think the present facts are somewhat different and sufficient to sustain the verdict of the jury. It is true the plaintiff's own witnesses apparently contradicted each other in their testimony, but this would not warrant the Court in granting the defendants' motion for nonsuit. Where the evidence is conflicting, with respect to a material matter, it must be submitted to the jury. *Shell v. Roseman*, 155 N.C. 90; *Ward v. Mfg. Co.*, 123 N.C. 252.

This action was instituted against Walker D. Hines, Director General, and the Atlantic Coast Line Railroad Company. The judg-

ment is against both of the defendants. Since this case was tried, the United States Supreme Court, in *R. R. v. Ault* (opinion filed 1 July, 1921), has held that in such actions arising under Federal control, the same may not be maintained against the railroad company. Hence, the judgment against the Atlantic Coast Line Railroad Company will be reversed and the action dismissed as to said company. The plaintiff consenting to this modification, the judgment against the Director General will be upheld under authority of *Kimbrough v. R. R., ante,* 234, where the reasons for this position are fully stated in an opinion by Clark, C.J., and, therefore, we will not repeat them here. See, also, *Wyne v. R. R., post,* 253.

The trial and judgment on the verdict against the Director General are

Modified and affirmed.

Cited: Childress v. Lawrence, 220 N.C. 196.

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GASTON WYNE v. ATLANTIC COAST LINE RAILROAD COMPANY AND HINES, DIRECTOR GENERAL.

(Filed 26 October, 1921.)

1. Railroads—Employer and Employee—Master and Servant — Personal Injury—Negligence—Evidence.

Where there is evidence that the plaintiff was injured while discharging his duties to the defendant railroad company, in carrying freight from its train to a depot platform by a passenger train running between another passenger train, discharging passengers at the depot, contrary to the rules of the company, and coming up, without signal or other warning, where the plaintiff's view was obstructed, and under noisy surroundings, which tended to prevent the plaintiff's hearing its approach, it is sufficient to be submitted to the jury upon the issue of defendant's actionable negligence.

2. Same—Contributory Negligence.

Where an employee on a freight train engaged in his duties as such, under the immediate direction of his superior, has been injured by a collision with the defendant's passenger train under evidence tending to show that the negligence of the defendant proximately caused the injury complained of, the question of the plaintiff's contributory negligence is one for the jury, upon the issue, and a motion to nonsuit should not be granted upon that ground alone.

3. Same—Questions for Jury—Trials.

The principle that requires one, before entering on a railroad track, to look and listen for approaching trains may be so qualified by the facts and circumstances of the particular case, when the defendant's negligence has been shown, as to require the question to be submitted to the jury upon the issue of contributory negligence, especially where the plaintiff, an employee, at the time was acting within the scope of his duty to the defendant, under the immediate order of his superior.

4. Evidence—Nonsuit—Contributory Negligence — Questions for Jury — Measure of Damages.

Both under our statute and the Federal law, an employee of a railroad company is not barred of his recovery for damages from a personal injury negligently inflicted on him, because of his contributory negligence, such being considered only upon the *quantum* of damages he may recover, when the defendant's negligence has been properly established; and a motion for nonsuit in defendant's behalf may not be granted.

5. Statutes—Federal Law — Controlling Decisions — Parties — Director General—Verdict Set Aside.

The decision of the Supreme Court of the United States controls in the interpretation of Federal laws, and, thereunder, an action against a railroad and the Director General to recover for a personal injury inflicted upon an employee of a railroad, under Government operation, improperly joins the railroad company, and the action as to it will be set aside on appeal.

6. Judgments—Courts—Law and Equity—Parties—Railroads — Director General—Dismissal of Action—Affirmance—Appeal and Error.

Under our present code of civil procedure, administering both principles of law and equity in the same court, with express statutory provision that judgment may be given for or against several plaintiffs or defendants in the same action, determining the ultimate rights of all parties between themselves, leaving the action to be proceeded with whenever a several judgment is proper, it is *held* that where an action is properly brought against the Director General of Railroads, under Government management, and against the railroad company, and a judgment has been obtained against both, the setting aside on appeal of the judgment against the railroad company and affirming it as to the Director General does not necessarily prejudice any of the rights of the latter, especially does it not do so when it appears that separate issues have been submitted as to each, and answered adversely to each of them by the jury.

7. Appeal and Error—Presumptions—Railroads—Director General—Dismissal as to One Party—Prejudice—Judgments.

The presumption on appeal to the Supreme Court is against error committed in the Superior Court, and it is accordingly *held* in this case that a judgment against the Director General of Railroads and a railroad under Government control at the time of the negligence alleged in the action must be dismissed as to the railroad company and affirmed as to the Director General of Railroads.

APPEAL by defendants from *Daniels, J.*, at the February Term, 1921, of CUMBERLAND. (254)

Civil action to recover damages for personal injuries, caused by alleged negligence of defendants, while plaintiff was engaged at his work as brakeman on a freight train on road of defendant company and while same was being operated by the government of United States under the supervision and control of W. D. Hines, Director General. A motion to dismiss the action as to the railroad corporation was overruled and defendant company excepted. There was denial of liability and plea of contributory negligence by defendant, and on evidence offered the jury rendered the following verdict:

"1. At the time the cause of action alleged in the complaint arose, was the possession, operation and control of the Atlantic Coast Line Railroad Company exercised by the Director General of Railroads under the proclamation of the President of the United States? Answer: Yes.

"2. Was plaintiff injured by the negligence of the agents, servants or employees of Federal Administration, acting through the Director General of Railroads? Answer: Yes.

"3. Was plaintiff injured by the negligence of the defendant Atlantic Coast Line Railroad Company? Answer: Yes.

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

"5. What damage, if any, is plaintiff entitled to re-
(255) cover? Answer: $6,000."

Judgment on verdict for plaintiff, and defendant appealed, assigning error.

Sinclair & Dye for plaintiff.
Rose & Rose for defendant.

HOKE, J. The facts in evidence tended to show that on 15 June, 1918, plaintiff was employed and working as a brakeman on a freight train on defendant road, and while engaged in carrying freight from his train, then on the ground at Kenly, N. C., to the station warehouse of the defendant road, was run over by a passenger train on the road going south and received painful and protracted physical injuries "to his great damage," etc. That at the time and place of his injury the freight train on which plaintiff was working was on a pass track of defendant company lying to the east and between that and the company station and freight depot, on the west there were two main line tracks and a station or warehouse track lying next to the buildings. That the passenger train going north was at the time on the yard on the main line track ly-

ing next to the freight train, and there was evidence permitting the inference that the train was then engaged in receiving and discharging passengers; that on the warehouse track and to the north there were freight cars standing, and which to a great extent obstructed the view in that direction. That when plaintiff had placed a load of freight on the platform of the warehouse and under the direction of his conductor was going back across the track to couple up his train, the passenger train of defendant going south came on the yard and struck plaintiff, knocking him down and dragging him some distance, causing the injuries complained of; that the train came without signal or warning of any kind and was in violation of a special rule of the defendant put in evidence to the effect "that trains must use caution in passing a train receiving or discharging passengers at a station, and must not pass between it and the platform at which passengers are being received or discharged." It was further shown that in crossing the track plaintiff passed just in front of No. 80, the passenger train going north, and that the noise of the train was such as to prevent or very much interfere with hearing the approach of the incoming train. It is stated also as an admission of record that the Atlantic Coast Line Railroad at the time was being operated by the Federal Administration. On this a sufficient statement to a proper apprehension of the question presented, the motion of nonsuit, in our opinion, was properly overruled, it appearing that a south bound train without any warning ran in on a main line of the company's track where divers persons were not unlikely to be at the time, and this, too, in violation of a rule of the company "that no train should run into a station yard between the station and a train engaged at the time in receiving or discharging passengers." Both were breaches of a duty very likely to result in harm and leading directly to the plaintiff's injury. And as to the conduct of the plaintiff, usually considered on the issues as to contributory negligence, in *Sherrill v. R. R.*, 140 N.C. 242, it was held that "while one who enters on a railroad track is required to look and listen for trains that may be approaching, when negligence of the defendant has been established, the facts and attendant circumstances may so qualify the obligation as to require that the question of contributory negligence should be left to the jury," a position that is particularly insistent when one is upon the railroad track in the line of his duty, and in this instance acting under the immediate direction of his conductor. The position so stated has been again and again approved in our decisions. *Lutterloh v. R. R.*, 172 N.C. 118; *Penninger v. R. R.*, 170 N.C. 475; *Johnson v. R. R.*, 163 N.C. 431; *Fann v. R. R.*, 155 N.C.

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136; *Inman v. R. R.*, 149 N.C. 126; *Wolfe v. R. R.*, 154 N.C. 569. Under these authorities and the principle they uphold and illustrate, it is clear, we think, that the question of contributory negligence should be referred to the jury, it appearing that plaintiff in the line of his duty and acting at this time under the immediate orders of the conductor, was endeavoring to cross the track; that his view as he approached was shut off to a great extent by box cars standing on the warehouse track; that the incoming train ran into the yard without signal or warning of any kind, and the noise of the passenger train on the other track was such as to prevent taking note of the incoming train. A full discussion of the question, citing most of the authorities on the subject in our own court to the time were approved in *Fann's* case, *supra*, and the decision in *Wolfe v. R. R.*, *Inman v. R. R.*, are especially pertinent to the facts appearing in the present record. Even if contributory negligence should have been made to appear, both under Federal and State law, it would not avail defendant on motion for nonsuit, the only exception urged before us on the general question of liability. It has been held, in several of our cases construing the Federal Statutes under which the government had taken over this and other roads, that both the Director General and the railroad corporation are liable for an injury under the circumstances presented in the record, and his Honor below in accord with these cases very properly entered judgment against both defendants. Since this case was tried the Supreme Court of the United States, the final authority on the interpretation of Federal law, has held that under the Federal statutes applicable and the various orders of those in control of the roads thereunder, particularly General Order No. 50, judgment could not be
(257) properly had against the corporation. *Missouri Pacific Railroad Co. v. Ault*, 68 L. Ed., Current Supreme Court advance opinions, 647. In deference to this authoritative ruling, we must direct that the judgment against the Atlantic Coast Line be set aside, but we do not approve the position further insisted on that, for this reason, the entire judgment must be nullified. We were referred to several of the older decisions of our court to the effect that "a judgment is to be regarded as an entirety, and that it cannot be affirmed as to one or more defendants and reversed as to the others," citing *Davis v. Campbell*, 23 N.C. 482, etc. But if that and other like decisions could be considered as applicable to the facts of the record under the former law, they do not prevail under our present system of procedure, wherein the same court administers principles of both law and equity, and further there is express statutory provisions "That a judgment may be given for or against

one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves and in an action against several defendants the court may, in its discretion, enter judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." C.S., sec. 602, sub-secs. 1 and 3, and further, see section 1412: "In any case the court may render such sentence, judgment and decree as on inspection of the whole record it shall appear to them ought in law to be rendered thereon." There is, therefore, no objection as a conclusion of law to the entry of several judgment against one of the defendants while the other has been relieved, unless it appears that the liability of the codefendants are mutually dependent the one upon the other, or that the rights of the defendant who is held has been in some way prejudiced by the presence of the other in the trial of the cause. There is, however, a presumption against error, and not only does it not appear that the rights of the Director General have been prejudiced by the presence of the corporation, but a perusal of the record will disclose that on the facts in evidence the question of liability was determined by the jury on a separate issue and entirely as between plaintiff and the Director General in the present control and management of the road, and the liability of the corporation also on a separate issue was ruled by the court as a conclusion of law from the verdict against the Director General. The trial as to him, therefore, could in no way have been prejudiced by the presence of the corporation, nor is there any reason in law or fact why, under our present system, a several judgment may not be upheld. The admission of the rule as to the approaching of an incoming train alleged to have been violated, was not objected to nor does it appear as an assignment of error, and is evidently a rule under which the road is being presently operated. In this aspect of the matter the request of the (258) plaintiff to a several judgment is fully upheld in *Kimbrough v. R. R.*, *ante*, 234.

For the reasons stated, the judgment against the Atlantic Coast Line Railroad will be set aside and action dismissed and the judgment against the Director General is affirmed.

Modified and affirmed.

Cited: *Bagging Co. v. R. R.*, 184 N.C. 74; *Davis v. R. R.*, 187 N.C. 150.

J. W. BROOKS v. ORANGE RICE MILL COMPANY.

(Filed 26 October, 1921.)

1. Banks and Banking—Bills and Notes—Drafts—Holder in Due Course—Agency for Collection.

Where a foreign draft has been attached by a local creditor of the drawer while in a bank subject to the jurisdiction of our courts, and the forwarding bank has intervened and claims as a purchaser of the paper for value and in due course, and has introduced evidence to that effect, a question of fact is raised for the determination of the jury, when the intervener's evidence also raised an inference that it was simply an agency for collection.

2. Same—Attachment.

A draft made by a nonresident debtor is the subject of attachment in the resident creditor's action, in the courts of this State, when it has not been transferred to another in due course, etc.

3. Same—Evidence—Questions for Jury.

A resident creditor attached in his local bank a draft by his debtor on another, payable to himself, and the forwarding bank intervened and claimed as a purchaser for value in due course, and its evidence tended to establish its claim: but it further testified that it would look to the drawer, its depositor, for the payment of the discount and the rate of interest it charged: *Held*, it was for the jury to determine whether the interpleader was a holder in due course for value or merely an agency for collection.

4. Instructions—Verdict Directing—Evidence.

An instruction that directs a verdict upon the evidence in favor of one of the parties to the action, is reversible error to the prejudice of the other, when there are such reasonable inferences therefrom as would justify the verdict of the jury in his favor.

5. Same—Form—Appeal and Error—Prejudice.

The language of a direction by the trial judge of the verdict upon the evidence in favor of a party to the action, that if "you believe the evidence testified to by the witnesses in the case" they should so find, is inexact and contrary to the form suggested by the Supreme Court, and will constitute reversible error when to the prejudice of the other party appealing therefrom.

APPEAL by plaintiff from *Kerr, J.*, at June Term, 1921,
(259) of NEW HANOVER.

Plaintiff, a citizen of this State, having a cause of action against Orange Rice Mill Company, a foreign-resident corporation, instituted this suit in the Superior Court of New Hanover County and sought to obtain service upon the defendant by attaching the proceeds of a certain draft in the hands of the American Bank and Trust Company of Wilmington, N. C., it being alleged that said funds belong to the defendant.

Thereafter, on 29 March, 1920, the Orange National Bank, of Orange, Texas, was allowed to intervene and set up its claim of title to the proceeds of said draft.

The cause then came on for trial upon the issue of ownership raised by the interpleader. There was evidence tending to show that the draft in question had been purchased by the Orange National Bank, and that it alone was interested in its collection. But on cross-examination the cashier of the intervening bank testified as follows:

"We accepted this draft at the rate of 6 per cent discount. No notation was made on the face of the draft to that effect. It was not the policy of our bank at this time to accept this draft with bill of lading attached at 6 per cent discount and treat the paper as cash and become the absolute purchaser of it, releasing the Rice Mill from liability for nonpayment with the possibility of losing the amount, or even the discount, if for any reason the goods were refused and the draft returned the Rice Mill would take it up. We did not unconditionally release the Rice Mill when the draft was cashed.

"As I stated, in case of goods refused or draft returned the Rice Mill Company would reimburse us. We bought it outright with that exception. The bank was to accept and discount drafts with bill lading attached on parties against whom they were drawn and to charge 6 per cent interest on such drafts until paid and the funds placed in the bank's hands. The discount and the interest were the obligations of the Orange Rice Mill Company.

"In the event the American Bank and Trust Company does not pay this draft, we would not look to the Rice Mill Company to reimburse us to the extent it was not paid."

Witness was then asked, "Would you release the Rice Mill Company from all obligations in connection with Heyer Bros. transaction?" to which the witness answered, "Yes, legally."

At the close of the evidence his Honor charged the jury that "if they believed the evidence testified to by the witness in the case," they would answer the issue in favor of the intervener. Plaintiff appealed.

Robert Ruark and Wm. B. Campbell for plaintiff.
Rountree & Davis for interpleader.

STACY, J. We think the evidence upon the issue as to whether the intervening bank was an agent for collecting (260) the draft in question, or a purchaser thereof for value, and

sufficiently equivocal, if not contradictory, to require a finding by the jury, and that his Honor's charge, which practically amounted to a direction of the verdict, was erroneous.

Of course, if the intervener held the draft as a purchaser for value, the proceeds derived therefrom could not be attached in the hands of the American Bank and Trust Company as the property of the Orange Rice Mill Company; but, on the other hand, if the intervener acted merely as a collecting agent, the proceeds would belong to the defendant, and consequently they would be subject to attachment in the hands of the garnishee Trust Company. *Worth Co. v. Feed Co.*, 172 N.C. 335; *Markham-Stephens Co. v. Richmond Co.*, 177 N.C. 364.

The plaintiff also excepts to the form of expression, "If you believe the evidence testified to by the witness in the case," employed by his Honor in charging the jury. This language is inexact and, while in proper instances it will not be held for reversible error — and should not be unless the objecting party has in some way been prejudiced thereby — yet this Court has taken occasion, in a number of cases, to say that a different form of expression is more desirable. *Holt v. Wellons*, 163 N.C. 124; *S. v. R. R.*, 149 N.C. 508; *S. v. Godwin*, 145 N.C. 461, and cases there cited; *S. v. Simmons*, 143 N.C. 613; *Merrell v. Dudley*, 139 N.C. 59, and cases there cited; *Sossamon v. Cruse*, 133 N.C. 470.

For the error, as indicated, in directing a verdict on evidence from which different inferences may be drawn, we are of opinion that the cause must be submitted to another jury, and it is so ordered.

New trial.

Cited: Brooks v. Mills Co., 183 N.C. 678; *S. v. Singleton*, 183 N.C. 739; *Mangum v. Grain Co.*, 184 N.C. 183; *Bank v. Rochamora*, 193 N.C. 7; *Combs v. Cooper*, 194 N.C. 204; *Swinson v. Realty Co.*, 200 N.C. 279; *Adams v. Enka Corp.*, 201 N.C. 770; *Childress v. Lawrence*, 220 N.C. 197; *Hohn v. Perkins*, 228 N.C. 730; *Morris v. Tate*, 230 N.C. 32; *Commercial Solvents v. Johnson*, 235 N.C. 243; *Gouldin v. Ins. Co.*, 247 N.C. 168.

W. O. THOMPSON v. TOWN OF LUMBERTON.

(Filed 26 October, 1921.)

1. Equity—Injunction—Criminal Law— Municipal Corporations — Cities and Towns—Ordinances.

The enforcement of the criminal law, whether by statute or valid ordinance, made punishable as a misdemeanor under general statute, cannot be interferred with by the equitable remedy by injunction.

2. Same—Damages.

Where the violation of a town ordinance is made a misdemeanor, its validity may be tested by the one who is tried for violating it as a matter of defense, and he cannot invoke the equity jurisdiction of the court by injunction on the ground that his remedy is inadequate because an incorporated city or town cannot be made liable in damages in such matters.

3. Same—Statutes—Automobiles.

An ordinance providing for the examination of the character and ability of one applying for the license for running an automobile upon the streets of the city, and the issuance of a license if proven or adjudged satisfactory by the municipal authorities, upon the payment of an annual license fee of $5, comes within the valid legislative powers conferred on municipal corporations by general statute in regard to their well government, for the protection of the citizens from danger of collisions, and for the morals of the community. Laws 1907, ch. 343, secs. 45 and 46, and is further sustained by the express provisions of the act of 1919, relating to the subject.

4. Same—Licenses—Automobiles.

An ordinance of a municipality regulating the issuance of licenses to permit the running of automobiles upon their streets is not invalid because they require a license fee, but is enforceable for the protection of the pedestrians and others from collisions, and for the better morals of the citizens, and being in part a police regulation, an injunction will not lie.

APPEAL by defendant from *Kerr, J.*, July Term, 1921, of ROBESON. (261)

The commissioners of the town of Lumberton adopted the following ordinance:

"SECTION 1. No person or persons residing within the corporate limits of the town of Lumberton shall be allowed to operate a motor vehicle within said town until he shall have been granted license as a chauffeur or driver, as provided by this ordinance.

"SEC. 2. Every person desiring to operate a motor vehicle within the town of Lumberton shall file written application with the town clerk and treasurer, accompanied by a certificate signed by two reputable, disinterested citizens, certifying that said applicant is of good moral character, and that in their opinion has sufficient knowledge of motor vehicles and sufficient experience and training as a

chauffeur or driver to enable said applicant to safely operate the same; and that applicant is at least sixteen years of age. If said certificate is sufficient to satisfy said town clerk and treasurer that the applicant is qualified he shall, upon payment of the fees as hereinafter provided, issue a license, authorizing the applicant to operate motor vehicles within said town of Lumberton. If the certificate, or other accompanying evidence does not satisfy said town clerk or treasurer that said applicant is qualified and entitled to a chauffeur's or driver's license, he may decline to grant the same, and it shall be his duty in such cases to file the said application and present it at the next meeting of the board of commissioners of said town, at which time the said board may either grant or refuse said license, as they may deem proper; provided that until the meeting of the town board applicant shall be allowed to operate his motor vehicle in the same manner as if said license had been granted.

"SEC. 3. A fee of $5 shall be paid by each applicant
(262) to cover the costs and fees of investigating the qualifications of the applicant for driver's or chauffeur's license and the expense of granting the same. The said license shall expire on 30 June, 1922, but the same may be renewed from year to year by complying with the provisions of this ordinance. If as much as half of the fiscal year had expired at the time of application for license, then only one-half of the foregoing license fees shall be charged.

"SEC. 4. That every person violating the provisions of this ordinance shall be guilty of a misdemeanor and shall be fined the sum of $25 for each and every offense.

"SEC. 5. That this ordinance shall become effective on 30 June, 1921."

At the instance of the plaintiffs, taxpayers, a temporary injunction was issued by Kerr, J., who at July Term, 1921, continued the restraining order to the hearing, and the defendant appealed.

McIntyre, Lawrence & Proctor for plaintiffs.
Johnson & Johnson for defendant.

CLARK, C.J. An injunction does not lie to restrain the enforcement of an alleged invalid town ordinance. It has been uniformly held that equitable relief will not be granted in cases where there is an adequate and effectual remedy at law. *Busbee v. Macy*, 85 N.C. 329. It has also been uniformly held that an injunction will not be granted to restrain the enforcement of the criminal law except when it is necessary to prevent irrevocable injury to, or destruction of, property or to protect the defendant from oppressive and vexatious

litigation. In the latter case, the courts will grant an injunction only after the controverted right has been determined in favor of the defendant in a previous action.

Every violation of a town ordinance is by statute a misdemeanor, and if the courts should issue an injunction against the enforcement of an ordinance it would be an interference with the administration of the criminal law. When the defendant is put on trial for violation of the ordinance he has full opportunity to test its validity. This has been often presented to the Court, and the decisions are so clear and uniform as to leave the matter no longer debatable.

In *Cohen v. Goldsboro*, 77 N.C. 2, that town had adopted an ordinance forbidding the sale of fresh meat, except under restrictions prescribed in the ordinance. The defendants were arrested and fined for its violation, and as a result were forced to suspend their business. They sought to restrain the enforcement of the ordinance, and Reade, J., said: "If the defendants have an unlawful ordinance, and have arrested and fined the plaintiffs, as they allege, the plaintiffs have complete redress in an action for damages. (263) And, as often as the arrest may be repeated, they have the like redress; but we are aware of no principle or precedent for interposition of a court of equity in such cases. The injunction is dissolved, and the case remanded." To this we might add that the defendant could set up the defense of the invalidity of the ordinance when arrested and put on trial, and has the right of appeal should the matter be decided against him.

In *Wardens v. Washington*, 109 N.C. 21, an injunction was sought against the enforcement of an ordinance prohibiting the burial of the dead within the corporate limits of that town, except upon a permit from the town clerk, which could be given only upon a prescribed certificate from the attendant physician, and violation of the ordinance was made punishable by a fine of $50. The Court refused to pass upon the validity of the ordinance, or restrain its enforcement, saying: "It is unnecessary, however, to pass upon the question as to the power of the Legislature to authorize or to validate the ordinance in the exercise of the police power inherent in the State, for we have an express authority, if one were needed, that an injunction does not lie to prevent the enforcement of an alleged unlawful town ordinance," adding that the plaintiff had his remedy by an action for damages, and saying further, "if the plaintiffs, or any one else, should violate the ordinance, upon a criminal prosecution for such violation the validity of the ordinance and of the act of the

Legislature authorizing and validating it would come directly and properly before the Court."

The same question was again presented in *Scott v. Smith,* 121 N.C. 94, where the ordinance sought to be enjoined made it unlawful to play baseball in town without the mayor's permission. The Court said: "If the ordinance is lawful and valid, as insisted by the defendants, the plaintiff has no cause of complaint, and can maintain no form of civil action. If it is void, as insisted by the plaintiff, then he has misconceived his remedy, for a court of equity will not interpose when the plaintiff has a remedy at law by civil action for damages, and in a criminal action also the validity of the ordinance would be presented."

In *Vickers v. Durham,* 132 N.C. 880, the ordinance was attacked upon the ground that the statute under which the city proposed to condemn the plaintiff's land was unconstitutional. The court refused to sustain the injunction for the reason that the plaintiff had his remedy at law.

In *Paul v. Washington,* 134 N.C. 369, the plaintiff undertook to distinguish his case from the principles above cited upon the ground that he had no adequate remedy at law because of the well settled doctrine that municipal corporations are not liable for torts committed by their officers when undertaking to enforce un-
(264) constitutional and void ordinances enacted in the attempted exercise of the police power; and also because the policeman who arrested the plaintiff was insolvent and contended that since neither the town nor its policemen could be held responsible in damages, the plaintiff had no remedy except by injunction. On this the Court ruled that the law had been correctly laid down in the above cases, and that an injunction was not the remedy to test the validity of a municipal ordinance.

In *S. v. R. R.,* 145 N.C. 521, in which the whole matter was fully considered, the Court held that it is well settled, both in England and in America that a court of equity has no jurisdiction to interfere with by injunction or to restrain a criminal prosecution, whether the prosecution be for the violation of a statute, or for an infraction of a municipal ordinance, and that this rule applies whether the prosecution is by indictment or by summary process and whether it has been merely threatened or has already been commenced.

The plaintiff contends, however, that the intention of the board of commissioners in enacting said ordinance was to levy a tax not to provide a police regulation, but the intention can be ascertained only from the face of the ordinance itself. It has been uniformly

held, without a dissent, that evidence cannot be received to explain or qualify an act of the General Assembly, and even a member of that body will not be permitted to aid the Court by testifying as to the purpose of the governing body in enacting the statute. This would seem to apply equally to the passage of an ordinance by the lawmaking body of a town.

The court found as a fact that this ordinance was enacted both for the purpose of regulating automobiles and to lay a license tax upon those not used for hire, and the plaintiffs contend, therefore, that an injunction will lie against the levy of the tax. But if this finding of fact were adopted by us, still the ordinance being in part a police regulation, the injunction would not lie.

In view of the vast number of automobiles and the great danger from lack of adequate supervision in cities and towns, both from the danger of collisions and to pedestrians, and to the morals of the community there is hardly any subject which more imperatively demands the exercise of the police power. Last year in this country there were 92,000 injuries and deaths sustained in the operation of automobiles. This is an aggregate of casualties in a year nearly double that sustained by this country during the entire duration of the World War.

The ordinance in this case is not in conflict with any statute, and is authorized under the general provisions of the defendant's charter, and is reasonable. The charter of defendant's town as re-enacted and amended by ch. 343, Laws 1907, contains secs. 45 and 46 as follows: "Sec. 45. The mayor and board of commissioners shall have power to enact such rules, regulations, (265) ordinances and by-laws as they may deem necessary to secure the peace and good government of said town, and to enforce the same by imprisonment, fine or penalty, and the ordinances enacted by the said board, with the pains and penalties pertaining thereto, may be enforced within the corporate limits of the said town, and for one mile beyond and around said corporate limits.

"Sec. 46. Said mayor and board of commissioners, in addition to the powers which they possess by law, and which are conferred upon them by this charter, shall particularly have power to enact ordinances and to enforce same by imprisonment, fine or penalty as follows: 'To prevent vice and immorality, to preserve public peace and good order, to prevent and quell riots, disturbances and disorderly conduct.' "

Without elaborating the instances in which the uncontrolled and unrestrained operation of automobiles would violate the public peace and good order and might tend to promote vice and immorality and

increase disorderly conduct, it is clear that the defendant is authorized by its charter to pass this ordinance.

The plaintiff was doubtless relying upon the decision in *S. v. Fink,* 179 N.C. 714, which held that under the Revenue Act of 1919 the provision prohibiting cities and towns from charging any license fee for driving or operating automobiles greater than $1, such tax was void. That decision was correct, and compelled by the language of the Revenue Act of 1919, but the General Assembly in 1921 added the following provisos to the section construed in *S. v. Fink:* "Provided nothing herein shall prevent the governing authorities of any city from regulating licenses controlling of chauffeurs and drivers of any car or vehicle and *charging a reasonable fee.*" And provided further, that any city or town may charge a license not to exceed $50 for any motor vehicle used in transporting persons or property for hire in lieu of all other charges, fees and licenses now charged."

The effect of this amendment was to authorize the city to regulate and control the conduct of chauffeurs of automobiles and the drivers of all other vehicles and to impose a reasonable license fee, which we deem was not exceeded by the requirements of the payment of a license tax of $5. Even if this ordinance were enacted solely as a revenue measure, $5 is not an unreasonable amount to be levied as a tax and license fee on pleasure or other motor vehicles when $50 is authorized as a tax upon those motors engaged in transportation for hire.

Inasmuch as an injunction does not lie to test the validity of a town ordinance, we not only reverse the judgment, but must dismiss the action.

Action dismissed.

Cited: Turner v. New Bern, 187 N.C. 548; *S. v. Denson,* 189 N.C. 174; *Advertising Co. v. Asheville,* 189 N.C. 738; *Moore v. Bell,* 191 N.C. 311; *S. v. Jones,* 191 N.C. 373; *Wood v. Braswell,* 192 N.C. 589; *S. v. Hughes,* 193 N.C. 847; *Elizabeth City v. Aydlett,* 198 N.C. 588; *Loose-Wiles Biscuit Co. v. Sanford,* 200 N.C. 468; *Flemming v. Asheville,* 205 N.C. 767; *McCormick v. Proctor,* 217 N.C. 28; *Suddreth v. Charlotte,* 223 N.C. 634; *Jarrell v. Snow,* 225 N.C. 432; *Lanier v. Warsaw,* 226 N.C. 639.

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R. P. TAYLOR ET AL. v. J. F. MEADOWS ET AL.

(Filed 26 October, 1921.)

Instructions—Evidence—Testimony of One Witness—Excluding Testimony —Trials—Appeal and Error.

Where the dividing line, or lines, between the lands of the plaintiff and defendant are in dispute in an action of ejectment, and deeds and maps of survey relating thereto are in evidence, together with the testimony of the surveyor, an instruction, in effect, that the jury render their verdict accordingly, without regard to the oral testimony offered by either side to show the proper location of the lines, is erroneous in singling out the testimony of one witness by name, and also in taking his evidence out of its proper setting in its relation to the other evidence, which may have tended to modify or explain it.

APPEAL by defendants from *Horton, J.*, at April Term, 1921, of GRANVILLE.

Civil action in ejectment. The *locus in quo* in a small strip of land 30 feet wide by 161⅓ feet long, situated on the north side of Williamsboro Street in the city of Oxford. The facts are fully set forth in 175 N.C. 373, where this case is reported on a former appeal, and the evidence as there stated is substantially the same upon the present record.

From a verdict and judgment in favor of plaintiffs, the defendants appealed.

A. W. Graham & Son, A. L. Brooks, James A. Taylor, and D. G. Brummitt for plaintiffs.

Hicks & Stem, Parham & Lassiter, Royster & Royster, and T. T. Hicks & Son for defendants.

STACY, J. The case at bar has been tried three times in the Superior Court, and this is the third appeal here. Former opinions reported in 169 N.C. 124, and 175 N.C. 373. As desirable as an ending of this litigation would seem, we are unable to sustain the following portion of his Honor's charge, which was given at the request of the plaintiffs, and to which the defendants have specifically excepted:

"That if from the calls in the deeds and the map of survey offered in evidence, and the testimony of the surveyor explaining such survey, you are satisfied as to the proper location of the several lines bounding the land in dispute, then it would be your duty to act upon the same and render your verdict accordingly without regard to the

oral testimony offered by either side tending to show the proper location of the line or lines."

This instruction was erroneous, because its effect was to
(267) give undue credit to the testimony of the surveyor. The plaintiffs were not entitled to have the court single out by name any one witness from among all the others, who had testified to the same matter, and tell them that if they were satisfied from his evidence, taken in connection with the deeds and the map, they should render their verdict accordingly. This was in direct conflict with a number of our decisions. *Cogdell v. R. R.*, 129 N.C. 398; *Jackson v. Comrs.*, 76 N.C. 282; *Anderson v. Steamboat Co.*, 64 N.C. 399. In *Weisenfield v. McLean*, 96 N.C. 248, Davis, J., speaking for the Court said: "It would be error to single out the testimony of one witness, when there are others testifying to the same matters, and charge the jury that if they believed that witness, they must find in accordance with his testimony." And this for the very good reason, among others, that though the witness may speak truthfully, yet his evidence is given in the light of other testimony which may tend to modify and explain it, and it would be improper to take it from its own setting. *Willey v. Gatling*, 70 N.C. 410.

There are other exceptions appearing on the record worthy of consideration, but we apprehend they will not arise on another hearing.

For the error, as indicated, the cause must be tried again, and it is so ordered.

New trial.

Cited: Taylor v. Meadows, 186 N.C. 353; *Power Co. v. Taylor*, 194 N.C. 233; *Halsey v. Snell*, 214 N.C. 212.

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LENA S. WILLIAMS, ADMINISTRATRIX, v. RANDOLPH AND CUMBERLAND RAILWAY COMPANY AND SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 26 October, 1921.)

1. Railroads—Lessor and Lessee—Torts.

A railroad company, by leasing its road to another such company for its operation, may not escape liability for the torts of the lessee, however many times the lease may have passed from one to another railroad, and notwithstanding the fact that the present company has absorbed the original lessor railroad company and has become its successor.

2. Same—Statutes.

The mere fact that the lease by one railroad company to another for the purpose of its operation has been approved by statute does not alone change the liability of the lessor road for the torts of its lessee.

3. Same—Equal Liability.

The liability of a lessor road for the torts of its lessee is joint and several in equal degrees, and an instruction of the court to the jury that the lessor would be only secondarily liable is reversible error.

4. Railroads—Lessor and Lessee—Absolute Assignments—Leases.

Where a railroad company has contracted with another that the other company shall operate the road for a part of the unexpired term of its lease, requiring an indemnity against liability for its torts and providing for a forfeiture, etc., and that it should make no traffic affiliations with other railroads without its written consent, the contract is one of lease, and not one of absolute assignment.

5. Same—Leases Defined.

An absolute assignment makes no reservation of rent or interest in the property assigned, differing from a lease of the subject-matter, in that the latter creates a lesser estate from the greater, reserves rent, and retains some interest or estate after the termination of the term, and recognizes ownership of the demised property by the lessor.

6. Evidence—Dying Declarations—Wrongful Death—Statutes.

Under the provisions of C.S. 160, amended by the Legislature of 1919, permitting dying declarations in actions to recover damages for a wrongful death, in like manner and under the same rules as such declarations in criminal actions for homicide, are admissible, the dying declarations of the deceased in an action against a railroad company to recover damages for his negligent killing while crossing the defendant's tracks at a public crossing, that "I am going to die. I am broken all to pieces. I want you to see that they pay you for this. I did not see the train," are competent, when the attendant circumstances are fully in evidence, without question as to the death having been caused by the defendant's train at the crossing.

7. Same—Approaching Death—Integral Parts of Full Declaration.

Under the evidence of this case a part of the dying declarations of the deceased that he was broken all to pieces, and he wanted the railroad company to pay, was competent as expressing his conviction that he knew that death was rapidly approaching and had abandoned hope, and as being an integral part of the whole of his declaration.

8. Evidence—Statutes — Change of Procedure — Vested Rights — Rules Changed at Legislative Will.

The amendment of 1919 to C.S. 160, enlarging the rule of the admissibility of evidence of dying declarations to instances of wrongful death, does not change any vested rights, and is applicable in cases where such death was caused before its passage.

9. Railroads—Public Crossing—Negligence—Evidence—Trials.

Defendant's exceptions to the evidence in this action for the negligent killing of plaintiff's intestate by the defendant's train pushed forward by

the locomotive through a cut, without signals or warnings, and where bushes had been permitted by the defendant to grow to obstruct the view of the engineer, are held untenable under the decision of *Perry v. R. R.*, 180 N.C. 295, wherein the rules governing such occasions are stated, and the charge is approved in conformity to that case.

APPEAL by plaintiff and by each of the defendants from (269) *Horton, J.*, at the May Term, 1921, of ORANGE.

This was an action for the death of the defendant at a railroad crossing at Cameron, N. C., caused by a train which was being operated at that time by the defendant Randolph & Cumberland Railway Company, lessee of the defendant. Both defendants answered denying negligence and pleading contributory negligence, and the defendant Seaboard Air Line Railway Company denying that it was liable as lessor. The jury found upon the issues submitted that the plaintiff's intestate was killed by the negligence of the defendants, and that the plaintiff was not guilty of contributory negligence, and assessed damages.

The court set aside the verdict on the second issue as against the Seaboard Air Line Railway Company as a matter of law, and entered a nonsuit as to it. The said company having, however, assigned errors on the trial to the evidence and the charge appealed, as did also the Randolph & Cumberland Railway Company and the plaintiff.

Williams & Williams, Brogden & Bryant, W. S. Roberson, and A. L. Brooks for plaintiff.

Walter H. Neal and Murray Allen for defendant Seaboard Air Line Railroad Company.

U. L. Spence and R. L. Burns for defendant Randolph & Cumberland Railway Company.

CLARK, C.J. In August, 1917, the Randolph & Cumberland Railway Company were operating a railroad between Cameron and Carthage in Moore County, which crosses the National Highway at right angles just inside the corporate limits of the town of Cameron at a point where the railroad track crosses this highway from a deep cut, which was 8 to 10 feet high on the north side and 12 to 15 feet high on the other. On the banks of this cut for some distance on each side of the railroad bushes, trees and thick growth had been permitted to grow, obstructing the view of the approaching train.

The plaintiff's intestate, driving along this highway on 22 August, 1917, in an automobile going south, crossed a bridge north of the railroad, and was approaching this crossing. The railroad train

was approaching the crossing from the west with a box car at the front end nearest the crossing, then two or three gondola cars, then the passenger car, and the engine attached to the rear was pushing the cars over the crossing at a speed of 8 to 10 miles per hour, the engine being in the cut. There was evidence that the engineer did not ring the bell, blow the whistle or give any warning of the approach as the train emerged from the cut on the west and entered on the highway. The train collided with the auto- (270) mobile, and plaintiff's intestate sustained severe injuries from which he died next day.

On 23 August, 1888, the Carthage Railroad Company leased its roadbed franchise, etc., to the Raleigh & Augusta Air Line Railroad Company for 99 years. In 1890 the latter company leased the property acquired from the Carthage Railroad Company, together with its own franchise rights, powers and other privileges, and some other property, to W. C. Petty for a term of 97 years. Petty operated the road for some time, and after his death the trustees named in his will, in 1906, leased all the property acquired under his lease as above to the defendant Randolph & Cumberland Railway Company. In 1901 the defendant Seaboard Air Line Railway Company succeeded to the rights of the Raleigh & Augusta Railroad Company.

On 20 September, 1907, the defendant Seaboard Air Line Railway Company and the defendant Randolph & Cumberland Railway Company executed a lease agreement set out in the record releasing Petty's estate and substituting the defendant Randolph & Cumberland Railway Company as lessee of the property specifically readopting and reaffirming all stipulations and terms of the lease from the Raleigh & Augusta Air Line Railroad Company and Petty, expressly providing that the defendant Randolph & Cumberland Railway Company pay rent direct to the defendant Seaboard Air Line Railway Company, and should make no traffic arrangements or business connection with any other railroad company, except with the written consent of the Seaboard Air Line Railway Company, and that the latter may declare the term forfeited and reënter upon the property, and that the Randolph & Cumberland Railway Company shall indemnify the Seaboard Air Line Railway Company against loss by reason of damage arising out of the operation of the road and return the property to the Seaboard Air Line Railway Company at the expiration of the term.

APPEAL BY THE PLAINTIFF.

This appeal presents for review the action of the judge in setting aside as a matter of law the verdict as to the second issue which

held the Seaboard Air Line Railway Company liable, and his instruction to the jury under which they found that the liability of the Seaboard Air Line Railway Company was secondary and entered judgment of nonsuit as to that company.

In these particulars there was error. This Court has repeatedly held that the lessor and lessee of a railroad company are jointly liable for the torts of its lessee, and both defendants, the
(271) Randolph & Cumberland Railway Company and the Seaboard Air Line Railway Company are liable equally and in the same degree to the plaintiff.

In *Aycock v. R. R.*, 89 N.C. 321, the Court held: "The defendant company leasing the use of its road or permitting the use of it by another company remains liable for the consequences of the mismanagement of the train in charge of the servants of the latter, and the injuries thence resulting to the same extent as if such mismanagement was the act or neglect of its own servants operating its own trains."

In a very full opinion the Court says in *Logan v. R. R.*, 116 N.C. 947-948, that "the lessor company remains liable for the performance of its public duties to private parties for the nondelivery of goods received by it for delivery, and for all acts done by the lessee in the operation of the road, notwithstanding the lease is authorized by the lessor's charter. *No matter how many leases and subleases may be made,* the law attaches to the actual exercise of the privilege of carrying passengers and freight the compensatory obligation to the public to use ordinary care for the safety of both persons and property so transported. On the other hand, the carrier, who simply substitutes with the consent of the State another in his place, cannot establish his own right of exemption from responsibility for the wrongs of the substitute unless he can show, not only explicit authority to lease the property, but to rid itself of such responsibility."

In *Harden v. R. R.*, 129 N.C. 362, in which case the authorities are collected and approved, the Court said: "If a railroad corporation could relieve itself of liability by leasing, it would follow that leases could be made to another corporation with no tangible assets — as, indeed, the lessee in this case, if a foreign corporation, has none in this State —leaving the travelers and shippers over its line, the general public and its employees alike, without recourse on the property of the corporation which was chartered to operate the road, and which is left in receipt of the rent, which might readily be made high enough to cover the profits. Thus the company would, by the devise of a lease, receive the profits without incurring the liabilities

of its business. Among the many cases to the same effect, besides *Aycock v. R. R., supra,* and *Logan v. R. R., supra,* and *Harden v. R. R., supra,* will be found *Tillett v. R. R.,* 118 N.C. 1043; *James v. R. R.,* 121 N.C. 528; *Norton v. R. R.,* 122 N.C. 910; *Kinney v. R. R., ib.,* 961; *Benton v. R. R., ib.,* 1009; *Pierce v. R. R.,* 124 N.C. 93; *Perry v. R. R.,* 128 N.C. 471; *S. c.,* 129 N.C. 333; *Raleigh v. R. R., ib.,* 265; *Smith v. R. R.,* 130 N.C. 344; *S. c.,* 131 N.C. 616; *Brown v. R. R., ib.,* 455; *Mabry v. R. R.,* 139 N.C. 388; *Parker v. R. R.,* 150 N.C. 433; *Zachary v. R. R.,* 156 N.C. 496; *S. c.,* 232 U.S. 258, and there are many others since, among them *Mitchell* (272) *v. Lumber Co.,* 176 N.C. 645; *Hill v. R. R.,* 178 N.C. 607.

In this case the relationship of lessor and lessee is fully shown by the allegations in the complaint and the admissions in the answer, and the lease contract, as set out in the record in which there are all the elements of a lease, *i. e.,* the creation of a lesser estate from the greater; the reservation of rent, the retention of some interest or estate after the termination of the term and the recognition by the terms of the lease of the ownership of the demised property by the lessor. A lease is distinguished from an assignment in that the latter is a conveyance which transfers the whole and entire estate. An assignment makes no reservation of rent and reserves no interest in the property assigned. In this case the term for which the property was demised is less than the term for which part of the property was acquired from the Carthage Railway Company, and the terms of the lease create the direct relationship of lessor and lessee, substituting the Randolph & Cumberland Railway Company for the former lessee; the Seaboard Air Line Railway expressly retains absolute control over the operation of the road by the Randolph & Cumberland Railway Company, its lessee, and the right and power to say with whom, how, when, or on what terms the Randolph & Cumberland Railway Company may make traffic arrangements or business connections with any other railroad, thus securing to the lessor the benefit of operating the road, and protects the lessor against payment of taxes levied against the demised property and franchise rights, requiring the lessee to pay the same.

The lessor by its contract requires that the demised property shall be returned to it upon expiration of the terms specified, and that during the lease it shall be insured for its benefit, thus recognizing a present interest in the term. The lease demises the "rights, powers, privileges, easements and franchises" of the lessor who also reserves the right to declare a forfeiture of the term and make reëntry and retake the property demised upon nonpayment of rent,

and the lessee agrees to indemnify the lessor against loss or damage arising out of the operation of the road by the lessee.

The cases relied upon by the defendant — *Dunn v. R. R.*, 141 N.C. 521, and *Gregg v. Wilmington*, 155 N.C. 18 — differ radically as to the facts from the case at bar, and are not in point.

There being a lease, the court erred in charging the jury that the liability of the Seaboard Air Line Railway Company was secondary. The liability of lessor and lessee is joint and several, and in equal degree, and there was also error in setting aside the verdict as against the Seaboard Air Line Railway Company as a matter of law.

APPEAL BY DEFENDANTS.

(273) In view of what has just been said, the appeal of the two defendants as to the other exceptions should be considered jointly.

The defendants except to the evidence as to the physical condition of the plaintiff's intestate and the dying declarations made by him a short time before his death. The Legislature of 1919, amended C.S. 160, which authorizes recovery of damages for death caused by wrongful act, by adding to said section the following clause: "In all actions brought under this section the dying declarations of the deceased as to the cause of his death shall be admissible in evidence in like manner, and under the same rules, as dying declarations of deceased in criminal actions for homicide are now received in evidence."

This amending clause has been construed in *Tatham v. Mfg. Co.*, 180 N.C. 627, in which the power of the Legislature to so enact was sustained in an opinion by Mr. Justice Hoke. The circumstances under which dying declarations are competent in criminal actions are set out fully in *S. v. Mills*, 91 N.C. 594, which has been repeatedly cited and approved since. See citations in Annotated Edition.

The entire dying declaration of plaintiff's intestate is as follows: "I am going to die. I am broken all to pieces. I want you to see to it that they pay you for this. I did not see the train. I did not know that it was anywheres near until my car was going over." The attendant circumstances were fully set out in evidence, and leave no question as to the death of the plaintiff's intestate being caused by the collision of the train with the car which he was driving. He died on the following day. That part of the declaration to which the defendants except, "I am broken all to pieces. I want you to see to it that they pay you for this," was competent as expressing the conviction of the deceased that he knew that death was rapidly ap-

proaching, and that he had abandoned all hope, and as being also an integral part of the dying declaration.

It can make no difference that the act authorizing the admission of dying declarations in such action was passed after this occurrence. It is a general statute changing the rule of evidence, in which no one has a vested interest and which the law-making power can extend, alter or repeal at will.

The exceptions to the evidence showing the condition of the track and rails at the crossing at the time of the injury to plaintiff's intestate cannot be sustained. This evidence tended to show that the death was proximately caused by the want of care and the negligence on the part of the defendants, as alleged in the complaint, in failing to maintain at said public crossing some notice to warn the public and failure to remove the soil from the rails and track and to clear away and keep down the undergrowth and other obstructions which concealed from view the railroad track (274) at the point where it crossed the public highway; also failure to sound the whistle or ring the bell or give other suitable warning as the box car in front of said train was being pushed over the crossing at a point where its approach was obscured by the growth of trees and other obstructions, and by pushing the train of cars in front of the engine across the public highway in the town of Cameron, without giving warning, and when those in charge of said train could not see the danger to plaintiff's intestate and avoid injuring him.

The duty of the respective parties at a crossing have been so often stated by this Court that it would be supererogation to do more than give the summary of the rules governing such occasion as stated by the late Mr. Justice Allen in the recent case of *Perry v. R. R.*, 180 N.C. 295: "If the view of the traveler is obstructed or his hearing an approaching train is prevented, and especially if this is done by the fault of the defendant and the company's servants' failure to warn him of its approach, and induced by this failure of duty which had lulled him into security, he attempts to cross the track and is injured, having used his faculties as best he could under the circumstances to ascertain if there is any danger ahead, negligence will not be imputed to him, but to the company, its failure to warn him being regarded as the proximate cause of any injury he received."

There was evidence fairly submitted to the jury to justify their finding this state of facts, and the charge is almost in the exact language of the Court in *Perry v. R. R.*, which followed the previous

decisions in *Goff v. R. R.*, 179 N.C. 216; *Shepard v. R. R.*, 166 N.C. 544; *Jenkins v. R. R.*, 155 N.C. 203; *Hinkle v. R. R.*, 109 N.C. 472.

Upon examination of the entire case, the Court directs that the order striking out the verdict on the second issue must be reversed and the verdict on that issue reinstated; and judgment must be entered in favor of the plaintiff for the amount of the verdict against both defendants, jointly and severally, without any priority as to liability between then.

In appeal by plaintiff, error.

In appeal by defendants, no error.

ADAMS, J., not sitting.

Cited: Dellinger v. Bldg. Co., 187 N.C. 847; *S. v. Franklin*, 192 N.C. 725; *Barber v. R. R.*, 193 N.C. 695; *S. v. Beal*, 199 N.C. 297.

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SAMUEL A. WHITE, BY HIS GUARDIAN, ELLA WHITE, v. WALKER D. HINES, DIRECTOR GENERAL OF RAILROADS, AND THE ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 26 October, 1921.)

1. Pleadings — Admissions — Railroads — Derailment — Negligence — Evidence.

An admission in the answer of the defendant railroad company of the allegation in the complaint that the damages sought in the action were caused by a derailment while the plaintiff was a passenger in the defendant's coach, is competent as evidence of a separate fact relative to the issue as to the defendant's negligence, and does not require that further part of the answer, disclaiming negligence or fault, must also be introduced by the plaintiff.

2. Same—Res Ipsa Loquitur—Prima Facie Case.

Where the plaintiff alleges that his ward was injured by the derailment of a coach in which he was riding as a passenger, the proof of the plaintiff's qualifications as guardian, the derailment of the train, and the ward's personal injury as the proximate result, nothing else appearing, makes a *prima facie* case of defendant's negligence.

3. Same—Burden of the Issue—Defendant's Further Evidence—Verdict.

Where a *prima facie* case of negligence is made out the jury will be justified in finding for the plaintiff thereon, the burden of the issue remaining on the plaintiff, it being for the jury to determine whether upon

the entire evidence the plaintiff has established the defendant's negligence by the greater weight of the evidence, leaving it for the defendant to determine whether it will introduce further evidence or take the chance of an adverse verdict on the issue.

4. Evidence—Mental Capacity—Negligence—Receipt for Damages.

Where a receipt in full of damages has been signed by the plaintiff's ward in his action to recover damages of a railroad company for its negligent injury to the ward, it is competent to show that at the time the mental condition of the ward, resulting from the injury, was insufficient for him to have understood what he was doing, or its effect.

5. Evidence—Opinion Upon the Facts — Nonexpert Witnesses — Mental Capacity.

Where the sufficient mental capacity of one who has signed a receipt in full for damages caused by the negligent acts of another is at issue in an action, a nonexpert witness who has had personal observation of the acts and conduct of the one who has signed, and has had conversations with him, may thereon state whether he, at the time of signing, was crazy or abnormal, and such is not objectionable as his opinion upon the facts.

6. Same.

It is competent to show, as the basis of a nonexpert opinion as to mental incapacity of a party who has receipted in full for damages for a personal injury, the manner in which such person treated his family before and after the injury, his disregard to his physician's advice, his declarations and conduct, and his former mentality and physical vigor, with the other evidence in the case, when tending to sustain the opinion of the witness.

7. Evidence—Expert Opinion.

The opinion of a physician, testifying as an expert to the mental incapacity of a person, relevant to the inquiry, may be given in evidence when based upon his own observation.

8. Evidence—Rebuttal—Mental Capacity.

Where the mental incapacity of the ward to give a receipt for damages is relevant to the inquiry in plaintiff's action to recover damages for an injury alleged to have been negligently inflicted on him, which was relied upon as a defense to the action, and the defendant's witness has testified that he was in sound mental condition when he received the check therefor, it is competent for the plaintiff's witness to testify in contradiction of the testimony of the defendant's witness, that the ward was not of sufficient mental capacity at that time.

9. Evidence—Photographs—Accuracy—Witnesses.

Where a photograph of a place where a personal injury occurred is evidence in an action for a personal injury which occurred at the place, it is not required that the photographer himself should testify as to the accuracy of the picture, for this may be done by another witness who knows of the fact.

10. Evidence—Opinions — Expert Witnesses — Facts Within Their Own Knowledge.

Objection to the testimony of a medical expert on the question of insanity involved upon trial in this case, that the questions eliciting it were

not sufficiently definite, and that they contained hypotheses for the support of which there was no evidence, are found to have been untenable upon a careful examination of the record by the Court.

11. Instructions—Correct as a Whole—Erroneous Portions.

The charge of the court must be construed connectedly as a whole, presuming that the jury considered every portion thereof; and if it presents the law fairly and correctly, it will not be held erroneous because of some of its expressions, standing alone, may be regarded as erroneous.

12. Same—Res Ipsa Loquitur—Prima Facie Case.

Where the charge of the court, under the doctrine of *res ipsa loquitur*, places the burden of the issue of negligence on the plaintiff, and gives the proper effect to the *prima facie* case, if established, the defendant is required to go forward with his evidence in explanation or take the chances of an adverse verdict.

APPEAL by defendants from *Daniels, J.*, at the March
(276) Term, 1920, of CUMBERLAND.

This was a civil action brought by the plaintiff to recover damages for injury to Samuel A. White, the ward of the plaintiff, alleged to have been caused by the negligence of the defendants. The case was tried before his Honor, Daniels, J., and a jury, at the March Term, 1920, of the Superior Court of
(277) Cumberland County, the trial resulting in a verdict and judgment for the plaintiff, from which defendants appealed to the Supreme Court.

The plaintiff moved to substitute John Barton Payne as the successor of Walker D. Hines, as Director General of Railroads.

Upon the trial there was evidence for the plaintiff tending to show that her ward, Samuel A. White, while a passenger on a train of the defendants, was injured by the derailment of the train; that he was "thrown about within the coach," which was overturned; that he was injured on the back of the head about the base of the brain, and that his body and limbs were bruised; that his mind was seriously affected; that he was treated, after the injury in the Tranquil Park Sanitarium in Charlotte, at Johns Hopkins Hospital in Baltimore, and at the Highsmith Hospital in the city of Fayetteville, and that he is now confined in the State Hospital for the Insane. The plaintiff alleged that the injuries were caused by the negligence of the defendants in the operation of the train; in the negligent care of the rolling stock and roadbed, and in the negligent failure properly to inspect and to care for them. The plaintiff further alleged that her ward, by reason of said injuries, had suffered great pain, had incurred expense for medical and hospital service, had been ruined in physical health, and made permanently insane;

that his earning capacity had been destroyed, and his family deprived of his support; that prior to the alleged injuries, to wit, 20 July, 1917, her ward had been strong and vigorous, both mentally and physically, and that he had been industrious, skillful, and proficient in his occupation of "beamer and stationary engineer."

The defendants denied that they were negligent in any of the respects complained of, and alleged that the plaintiff's injury, if any, was due to an accident which could not reasonably have been foreseen or prevented.

The defendants further alleged that the plaintiff's ward had executed to the Atlantic Coast Line Railroad Company, one of the defendants, a release and receipt in full for his claim for damages resulting from the alleged injuries. This alleged release was introduced in evidence.

There was evidence tending to show that the derailment had been caused by a washout in the roadbed; that the section master had examined the track about three hours before the derailment occurred, and had found it apparently in safe condition; that the train had been inspected before it left Rocky Mount, and was found to be in good condition in all respects, and that it was skillfully operated by a competent crew. There was evidence tending to show that there had been heavy rains for one or two days, and that a hole under the track, five or six feet deep, had been caused by water running underneath.

There was evidence for the plaintiff tending to show that her ward's mind had been seriously impaired by the (278) injuries which he had sustained in the derailment, and that he did not have sufficient mental capacity to execute the release introduced in evidence by the defendants, and that the release had been procured by fraud and undue influence. Plaintiff contended that said release, for this reason, was voidable. There was evidence for the defendant tending to show that the plaintiff's ward had sufficient mental capacity to execute said release. Evidence was introduced tending to show his mental condition prior to the alleged derailment, at that time, and thereafter, and especially with reference to his mental condition at the time the release was alleged to have been signed. There was further evidence for the plaintiff tending to show that her ward had judicially been declared a lunatic in July, 1918, by a proceeding duly prosecuted before the clerk of the Superior Court of Cumberland County, and that the plaintiff had duly been appointed as his guardian.

At the close of the plaintiff's evidence the defendants moved

for judgment as in case of nonsuit, and at the close of all the evidence this motion was renewed.

The defendant's motion was allowed as to the Railroad Administration and denied as to the Atlantic Coast Line Railroad Company. To the court's refusal to dismiss as to the railroad company, the company duly excepted.

The issues were answered by the jury as follows:

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

"2. Did plaintiff execute the release set cut in the answer? Answer: 'Yes.'

"3. Was the execution of said release procured by fraud or undue influence, as alleged in the reply? Answer: 'Yes.'

"4. Was plaintiff incapable, by reason of mental affliction, to execute the said release, as alleged in the reply? Answer: 'Yes.'

"5. What damages, if any, is plaintiff entitled to recover of the defendant? Answer: '$12,500, less $554 paid.' "

Judgment was entered for $11,946, together with the costs of this action. The defendants appealed.

Evans & Eason for plaintiff.

Rose & Rose for defendants.

ADAMS, J. There are fifty-two exceptions in the record, several of which have been formally abandoned.

(279) The plaintiff alleged that the train in which her ward was traveling "was wrecked by derailment." In their answer the defendants admitted that the train was "wrecked by derailment without fault or negligence on the part of the defendants, or any of their agents or employees." The plaintiff offered in evidence the following portion of the answer:

"Answering the allegations contained in article five of the complaint, the defendants admit that on 20 July, 1917, S. A. White was a passenger on train No. 89, of defendants, en route to Hope Mills, N. C., and that while said White was a passenger on said train, about one and one-half miles from Hope Mills, said train was wrecked by derailment."

The defendants objected on the ground that the remainder of their allegation was omitted, and that the court below should have excluded the evidence or required the plaintiff to offer the additional phrase denying "fault or negligence on the part of the defendants." The evidence offered by the plaintiff was admitted, and the defendants excepted. This is the first exception in the record.

Evidence of the derailment and of the ward's injury as the proximate result was sufficient on the question of negligence to carry the case to the jury. The plaintiff's allegation that the train had been wrecked by derailment was the distinct statement of a circumstance relevant to the first issue. Proof of the plaintiff's qualification as guardian, of the derailment of the train, and of the ward's personal injury as the proximate result, nothing else appearing, made a *prima facie* case for the plaintiff, and upon the defendants devolved the duty of explaining the alleged wreck. In a number of decisions this principle has been applied, and it has frequently been held, in accordance with his Honor's ruling, that the admission of a separate fact relevant to the inquiry, though only a part of an entire paragraph, is competent without qualifying or explanatory matter inserted by way of defense. *Sawyer v. R. R.*, 145 N.C. 30; *Stewart v. R. R.*, 136 N.C. 387; *Wade v. Contracting Co.*, 149 N.C. 177. The first exception cannot be sustained.

Exceptions 9, 10, 11, 21, 23, 24, 29, 30, 32, 35, 36, 38, and 39 are addressed, directly or inferentially, to the mental condition of the plaintiff's ward, and may be grouped and considered together. All these exceptions are without real merit. The defendants offered in evidence a paper-writing purporting to be the ward's receipt for $554 and a release of the railroad company from all liability resulting from the derailment. The plaintiff replied that Samuel A. White was mentally incapacitated to such an extent that at the time of its execution he could not comprehend the nature and effect of the instrument to which he had affixed his signature. Evidence as to White's mental condition, then, was both material and essential. The defendants contended that testimony to the effect that he "was crazy" or "not normal," was the statement of a positive conclu-
sion, or fact, and, for this reason, incompetent. But in this (280)
jurisdiction it is established that a nonexpert witness, who has had conversations and dealings with another, and a reasonable opportunity, based thereon, of forming an opinion as to the mental condition of such person, is not disqualified on the ground that his testimony is a mere expression of opinion. *McLeary v. Norment*, 84 N.C. 235; *In re Stocks*, 175 N.C. 224; *In re Broach*, 172 N.C. 522. One not an expert may give an opinion, founded upon observation, that a certain person is sane or insane. *Whitaker v. Hamilton*, 126 N.C. 470; *Clary v. Clary*, 24 N.C. 78. Evidence as to the manner in which White treated his family before and after the injury was admitted on the issue of mental competency. His Honor carefully limited this evidence to the fourth issue. Upon this issue evidence of his stay in various hospitals was likewise competent.

The admission of Mrs. Porter's testimony that "we all begged him (White) not to go to Hopewell, and he went anyhow, and that the doctor advised him not to go back," is not reversible error. White's conduct and declarations were competent on the question of his mental condition, and as a fact in connection with other circumstances, upon which Mrs. Porter founded her opinion of his mental capacity. *McLeary v. Norment, supra; Clary v. Clary, supra; S. v. Cooper,* 170 N.C. 719. Nor is the testimony of Deaver touching White's mental condition three years before the injury ground for reversal. The plaintiff's allegation that prior to the injury her ward was "strong and healthy, both mentally and physically" was denied by the defendants, and this evidence, offered in support of the plaintiff's allegation, was not too remote to be considered by the jury.

We are unable to see why the testimony of Dr. Small, based upon his observation concerning the condition of the plaintiff's ward at the trial, was not competent. The plaintiff distinctly alleged that White's insanity was permanent, and this the defendants denied. Evidence as to his mind subsequent to the injury and at the time of the trial was clearly competent in support of the plaintiff's contention. This disposes of exceptions 45, 46, and 47.

E. L. McDonald, a witness for the defendants, testified that he had paid White a check for $554, and that his mental condition at that time was good. On cross-examination he denied having told the plaintiff that White "was in mighty bad shape" when he gave White the check. The evidence of J. W. McFayden and of the plaintiff was admitted only for the purpose of contradicting McDonald. Exceptions 33, 34, are therefore overruled.

Exception 22 also is untenable. A witness for the plaintiff was permitted to testify, over the objection of the defendants, that a photograph "was a correct picture of the wreck." That a
(281) photograph is a true representation may be shown by witnesses other than the photographer. *Bane v. R. R.*, 171 N.C. 332. But the evidence was harmless in any event, since the photograph was neither introduced in evidence nor exhibited to the jury.

Exceptions 43 and 44 relate to interrogatories propounded to Dr. Small, a medical expert. The objection is that the questions were not sufficiently definite, and that they contained hypotheses for the support of which there was no evidence. We have bestowed upon these questions a critical examination, and have concluded that the evidence was properly admitted. *S. v. Cole,* 94 N.C. 960;

S. v. Keene, 100 N.C. 509; *S. v. Wilcox,* 132 N.C. 1120; *Summerlin v. R. R.,* 133 N.C. 550.

Exceptions 49 and 50, which are directed to the charge of the court concerning the "shifting of the burden of proof," cannot be sustained.

His Honor instructed the jury as follows:

"Our Supreme Court has laid down the principle that where one is a passenger on a train and the train is derailed and he is injured, and the derailment is the proximate cause of the injury, then the burden shifts to the defendant. The burden originally was on the plaintiff in this case to satisfy the jury by the greater weight of the evidence that there was negligence in respect to the roadbed, on the part of the defendant, and that this negligence was the proximate cause of the injury, but where it is admitted that plaintiff was a passenger on a train of defendant, and that train was derailed, and if the jury should be satisfied by the greater weight of the evidence that the plaintiff was injured and that his injury was the proximate result of the derailment of defendant's train, then the burden shifts to defendant, and the defendant must go forward and produce evidence to relieve itself of the charge of negligence and show to the jury that it is not guilty of the negligence or that its negligence was not the proximate cause of the injury. . . . Now under this first issue the burden of it being upon the plaintiff, if you are satisfied by the greater weight of the evidence that plaintiff was a passenger on the train of the defendant company, and if you are satisfied by the greater weight of evidence that he was injured, and that his said injury was proximately caused by the negligence of defendant, then you will answer the first issue Yes; otherwise you will answer it No. . . . And if you should be satisfied by the greater weight of the evidence that there was a derailment by which the plaintiff's injury was proximately caused, nothing else appearing, you should answer the first issue yes, unless the defendant has satisfied you that there was no negligence on the defendant's part, with reference to the construction of the roadbed, and with respect to the proper inspection of conditions that prevailed there.

"Then, if you are satisfied, gentlemen, by the evidence, or if you are satisfied by the testimony introduced by the (282) defendant, the burden being on the defendant that in the construction of its roadbed the defendant exercised reasonable care and that it was inspected and repaired in a proper manner, then you will answer the first issue No. If you answer the first issue No, that ends the case, and you need not consider the issues further."

To each of these instructions the defendant duly excepted, con-

tending that they were tantamount to shifting the burden of proof from the plaintiff to the defendant. In this connection the court further said:

"The defendant contends that this was an accident; that it had done all of its duty, as I have told you was required of it, but that on account of the heavy rains existing there, it could not, in the exercise of its proper care, have discovered the conditions of the roadbed; that the roadbed had been properly constructed and inspected (there is evidence that it had been inspected on that day by the roadmaster and the sectionmaster), and that the defendants did not and could not, in the exercise of such reasonable care, as I have described to you, have discovered that it was in defective condition."

The exceptions require a brief examination of former decisions of this Court which, it is admitted, unfortunately disclose expressions as to the burden of proof and the burden of the issue that are inconsistent, contradictory, and confusing. Beginning with *Ellis v. R. R.*, 24 N.C. 138, in which the plaintiff sought to recover damages for loss caused by fire escaping from the defendant's locomotives, this Court, in discussing the principle to which the exceptions relate, said: "We admit that the gravamen of the plaintiff is damage caused by the negligence of the defendants. But we hold that when he shows damage resulting from their act, which act, with the exertion of proper care, does not ordinarily produce damage, he makes out a *prima facie* case of negligence, which cannot be repelled but by proof of care or of some extraordinary accident which renders care useless."

Referring to *Ellis'* case, Justice Read said: "In that case the plaintiff proved that his fence was fifty feet from the railroad and that sparks from the engine set it on fire; and that although it had been there for a long time, it had never caught fire before, and that the engine usually had a spark-catcher, but it did not appear whether it had one on that day. There was no evidence by the plaintiff, and the defendant offered none. It was held to be *prima facie* negligence. Of course it was. There was the plain fact that the defendant had set fire to the plaintiff's fence, which the prudent use of his engine had never fired before. That made it necessary for the defendant to show that he had used the same care on that day as had been used theretofore. If he had proved that the engine was supplied
(283) with a spark-catcher and that the usual care was used, the decision would have been the other way." In *Aycock v. R. R.*, 89 N.C. 321, a suit for the recovery of damages caused by fire from a passing locomotive, Chief Justice Smith, in discussing *R. R. v. Schurtz*, 2 A. & E. R. R. Cases 271, used this language: "A num-

erous array of cases are cited in the note in support of each side of the question as to the party upon whom rests the burden of proof of the presence or absence of negligence, where only the injury is shown, in case of fire from emitted sparks. While the author favors the class of cases which imposes the burden upon the plaintiff, we prefer to abide by the rule so long understood and acted on in this State, not alone because of its intrinsic merit, but because it is so much easier for those who do the damage to show the exculpating circumstances, if such exist, than it is for the plaintiff to produce proof of positive negligence. The servants of the company must know and be able to explain the transaction, while the complaining party may not; and it is but just that he should be allowed to say to the company, you have burned my property, and if you are not in default show it and escape responsibility." The learned Chief Justice followed this decision by another in *Lawton v. Giles*, 90 N.C. 380, in which he said: "The reason for the exception to the general rule that one required to allege must prove negligence, in the case of fire caused by steam engines, is thus stated in a late and valuable treatise: 'All information as to the construction and working of its engines is in the possession of the company, as are also the means of rebutting the charge of negligence entirely in its power.' An outsider can hardly be expected to prove that in the construction of the engine, or in the use of it, at the time the injury occurred, the company was guilty of negligence. He can only prove that his property was destroyed by one of the company's locomotives; and having done this, it is but proper to call on the defendant to show that he was not negligent; that he employed careful and competent servants, and that he had used the most improved appliances to *prevent the escape of fire from his engines*. 1 Thomp. Neg. 153, par. 3."

In *Grant v. R. R.*, 108 N.C. 467, there may be observed a marked departure from the principle announced in preceding decisions. There the plaintiff brought suit to recover damages for personal injury caused by derailment. The trial judge instructed the jury that after the *prima facie* case of negligence was shown by the derailment of the train, "the laboring car was shifted to the defendant, and the defendant must show by a preponderance of the evidence that the defendant had not been guilty of negligence." The judgment of the lower court was affirmed, but in *Williams v. R. R.*, 130 N.C. 128, and in *Shepard v. Telegraph Co.*, 143 N.C. 244, a similar charge was expressly disapproved. The *Williams* case was followed by another in which it was held that the trial judge was in (284) error when he instructed the jury that if the fire originated from the defendants' engine, "this would not of itself cast the bur-

den on the defendant to prove that the engine was properly equipped with spark arresters, and skillfully operated." *Hosiery Co. v. R. R.*, 131 N.C. 240. In *Mfg. Co. v. R. R.*, 122 N.C. 888, it is said that when the origin of the fire is fixed upon the defendant, the presumption of negligence arises, and the burden rests upon the defendant to show that approved appliances were used; and in *Marcom v. R. R.*, 126 N.C. 204, it is said that the burden of proving a failure of legal duty rests upon the plaintiff, but when that fact is shown or admitted, the burden is on the defendant to excuse its failure. To the same effect is *Wilkie v. R. R.*, 127 N.C. 208, which was the case of a derailment. In *Overcash v. Electric Co.*, 144 N.C. 573, the plaintiff sued to recover damages for personal injury caused by the derailment of an electric car. The plaintiff's counsel, undertaking to conform their prayer to the cases theretofore decided, requested the court to give the following instruction, which was declined: "That if they find as a fact, from the evidence, that the plaintiff got aboard defendant's car and paid his transportation therefor, then he was a passenger on same; and if they further find as a fact, from the evidence, that the said car on which he was riding ran off the track and plaintiff was injured thereby, as alleged in the complaint, and that said derailment was the proximate cause of the injury, then the law presumes that the defendant was negligent in allowing said car to become derailed, and the burden is upon it to satisfy the jury that said derailment was not caused by its negligence; and unless it has so satisfied the jury they should answer the first issue 'Yes.'" The defendant prayed this instruction, which also was refused: "That while proof or admission of the derailment of the car raised what the law terms a presumption that such derailment was the result of the defendant's negligence, and casts upon it the burden of disproving negligence, yet the court charges you that, notwithstanding the fact that the car was derailed, if you shall find by the greater weight of the evidence that the track at the place of derailment was in good condition, the car properly equipped and in good repair, and being carefully run at a proper rate of speed, then the court instructs you that the defendant was not guilty of negligence, and you will answer the first issue 'No.'" The charge, which was approved by this Court, was as follows: "If you believe the evidence in this case, that there was a derailment of the defendant's car at the time of the injury complained of, and if there was a derailment, there would arise from this fact alone a presumption of negligence upon the part of the defendant, and this presumption of negligence, if not rebutted, is evidence of negligence for consideration of the jury, and if it satisfies you that the defend-

ant was negligent and that this negligence was the real and (285)
proximate cause of the injury, then it would be the duty of the jury to answer the first issue 'Yes.' This presumption of negligence may be rebutted by showing that the track of the defendant company was in a reasonably safe condition; that the car was equipped in a reasonably safe manner, and that it was being operated in a reasonably prudent way; and, if rebutted, then the presumption of negligence arising from the derailment is no longer evidence of negligence." In this charge the "burden" is not devolved upon the defendant. In fact, the judge declined the plaintiff's prayer that the presumption of negligence arising from the derailment "cast upon the defendant the burden of disproving negligence." The case of *Stewart v. R. R.*, 137 N.C. 690, had previously decided, certainly in effect, that "the burden is thrown upon the defendant to disprove negligence on its part." Apparently inconsistent with this position are such cases as *Womble v. Grocery Co.*, 135 N.C. 474; *Stewart v. Carpet Co.*, 138 N.C. 60; *Ross v. Cotton Mills*, 140 N.C. 115; *Shepard v. Telegraph Co., supra; Mumpower v. R. R.*, 174 N.C. 743. In *Cox v. R. R.*, 149 N.C. 117, the question is again presented. The court charged the jury, "If you find from the evidence that the fire which injured the plaintiff's property escaped from the defendant's engine, there is a presumption in law of negligence on the part of the defendant in the operation of its train, and in that event the burden of proof is cast upon the defendant to satisfy you that it was not negligent in the respect complained of." The Court said: "To this instruction exception was duly taken, and we think it was erroneous. It evidently made the impression upon the jury that the emission of the sparks raised a legal presumption of the defendant's liability and shifted the burden of proof to the defendant, in the sense that it had failed to satisfy them that there was no negligence; in other words, that if its engine was properly equipped and operated, they should return a verdict for the plaintiff. This charge is not sustained by the decisions of this Court. The presumption is one of fact and not law. Evidence that the sparks were emitted from the engine and that they set fire to the timber made a *prima facie* case for the plaintiff, but only to the extent of being evidence sufficient to carry the case to the jury and to warrant a verdict in favor of the plaintiff, if the jury should find the ultimate or crucial fact that the fire was caused by the defendant's negligence."

In the recent case of *Winslow v. Hardwood Co.*, 147 N.C. 275, we said: "The burden of the issue does not shift, but the burden of proof may shift from one party to the other, depending upon the state of the evidence. When the plaintiff introduces testimony in a

case of this kind to the effect that the injury to him was caused by the derailment of a train, it is sufficient to carry the case
(286) to the jury; but the burden of the issue remains with the plaintiff, though the burden of proof may shift to the defendant in the sense that, if he fails to explain the derailment by proof in the case, either his own or that of the plaintiff, he takes the chance of an adverse verdict, for then the jury may properly conclude that the plaintiff has established the affirmative of the issue as to negligence by the greater weight of the testimony. But the defendant is not required to overcome the case of the plaintiff by a preponderance of the evidence." This fits our case exactly, and distinctly shows the error in the instruction of the court. Judge Elliott states the general rule which applies in cases of this kind with clearness and accuracy when he says: "The burden of the issue, that is, the burden of proof in the sense of proving or establishing the issue or case of the party upon whom such burden rests, as distinguished from the burden or duty of going forward and producing evidence, never shifts, but the burden or duty of proceeding or going forward often does shift from one party to the other, and sometimes back again. Thus, when the actor has gone forward and made a *prima facie* case, the other party is compelled in turn to go forward or lose his case, and in this sense the burden shifts to him. So the burden of going forward may, as to some particular matter, shift again to the first party in response to the call of a *prima facie* case or presumption in favor of the second party. But the party who has not the burden of the issue is not bound to disprove the actor's case by a preponderance of the evidence, for the actor must fail if, upon the whole evidence, he does not have a preponderance, no matter whether it is because the weight of evidence is with the other party or because the scales are equally balanced." 1 Elliott on Evidence 139. We have approved the rule, as thus stated by Judge Elliott, and notably in *Board of Education v. Makely*, 139 N.C. 31, and *Shepard v. Tel. Co.*, 143 N.C. 244. The charge of the court was, we think, contrary to the principle established by those and the following cases: *Overcash v. Electric Co.*, 144 N.C. 572; *Ross v. Cotton Mills*, 140 N.C. 115; *Stewart v. Carpet Co.*, 138 N.C. 60; *Womble v. Grocery Co.*, 135 N.C. 474; *Stanford v. Grocery Co.*, 143 N.C. 419, and *Furniture Co. v. Express Co.*, 144 N.C. 644.

As to the duty of the defendant, it will seem that various expressions have been used. It has been held that after the plaintiff has established his *prima facie* case, the defendant must repel it by proof of care (*Ellis v. R. R., supra*), or repel the presumption of negligence (*Aycock v. R. R., supra*), or excuse its failure (*Marcom v.*

R. R., supra), or assume the burden of proving that it had used the necessary precautions (*Aman v. Lumber Co.*, 160 N.C. 370), or to go forward with proof (*Ross v. Cotton Mills, supra*).

The attempt to reconcile all the cases on this question would be a useless task; but from the perplexing variety (287) of decisions this Court, in the more recent cases, has undertaken to formulate a rule that should be accepted as reasonable, definite, and stable.

Although there are expressions in some of our decisions that seem to indicate a distinction between the terms *res ipsa loquitur* and *prima facie* case, the distinction is most plausibly drawn in those cases which require the defendant to disprove negligence. The terms are often used interchangeably, as in *Kay v. Metropolitan Co.*, 163 N.Y. 447, in which it is said: "In the case at bar the plaintiff made out her cause of action *prima facie* by the aid of a legal presumption (referring to *res ipsa loquitur*)." *S. v. Wilkerson*, 164 N.C. 435.

In 20 R.C.L., sec. 156, it is said concerning the doctrine of *res ipsa loquitur:* "While it may be true that the mere fact of injury will not give rise to a presumption of negligence on the part of any one, it is also true that some accompanying elemental facts have long been deemed to be sufficient proof of negligence to establish a *prima facie* case in favor of a person maintaining an action therefor. The presumption arises, it has been said, from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past. What has happened in the past, under the same conditions, will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown. More precisely the doctrine *res ipsa loquitur* asserts that whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care. . . . The presumption of negligence herein considered is, of course, a rebuttable presumption. It imports merely that the plaintiff has made out a *prima facie* case which entitles him to a favorable finding unless the defendant introduces evidence to meet and offset its effect. And, of course, where all the facts attending the injury are disclosed by the evidence, and nothing is left to inference,

no presumption can be indulged -- the doctrine *res ipsa loquitur* has no application."

A *prima facie* case or evidence is that which is received or continues until the contrary is shown. It is such as in judgment of law is sufficient to establish the fact, and if not rebutted remains sufficient for the purpose. *Troy v. Evans,* 97 U.S. 3; *Kelly v. Johnson,* 6 Pet., U.S. 622; Jones on Evidence, sec. 8; *S. v. Floyd,* 35
(288) N.C. 385; *S. v. Wilkerson, supra.* Even if the *prima facie* case be called a presumption of negligence, the presumption still is only evidence of negligence for the consideration of the jury. *Overcash v. Electric Co., supra; Shepard v. Telephone Co., supra; Mumpower v. R. R., supra.*

In some of our decisions the expressions *res ipsa loquitur, prima facie* evidence, *prima facie* case, and presumption of negligence have been used as practically synonymous. As thus used, each expression signifies nothing more than evidence to be considered by the jury. *Womble v. Grocery Co., supra; Stewart v. Carpet Co., supra; Ross v. Cotton Mills, supra; Shepard v. Telegraph Co., supra; Mumpower v. R. R., supra; Perry v. Mfg. Co.,* 176 N.C. 69.

When the plaintiff proves, for instance, that he has been injured by the fall of an elevator, or by a derailment, or by the collision of trains, or other like cause, the doctrine of *res ipsa loquitur* applies, and the plaintiff has a *prima facie* case of negligence for the consideration of the jury. Such *prima facie* case does not necessarily establish the plaintiff's right to recover. Certainly, it does not change the burden of the issue. The defendant may offer evidence or decline to do so at the peril of an adverse verdict. If the defendant offer evidence the plaintiff may introduce additional evidence, and the jury will then say whether upon all the evidence the plaintiff has satisfied them by its preponderance that he was injured by the negligence of the defendant.

We may remark in this connection that in *Currie v. R. R.,* 156 N.C. 422, the burden of the second issue was imposed upon the defendant because, contrary to the usual practice, two issues instead of one were submitted to the jury on the question of negligence.

As applicable to this class of cases the rule formulated by the more recent decisions of this Court is substantially as follows: In all instances of this character, after the plaintiff has established a *prima facie* case of negligence, if no other evidence is introduced, the jury will be fully warranted in answering the issue as to negligence in favor of the plaintiff, but will not be required to do so as a matter of law. When such *prima facie* case is made, it is incumbent upon the defendant to offer proof in rebuttal of the plaintiff's case,

but not to the extent of preponderating evidence. The defendant, however, is not required as a matter of law to produce evidence in rebuttal; he may decline to offer evidence at the peril of an adverse verdict. If he offer evidence, the plaintiff may introduce other evidence in reply, and the jury will finally determine whether the plaintiff is entitled by the greater weight of all the evidence to an affirmative answer to the issue; for throughout the trial the burden is upon the plaintiff to show by the greater weight of the evidence that he is entitled to such answer.

In his instructions to the jury his Honor evidently had in mind the principle stated in the later decisions of this (289) Court. The charge must be considered as a whole in the connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so construed, it presents the law fairly and correctly, it will afford no ground for reversing the judgment, though some of the expressions when standing alone might be regarded as erroneous. *S. v. Exum,* 138 N.C. 602; *Hodges v. Wilson,* 165 N.C. 323.

We do not understand that his Honor shifted to the defendant the burden of the issue, or even the burden of preponderating proof, but imposed on the defendant merely the duty of going forward with evidence tending to relieve itself of the charge of negligence, or to show there was no negligence, or, if there was, that the defendant's negligence was not the proximate cause of the injury. The paragraph of the charge in which his Honor used the expression "the burden being on the defendant" must be construed in connection with the first paragraph. It is manifest that his Honor used the word "burden" in each paragraph as signifying merely the burden of going forward with evidence tending to rebut the plaintiff's case.

His Honor conformed his charge to the requirements of *Perry v. Mfg. Co.,* 176 N.C. 70, in which there are expressions apparently going beyond the exigencies of the case in devolving upon the defendant the burden of establishing his defense to the satisfaction of the jury. In that case the trial judge instructed the jury that the burden would be shifted to the defendant to show that the fire was not due to its negligence. Justice Allen said, referring to the charge: "The instruction, reasonably construed, means that if the jury found from the facts recited by the judge the main fact that the engine sparks started the fire, a *prima facie* case was presented, calling upon the defendant to go forward with his proof, or take the risk before the jury of an adverse verdict." *Williams v. Mfg. Co.,* 177 N.C. 512. In view of one or two expressions in *Perry's* case, we suggest that, in cases of negligence in which the doctrine of *res ipsa*

loquitur applies, after all the evidence is introduced, the vital question is not whether the defense specifically relied on is established to the entire satisfaction of the jury, but whether on the issue of negligence the evidence preponderates in favor of the plaintiff, and by this test the answer to the issue is to be determined. The conclusion reached in *Page v. Mfg. Co.*, 180 N.C. 335, is directly in point: "It is true that expressions are to be found in some of our cases, filtered there from two or three cases based on the English rule, which justified his Honor's charge, but since they were decided we have adhered to the true and correct rule, which is stated in

(290) *Stewart v. Carpet Co., supra; Womble v. Grocery Co., supra; Cox v. R. R., supra; Shepard v. Tel. Co., supra,*

and many other cases, and which we have applied in this case, the substance of which is that the burden to prove his case is always on the plaintiff, whether the defendant introduces evidence or not. Where we have said, 'it is the duty of the defendant to go forward with his proof,' it was only meant in the sense that if he expects to win it is his duty to do so or take the risk of an adverse verdict, and not that any burden of proof rested upon him. He pleads no affirmative defense but the general issue, and this puts the burden throughout the case on the plaintiff, who must recover, if at all, by establishing his case by the greater weight of evidence. The Supreme Court of the United States has so stated the rule, and it referred with approval to our cases above cited. We say this much again, in the hope that the rule, as we have stated it, may hereafter be considered as the correct one."

The other exceptions are formal and require no discussion. Of course it will be understood that the rule herein stated is not intended in any way to modify the well established principles that apply in case of homicide. We find

No error.

Cited: Modlin v. Simmons, 183 N.C. 65; *Cotton Oil Co. v. R. R.,* 183 N.C. 96; *Morris v. Express Co.,* 183 N.C. 147; *Moore v. R. R.,* 183 N.C. 215; *Harris v. Mangum,* 183 N.C. 239; *Freeman v. Dalton,* 183 N.C. 541; *S. v. Brinkley,* 183 N.C. 723; *S. v. Dill,* 184 N.C. 650; *Construction Co. v. R. R.,* 185 N.C. 46; *Saunders v. R. R.,* 185 N.C. 290; *McDowell v. R. R.,* 186 N.C. 574; *Hinnant v. Power Co.,* 187 N.C. 294; *McAllister v. Pryor,* 187 N.C. 839; *Wheless v. Edwards,* 188 N.C. 459; *Speas v. Bank,* 188 N.C. 529; *Hunt v. Eure,* 188 N.C. 719; *Mfg. Co. v. McQueen,* 189 N.C. 315; *Graham v. Power Co.,* 189 N.C. 386; *Hunt v. Eure,* 189 N.C. 485; *Ferrell v. R. R.,* 190 N.C. 127; *Dickerson v. R. R.,* 190 N.C. 300; *McDaniel*

v. R. R., 190 N.C. 475; *Purnell v. R. R.*, 190 N.C. 576; *Lawrence v. Power Co.*, 190 N.C. 667; *Milling Co. v. Hwy. Com.*, 190 N.C. 697; *Malcolm v. Cotton Mills*, 191 N.C. 729; *Morris v. Bogue Corp.*, 194 N.C. 280; *S. v. Gill*, 195 N.C. 427; *O'Brien v. Parks Cramer Co.*, 196 N.C. 365; *Corporation Com. v. Harris*, 197 N.C. 203; *Bryant v. Construction Co.*, 197 N.C. 643; *Nelson v. Ins. Co.*, 199 N.C. 450; *Grier v. Woodside*, 200 N.C. 762; *Comr. of Banks v. Johnson*, 202 N.C. 388; *S. v. Lefler*, 202 N.C. 702; *In re Will of Brown*, 203 N.C. 350; *S. v. Jones*, 203 N.C. 377; *Stein v. Levins*, 205 N.C. 306; *S. v. Fowler*, 205 N.C. 608; *Harris v. Aycock*, 208 N.C. 525; *S. v. Witherspoon*, 210 N.C. 649; *Williams v. Ins. Co.*, 212 N.C. 517; *Clodfelter v. Wells*, 212 N.C. 828; *Woods v. Freeman*, 213 N.C. 318; *S. v. Hawkins*, 214 N.C. 333; *Mitchell v. Saunders*, 219 N.C. 184; *Mfg. Co. v. R. R.*, 222 N.C. 338; *Brady v. R. R.*, 222 N.C. 374; *Tuttle v. Bldg. Corp.*, 228 N.C. 513; *S. v. Gardner*, 228 N.C. 573; *In re Humphrey*, 236 N.C. 144; *Hunt v. Wooten*, 238 N.C. 47; *Young v. Anchor Co.*, 239 N.C. 290; *Ins. Co. v. Motors, Inc.*, 240 N.C. 186.

OSCAR Y. SMITH v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 26 October, 1921.)

1. Pleadings — Scope of Inquiry — Instructions — Appeal and Error — Amendments.

The plaintiff, in his action to recover damages of the defendant for a personal injury alleged to have been negligently inflicted on him, is restricted to those acts of negligence he has specifically alleged in his complaint, or amendments thereto allowed by the trial court, affording the defendant opportunity to amend his answer and prepare to meet the new phase of the case; and a charge of the court is reversible error when it goes beyond this, and into extraneous matters, to the defendant's prejudice.

2. Instructions—Material Omissions—Appeal and Error.

A material omission in the charge of the trial court to the jury of the principles of law involved upon a phase of the case he has assumed to instruct them upon is affirmative and reversible error.

3. Employer and Employee—Master and Servant—Safe Place to Work—Defects—Actual and Implied Knowledge—Inspection.

The defect in an apparatus which an employer has furnished to his employee to do the work required of him is not sufficient of itself to charge the employer, the defendant in the action, with negligence, causing the injury, for the plaintiff must show that the defect was either known to the defendant or had existed so long that the law will impute such knowl-

edge through the failure of the defendant to have discovered it by reasonable inspection required of the employer at proper intervals to secure safety in its use by his servants.

4. Same—Railroads—Instructions—Appeal and Error.

Where an employee of a railroad required to place water in its locomotive at a water tank, has been injured while doing so by an explosion in the pipe through which the water was being carried for the purpose, and the evidence is conflicting as to whether the employee was acting therein in the proper manner and whether the employer had had the apparatus properly inspected, or should have previously discovered the defect of which it was unaware by the use of ordinary care, a charge of the court omitting these requisites upon the issue of defendant's negligence, and in effect making the defendant's liability to depend altogether upon whether or not there was a defect that proximately caused the injury, is reversible error.

5. Same—Federal Employers' Liability Act.

Under the Federal Employers' Liability Act it is not every accident which may occur in causing a personal injury to an employee while working with the machinery and appliances furnished by the employer, a railroad company, for him to do the work that will make the employer liable, but only for those "due to its negligence" under the rule of actual or implied notice.

6. Employer and Employee—Master and Servant—Negligence—Rule of the Prudent Man.

It is not the absolute duty of an employer to furnish his employee a reasonably safe place for the latter to do his work, the rule being that he must provide for him such a place, under the rule of the prudent man, in the exercise of ordinary care.

7. Actions—Parties—Dismissal as to One Party—Statutes—Prosecution as to Party.

In an action against a railroad company and the Director General of Railroads, following the opinion of the Supreme Court of the United States, there is no liability upon the railroad company, but the action may be continued against the Director General under the provisions of C.S. 602, that a several judgment may be entered. *Kimbrough v. R. R.*, *ante*, 234, cited and applied.

APPEAL by defendant from *Connor, J.*, at the June Term,
(291) 1921, of WAKE.

Plaintiff brought this action to recover damages for personal injuries alleged to have been sustained at Sanford, N. C., 18 July, 1919, by being thrown from a stand-pipe while putting water in the tank of an engine. Plaintiff testified that he was fireman on one of the engines being operated on the Seaboard Air Line Railway while under Federal control, and that it became necessary for the engine to take water at Sanford; that the engine was properly placed, and he pulled the stand-pipe to the tender and around to the man-

hole and leaned against the stand-pipe to hold it down, and, as he pulled the lever to release the water, the stand-pipe (292) exploded and threw him backwards. In explaining his position when leaning against the stand-pipe plaintiff testified that he assumed a sitting posture. Plaintiff also testified that he had used this stand-pipe before the time of his injury; that he would pull the lever about half way over and the water would come with a rush. The lever referred to was on top of the spout of the stand-pipe and was used to regulate the flow of water through the pipe and into the tank of the engine.

It will perhaps be better, or at least more accurate, to state the substance of the testimony for plaintiff substantially in his own language, or rather in that of his counsel, as it is set forth in their brief, which we now do:

The plaintiff testified that at the time of his injury he was temporarily performing the duties of a railroad fireman; that he was a locomotive engineer by trade, and was employed on the Seaboard Air Line Railway on 18 July, 1919. The plaintiff testified in part as follows: The engineer ran up to the stand-pipe. He told me to take water on the tender, and I went to take water. He stopped the engine right even with the stand-pipe. I pulled the stand-pipe to the tender and around to the man-hole and leaned against it to hold it down, and as I pulled the lever to release the water the stand-pipe exploded and threw me backwards. The stand-pipe that I was leaning against exploded. . . . Before 18 July, I took water the same way I was taking it when I got hurt. There was nothing unusual before this time. . . . I had seen different firemen take water at the same pipe, all the time. . . . I was taking water on this day the same as they were. I was taking it in the same manner as I had authority to take it. I was working the lever with my left hand. The lever works the valves that let the water flow in the stand-pipe. . . . And I pulled it out to get water. . . . As you pull it toward you it opens the valve and the water comes in. . . . There was no place on the side of the spout that you could put your foot on and hold the spout down in the tank. I was not aware of the fact that there was more pressure there than at any other stand-pipe. . . . I pulled the lever up halfway, and, still holding it down, I took a seat on the side and pulled the lever over, and that is when it exploded. That is the position I had always assumed. I mean by the explosion that the pipe burst, and there was compressed air and water and it all came out at the same time. It was not solid force of water. There was a gush of air. The air and water came out at the same time. Q. What kind of noise was it making? A. A blow and

a sudden jerk. The blow was very strong and powerful. I had never heard anything like that at a stand-pipe before. It all hap-
(293) pened at the same time. I do not know how high the stand-pipe was thrown by the explosion. The last I remember it was going up and I was going with it. Q. You stated, Mr. Smith, on cross-examination, that some time before that in resting on it you had felt it go down and come up — explain to the jury what it was doing? A. There was no force as there was that day. I don't suppose it ever raised four or five inches. I was leaning there on it and pushed it down. I could not have done it on the day of the explosion.

The defendant's witness, J. L. Kelly, testified in part: Something broke loose. I don't know what it was. It pitched him 15 feet high. . . . A whole lot of stuff went up there with him. It exploded and he went up in the air. I did not see anything but a little water come out of that explosion. No; that little water would not have exploded with the tank that way. No; I did not hear the water running in the tank before that. I saw the piece break just as it was pulled down. I don't know whether he had hold of the lever at that time or not.

The defendant's witness, Yow, testified in part: I guess this stand-pipe exploded as soon as he pulled the lever. Yes; it suddenly exploded. . . . It was about as quick as lightning. He had not more than got it down when he reached up and got the lever. Just as he pulled it, it exploded. I was struck with the water. This whole arm was up straight. The explosion took place as soon as this man pulled the lever down. From where they picked him up I should say he went 20 feet into the air. . . . I think he was thrown 50 feet.

The defendant's witness, Gold, testified in part: That the column was 12 inches thick; that the ball was made of brass and was an inch thick. The ball was crushed and drawn in. . . . Mr. Owens, the pump repairer, was working on the same main that supplied this stand-pipe the day of Mr. Smith's injury. . . . Mr. Owens had the immediate supervision and upkeep of this stand-pipe.

Defendants offered the testimony of two eye-witnesses of the accident, neither of whom was connected in any way with the defendants, and they both testified that plaintiff straddled the spout of the stand-pipe and attempted to operate the lever while in that position. M. H. Gold, witness for defendants, testified that at the time of this accident he was division engineer in charge of the stand-pipe; that he went to Sanford on the day this accident occurred, and after the accident; that he had been there two days before and the stand-pipe was in very good condition; that there were two grab-irons on the spout by which you could pull it around, and there was sufficient room on the grab iron for a fireman to place his foot and hold the

spout in position; that a fireman could stand on the tender and place his foot on the grab-iron and hold the pipe in (294)
place; that by pulling the lever on top of the spout you could control the opening of the valve in the pipe so as to control the flow of water; that by pulling it gradually the water would flow gradually; that if the lever was pulled up suddenly that would throw the entire pressure on the stand-pipe, and that would have a tendency to straighten the pipe out at the end. This witness also testified that he examined the stand-pipe after the accident, and that there was no weak places in it.

D. T. Owens, witness for plaintiff, testified that he was pump repairer, and on the North Carolina division of the railroad; that he remembers this identical stand-pipe; that he gave Mr. Gold notice of the condition of the stand-pipe before the accident; that every time he talked to Mr. Gold he spoke to him about the stand-pipe; that he told him he did not like it because it would give him trouble; that they were too weak for the pressure. The witness further testified that the trouble with the stand-pipe was that it was leaking. He said that he worked the lever on this stand-pipe and that by working it slowly it would let the water in gradually, and if you pulled the lever suddenly that would cause the water to rush up suddenly. This witness further testified that the stand-pipe was all right before plaintiff was injured; that it was in good working order, and there was nothing about it that was broken; that he inspected it on the fourth of the month before the accident and put it in good condition; that after the accident he could find no defect except such as was caused by the spout flying up; that the tank is 70 feet high at Sanford.

At the conclusion of the evidence plaintiff admitted that he was employed in interstate commerce at the time of his injury, and, over defendants' objection, was permitted to amend his complaint so as to allege that defendants were engaged in interstate commerce, and that he was employed in such commerce.

The judge charged the jury, among other things, as follows: "I instruct you that if you find by the greater weight of the evidence in this case that this plaintiff, in the performance of his duty, after the engine had been placed opposite the water tank, took down the spout and placed the mouth of it in the tender in order that the water might flow, and further find that the usual and customary way was to pull the lever, and then find, gentlemen of the jury, that the plaintiff leaned his weight upon the spout in order to hold it in position, and you further find that when the water did come that it came in such a rush and force as to throw the young man in the

air, and further find that the violence with which the water came was due to some defect in the apparatus, or was due to
(295) carelessness on the part of the defendant, and if you find that such negligence was the direct and proximate cause of the injury, you will answer both of the two issues 'Yes.' "

The jury returned a verdict in favor of plaintiff on all the issues, and fixed the damages at $40,000.

Judgment thereon, and defendant appealed, assigning errors.

Armistead Jones & Son and Douglass & Douglass for plaintiff.
Murray Allen for defendants.

WALKER, J., after stating the case: The plaintiff alleged several acts of negligence in respect to the condition of the water tank at the time of the accident, and, of course, he is restricted to those specified. If he desired to show others, the proper way was to ask the court for an amendment, giving the defendants reasonable opportunity to amend their answer and prepare to meet the new phase of the case. Being thus confined to his own statement of the particular acts of negligence, it was error for the court to instruct the jury as appears in the above excerpt from the charge.

But there is a still more fatal defect in this instruction. The judge was attempting to state the law on this branch of the case, and there is nothing better settled than the rule that he must state it correctly, for any material omission is an affirmative error. A defect in apparatus is not sufficient of itself to charge the defendant with liability for negligence, unless the defect was either known to it or had existed so long that the law will impute such knowledge, when the defect could have been discovered by a reasonable inspection of the machinery and implements, which should be made by the master at proper intervals to secure safety in their use by his servants. This element of liability was entirely omitted from this instruction, and not even a reference made to it. The cases have thoroughly established this principle in the law of negligence. The following cases will show that this is so: *Hudson v. R. R.*, 104 N.C. 491; *Railway v. Barrett*, 166 U.S. 617; *Patton v. Railway*, 179 U.S. 658; *Railroad v. McDade*, 135 U.S. 554; *Blevins v. Cotton Mills*, 150 N.C. 493; Labatt on Master and Servant, sec. 119 *et seq.* And to these cases we add a recent one (which was carried from this Court by writ of error to the Supreme Court of the United States), in which this same doctrine is discussed, and formulated according to the view of it as above stated. *S. A. L. Rwy. Co. v. Horton*, 233 U.S. 492 (58 L. Ed., p. 1062), and especially the same case, on

second appeal, 239 U.S. 595 (60 L. Ed., p. 458), where a water gauge was alleged to be defective and exploded. In the *Hudson* case, 104 N.C. 491, we held that "The burden is upon the servant who sues his master for damages, resulting from the use of defective machinery furnished by the latter, to establish *prima facie* (296) (1) that the machinery was defective; (2) that the defects were the proximate cause of the injuries; and (3) that the master had knowledge of them, or might, by the proper exercise of care and diligence, have acquired such knowledge." Now, in this case, when the testimony is closely and carefully examined, it will be found that it is both ways as to this point. There is perhaps some evidence from which the jury might fairly and reasonably infer that if the tank or the pipe leading to it was defective, or that there was air in the latter which should have been expelled before using it, the defendant either knew it or should have known it by the exercise of ordinary care, and there also is testimony to the contrary, and some tending to show that the tank was put in good condition by repairs to it before the accident, and was in such condition just before the explosion took place. In view of this conflict of testimony, the case should have been submitted to the jury with proper instructions as to the law. A carrier is not liable for every accident that may occur and injure one of its employees, but, by the very terms of the Federal Employers' Liability Act, only for those "due to its negligence." Federal Employers' Liability Act, by Richie (2 ed.), page 122, sec. 53, and cases in notes. Extended comment is not required to further demonstrate the correctness of this rule as to the duties of the master to his servant, with respect to machinery and implements furnished to him by the latter, nor the citation of other authorities, though there are very many decisions of this and other State courts, and of the highest Federal courts, that might be added to those we have cited above. We will, though, refer especially to *Texas & Pac. R. R. Co. v. Barrett,* 166 U.S. 617 (41 L. Ed. 1136), in this connection.

There is also another exception to which we should advert, as it may be repeated unless attention is directed to it. The court instructed the jury "that, under the law, it was the duty of the defendant to furnish to the plaintiff, while in its employment, a safe place to do his work and reasonably safe implements with which to do the work required of him." His Honor corrected this charge afterwards by instructing the jury that he should have told them that the defendant was required to furnish only "a reasonably safe place for the servant to do his work," but left it otherwise intact. It is not the absolute duty of the master to furnish even a reasonably safe

place for the servant to do his work, but the true and correct rule is that he must use ordinary care to provide for him such a place. *Choctaw O. & G. R. C. v. McDade,* 191 U.S. 64; *Garner v. R. R.,* 150 U.S. 359; *Washington & G. R. Co. v. McDade,* 135 U.S. 570; *B. & O. R. R. v. Baugh,* 149 U.S. 368. See, also, *Powell v. Anderson S. & T. P. Co.,* 256 Pa. St. 618, and *Kryner v. Gold Min-*
(297) *ing Co.,* 184 Fed. 43. Justice Brewer said in *Patton v. Texas & Pac. R. R. Co.,* 179 U.S. 658 (45 L. Ed. 361): "It is also true that there is no guaranty by the employer that place and machinery shall be absolutely safe, *Hough v. Texas & P. R. R. Co.,* 100 U.S. 213, 218 (25 L. Ed. 612, 615); *Baltimore & O. R. R. Co. v. Baugh,* 149 U.S. 368, 386 (37 L. Ed. 772, 780); 13 Sup. Ct. Rep. 914; *Baltimore & P. R. R. Co. v. Mackey,* 137 U.S. 72, 87 (39 L. Ed. 624, 630); 15 Sup. Ct. Rep. 491; *Texas & P. R. R. Co. v. Archibald,* 170 U.S. 665, 669 (42 L. Ed. 1188, 1190); 18 Sup. Ct. Rep. 777. He is bound to take reasonable care and make reasonable effort; and the greater the risk which attends the work to be done and the machinery to be used, the more imperative is the obligation resting upon him. Reasonable care becomes, then, a demand of higher supremacy; and yet, in all cases it is a question of the reasonableness of the care; reasonableness depending upon the danger attending the place or the machinery. The rule in respect to machinery, which is the same as that in respect to place, was accurately stated by Mr. Justice Lamar, for this Court, in *Washington & G. R. R. Co. v. McDade,* 135 U.S. 554, 570, 34 L. Ed. 235, 241, 10 Sup. Ct. Rep. 1044. Justice Lamar's statement of the law in this respect in 135 U.S. 554, referred to by Justice Brewer, is a strong and very lucid exposition of the subject, but it is not necessary that we should insert it verbatim here, as it can easily be found in the volume where it is reported, and it is substantially covered by Justice Brewer's own version of the principle, as stated above. It also will be found stated by us in *Marks v. Cotton Mill,* 135 N.C. 287, and the same case, 138 N.C. 401, where it was held: In all questions of negligence the standard by which to measure the liability of the employer to the employee, is that followed by the ideally prudent man. What was held in the first of the two cited cases (135 N.C. 290) is directly in point here, that "The employer does not *guarantee* the safety of his employees. He is not bound to furnish them an absolutely safe place to work in, but is required simply to use reasonable care and prudence in providing such a place. He is not bound to furnish the best known machinery, implements and appliances, but only such as are reasonably fit and safe and are in general use. He meets the requirements of the law if, in the selection of machinery and appli-

ances, he uses that degree of care which a man of ordinary prudence would use, having regard to his own safety, if he were supplying them for his own personal use. It is culpable negligence which makes the employer liable, not a mere error of judgment. We believe this is substantially the rule which has been recognized as the correct one and recommended for our guide in all such cases. It measures accurately the duty of the employer and fixes the limit of his responsibility to his employees. *Harley v. B. C. M. Co.,* (298) 142 N.Y. 31. This Court has said that all machinery is to some extent dangerous, but the fact that it is dangerous does not of itself make the owner liable in damages. It is the negligence of the employer in not providing for his employees reasonably safe machinery and a reasonably safe place in which to work that renders him liable for any resulting injury to them." That case was cited and the principle it states approved by the Court in *Pressly v. Yarn Mills,* 138 N.C. 413, and has been cited and approved in numerous subsequent cases.

There are other exceptions worthy of consideration if the result depended in any way upon them, but it does not, and we will not prolong this opinion in order to foreclose them.

The action should be dismissed as to the Seaboard Air Line Railway Company, as the Supreme Court of the United States has recently decided that there is no liability as to it. *Mo. Pac. R. R. Co. v. Ault,* Adv. Opinions of that Court, p. 647, No. 16, 1 July, 1921. The plaintiff may continue, though, to prosecute the action against the Director General, under our present procedure, as will appear from C.S., sec. 602, where it is provided specially that a several judgment may be entered. This is discussed fully in the dissenting opinion of the writer in *Kimbrough v. A. C. L. Ry. Co. and Director General, ante,* 234, the Court being unanimous on this point. Reference is made to that opinion to avoid repetition.

There was error, in the respects indicated, because of which another jury must be called.

New trial.

Cited: Rierson v. Iron Co., 184 N.C. 367; *Hughes v. Luther,* 189 N.C. 841; *Bradford v. English,* 190 N.C. 745; *Lindsey v. Lumber Co.,* 190 N.C. 845; *Murray v. R. R.,* 218 N.C. 399; *Mintz v. R. R.,* 233 N.C. 612.

TRUSTEES OF ELON COLLEGE v. ELON BANKING AND TRUST COMPANY.

(Filed 26 October, 1921.)

1. Banks and Banking—Valuables Deposited for Safe Keeping—Consideration—Bailment for Hire—Negligence—Rule of the Prudent Man.

A banking institution which keeps stocks, bonds, and other such valuables for its patrons, receives compensation therefor in the advantage it obtains in attracting and retaining the business of its patrons, and its liability for such deposits for safe keeping is not that of a gratuitous bailee, responsible only for its gross negligence, but its liability is governed by the rule of the prudent man in the care of papers of such character deposited with him for hire, or commensurate with the value of the property under the particular circumstances.

2. Banks and Banking—Valuables Deposited for Safe Keeping—Scope of Business.

An important part of the business of a bank, whether private or incorporated, consists of acting as the agent or bailee of its customers for the safe keeping of their valuable papers, and services of this character are not outside of the scope of the authority of such institutions.

3. Same—Care Required—Negligence.

The care required of the bank receiving its customers' bonds or valuable papers for safe keeping, under the rule of the prudent man, is not measured alone by that care it may have taken with its own property of like value, when not in keeping with the care required under the rule of the prudent man in receiving for safe keeping the valuable papers of another for a consideration.

4. Bailment—Return of Property—Liability — Evidence — Prima Facie Case—Negligence.

Where property has been shown to have been delivered to a bailee for hire, and is not or cannot be returned by him, according to the terms of the bailment, it makes out a *prima facie* case for the bailor in his action for damages, which would justify a verdict in his favor.

5. Controversy Without Action—Case Agreed—Facts—Evidence—Questions for Jury.

In an action against a bank to recover the value of certain bonds that were stolen while placed with it by a customer for safe keeping, a case agreed must contain all the essential facts, and present only the naked questions of law for the decision of the court, and not alone the evidence from which the facts may be inferred; and the fact of defendant's negligence, or its absence, being the controlling question, which neither party could agree upon without the risk of an adverse decision, it should be determined either by a jury or upon a reference.

6. Same—Appeal and Error—Case Remanded.

Where the character of the evidence stated in the case agreed, submitted without action under the statute, is such that the parties could not agree upon the facts upon which the principles of law must necessarily be determined, and the case presented requires the findings of facts upon

the evidence set out, the case will be remanded to be proceeded with according to law.

CLARK, C.J., dissenting.

APPEAL by plaintiff from *Devin, J.*, 14 May, 1921, of ALAMANCE, at chambers. (299)

This action was brought to recover the value of certain bonds of the United States, known as Liberty Bonds, which were deposited with the defendant for the purpose of being exchanged for the new bonds to be issued in their stead under the Act of Congress. The exchange was effected by the defendant and the bonds received by it and deposited in its bank, which will hereinafter more fully appear. They were stolen by burglars. Hence this action for their loss. A more detailed account of the facts and in- (300) cidents of the case seems to be required.

The following is a substantial statement of the facts, as they appear in the record:

Plaintiffs are the Trustees of Elon College, and the defendant is a corporation of Elon College, N. C., engaged in the business of banking and writing, as agent, contracts of insurance. On 15 March, 1920, defendant received from plaintiffs $5,850 in United States Liberty Bonds (of which only $4,400 is here involved) belonging to plaintiffs, to be transmitted by defendant through the Federal Reserve Bank at Richmond, to the United States Treasury Department at Washington, and converted into bonds of the permanent issue and returned to plaintiffs. Plaintiffs offered to pay any expenses incident to the service, but the bank agreed to handle the transaction, as it was its custom, as a matter of accommodation; and further agreed to notify plaintiffs' agent, T. C. Amick, treasurer of the college, upon the return of said bonds. Plaintiffs requested that the shipment be protected by insurance, and the defendant procured such insurance upon the transmission of the bonds from Elon College to Richmond. Of the bonds $4,400 were duly returned, arriving at the postoffice at Elon College on 24 March, 1920, and on that date were receipted for by defendant's cashier, and taken into defendant's safe, where they remained until stolen, as hereinafter set out. On the night of 19 April, 1920, defendant's safe was blown open by persons unknown to the parties, and said $4,400 in bonds, as well as other property, were stolen, and have not been recovered. It had been the custom of plaintiffs to keep their bonds and other valuables in a safe in the main building of the college, and not in defendant's safe. At the time of the burglary the college bonds were deposited in the defendant's safe, where the bank kept its own Gov-

ernment bonds (which were also stolen), but not in the part thereof where the bank kept its cash and currency. That by the terms of certain insurance policies carried by the defendant, the bank could recover 100 per cent of any loss from the money chest (or burglar-proof compartment), but could recover only 10 per cent of any loss from other portions of the vault.

T. C. Amick, treasurer of the college, resides at Elon College, and is a teacher therein, and was at all times a director, vice-president, and local auditor of defendant bank; that on 2 April, 1920, he checked up the books of the bank, and found $5,800 in Liberty Bonds in there, but the books seen by him did not show that any of the bonds belonged to plaintiffs. A certificate or affidavit made by Amick, as auditor of the bank, showing that the bank had $5,800 Liberty Bonds in the vault on 2 April, 1920, was later used by the bank to induce the insurance companies to include the $4,400 of
(301) college bonds in the total appraisal of loss sustained by the burglary, a copy of which affidavit is set out in the record. At the time of the burglary the defendant carried two policies of burglary insurance; and in proof of the claim for loss under said policies the converted bonds belonging to plaintiffs, amounting to $4,400, were listed by the defendant as property, or money, for which the defendant was liable, and defendant has received and now has 10 per cent of the said sum, or $440 which it thus received from the insurance companies. If said bonds had been in the burglar-proof compartment where defendant kept its money, the bonds would not have been stolen, or, if stolen, the defendant would have received the full value of the same, or $4,400.

The defendant has tendered the sum of $440 to plaintiffs in full of plaintiffs' claim against it, but the offer has been declined. Defendant still tenders and offers to pay plaintiff said sum of $440.

The case was heard on facts agreed, submitting the controversy without action to the judgment of the court.

The court gave judgment for the defendant, and plaintiff appealed.

D. R. Fonville, and Brooks, Hines & Smith for plaintiffs.
E. S. W. Dameron for defendant.

WALKER, J., after stating the substantial facts: The plaintiffs' counsel contended that, in the consideration of the questions presented herein, certain material facts, which they contend have been admitted, should be kept in mind and control our decision. We will

state, as briefly as possible, the grounds upon which these contentions are laid, in discussing the prominent features of the case.

The bank solicited the business, and by reason of the bank's offer the plaintiffs did forego other safe and convenient methods of transmitting the bonds. The bank held itself out as having safe means of preserving the bonds, plaintiffs asked for insurance that would protect them, offered to pay any expense incident thereto, and defendant is an insurance agent. The bank being in the insurance business, was in a position to know just how fully it was protected, and but for its negligence in acquainting itself with the terms of its own insurance policies might have been, and doubtless would have been, fully protected, instead of being protected only to the extent of 10 per cent. The bank agreed to notify plaintiffs upon return of the bonds. It negligently failed for twenty-six days to do so. If it had done so the plaintiffs would have taken them from the bank and placed them in the safe of the college, "where it was the custom for the college to keep its bonds." The college safe was not robbed. The bank did not keep these bonds where it kept its money, and if it had, they would not have been stolen, (302) or, if they had been stolen, the bank would have recovered from the insurance company 100 per cent of such loss. The bank, at the time of the loss, acknowledged its liability, and recovered $440 insurance money by solemnly declaring its liability. It still has this money. It has never offered to return the money to the insurance company, but instead offers it to plaintiffs, and avers that it is liable only to this extent. These are some of plaintiffs' contentions.

It is thus well said, in an interesting note by the late Judge Freeman, to be found in 38 Amer. State Rep. 733: "A very important part of the business of every bank, whether private or incorporated, consists of acting as agent or bailee for its customers." It was at one time held by some courts that such services were outside the scope of authority of banking institutions, but all doubt about their property has been removed by such well considered opinions as *First National Bank of Carlisle v. Graham*, 100 U.S. 699, and *Third National Bank v. Boyd*, 44 Md. 47.

While it is a general rule that an accommodation bailee is liable only for gross negligence, the courts in nearly all recent cases have held that a stricter degree of care is required of banking institutions receiving articles of more than usual value, and holding themselves out as having special facilities for their transmission and safe keeping. In fact, they are not accommodation bailees, for "while a bank may not receive any direct compensation for its service, it obtains advantages therefrom in attracting and retaining clients."

Note, *Isham v. Post,* 39 A.S.R. 781. In the case of *Levy v. Pike,* 25 La. Ann. 630, the Court, discussing a case somewhat similar to this, substantially said: "Their object was doubtless to increase their deposits, and, of course, enhance their profits; and to accomplish it they held themselves out to the business community as prepared to take care of their valuable boxes. The taking care of their boxes was a part of the business of the bank, by which they doubtless induced cash deposits and made considerable profit. We, therefore, do not regard the deposit in question as only a gratuitous one. Something more than no gross negligence or fraud was expected from the defendants. They were bound to exercise such diligence as prudent bankers would exercise in taking care and preserving a thing of that character deposited with them." Since banks hold themselves out as having unusually safe and convenient means of transmitting and keeping Liberty Bonds and other valuable securities, as well as money, and since such institutions at such small cost can obtain indemnity that will absolutely protect them, the courts have come to apply to them a measure of liability which has been invited by them, to wit, the rule of the ordinary prudent man in like
(303) circumstances; or to be more specific, the care that a prudent and diligent banker would give his own property or securities of like value and importance. As has been said, the assertion that banks are liable for gross negligence only is well calculated, if generally accepted as such, to thwart the only purpose for which such a deposit is ever made. Banks are instituted, and their buildings constructed, for the delivery in, and safe keeping of, money and money securities; and these bonds were deposited in defendant's bank for greater security of the bonds, that is, for safe keeping. *Whitney v. National Bank,* 55 Vt. 155; *Isham v. Post,* 38 A.S.R. 780, and note. Schouler, in his recent work on Bailments and Carriers, sec. 35, after stating that a gratuitous bailee is liable only for slight care and diligence, according to the circumstances, and cannot be held for loss or injury, unless grossly negligent, says: "This statement of the rule, though strongly buttressed upon authority, fails at this day of universal approval in our jurisprudence." The same author says that what is negligence or gross negligence depends largely upon the value of the property, and upon business usage, and the attendant facts. This Court, in *Hanes v. Shapiro,* 168 N.C. 28, treating of this question, brings our State into line with the majority of jurisdictions, by saying: "But, in the last analysis, the care required by law is that of the man of ordinary prudence. This is the safest and best rule, and rids us of the technical and useless distinctions in regard to the subject." And this case is quoted with ap-

proval in *Perry v. R. R.*, 171 N.C. 158. It is evident that the so-called distinctions between slight, ordinary and gross negligence over which courts have perhaps somewhat quibbled for a hundred years, can furnish no assistance. *Maddock v. Riggs*, 106 Kans. 108; 12 A.L.R. 221. The care must be "commensurate care," having regard to the value of the property bailed and the particular circumstances of the case. *Hanes v. Shapiro, supra.*

The Supreme Court of the United States, in the case of *Preston v. Prather,* 137 U.S. 604, held that banks, acting as bailees, without reward, in the care of special deposits, are bound to exercise such reasonable care as men of common prudence bestow upon the protection of their own property of a similar character. The theory that the bailee's care of his own property is a satisfactory test of his duty to a bailor has also been rejected. It is now the law that the bailee must take such care of his property as prudent and careful business men generally take of property of like value and importance. Any other rule would put a premium upon negligence and carelessness. The modern rule is well stated in *Maddock v. Riggs,* 106 Kan. 808, 12 A.L.R. 219, and is, in substance this, that while many respectable authorities may be found which regard such a showing as the true test in determining (304) whether there has been gross negligence, the better rule is that taking such care of the property, or thing, as of one's own, repels a presumption of gross negligence, but this may be overcome and liability fastened upon the bailee, nevertheless, by showing the failure to exercise the care that under all the circumstances was required of him, because, manifestly, one may take risks with his own property, that he has no right to take with another's, and because it is not a question of the care exercised by him as an individual merely, but as one of a class. In 3 R.C.L. 102, it is well said that a gratuitous bailee will not be permitted to absolve himself from all responsibility for the care of an article bailed, merely by proving that he has been likewise grossly negligent with his own goods. See, also, 6 C.J. 1119, sec. 57 and 59.

In *Boyden v. Bank,* 65 N.C. 19, is found an expression which is relied on by defendant, that a bank "is bound only to keep a (special) deposit with the same care that it keeps its own property of like description." Of course, the Court did not mean to make that bald statement, that a bank can be negligent with its own property, and be excused from responsibility for that of another, because the latter was held by it as bailee and dealt with in the same manner as was its own. In the old case of *Doorman v. Jenkins* (1834), the plaintiff proved the delivery of the money to the defendant for the

purpose of taking up a bill. The defendant was the proprietor of a coffee house, and the account he gave of the loss was that he unfortunately placed the money in a cash box which was kept in the taproom, and that the cash box with the plaintiff's money in it, and also a larger sum belonging to the defendant, was stolen from its place of deposit on a Sunday. Lord Chief Justice Denman, a very eminent and learned jurist, said in his charge, it did not follow, from the defendant's having lost his own money, at the same time as the plaintiff's that he had taken such care of the plaintiff's money as a reasonable and prudent man would ordinarily take of his own. The case is reported in 2 Ad. & El. 256 (111 Eng. Reprint 99), where the action of the court in leaving the question, whether there had been culpable negligence, to the jury, was approved. See, also, *Coggs v. Bernard*, 2 Ld. Raym. 909 (92 Eng. Reprint 107), 1 Smith, Lead. Cas. 199.

We dealt with this question in *Marks v. Cotton Mills*, 135 N.C. 287, and *Hanes v. Shapiro, supra.* In the *Marks'* case we held that an employer in respect to machinery and appliances was not exonerated from liability for an injury received by his employee, while using a machine or appliance, simply because he exercised that degree of care which he would have used if he had been supplying them for his own use, but that he must have been as careful of his employee as a man of ordinary prudence would have been
(305) if he was himself exposed to injury, and having regard for his own safety. The principle, as to negligence, is practically the same in both of the classes.

Reverting to the agreed facts in the case at bar, plaintiffs contend that the defendant has admitted five important things:

(1) It received the bonds as bailee, and is unable to return them.

(2) It was directed to insure the bonds, but carried only 10 per cent insurance on them.

(3) It failed for a period of twenty-six days, contrary to express agreement, to notify plaintiffs that the bonds had been returned.

(4) It failed to keep the bonds in the burglar-proof compartment of its safe, where there was 100 per cent safety and 100 per cent insurance.

(5) It virtually admitted to its insurance company that it was liable for the loss, and has received as insurance money, and retains, 10 per cent of the amount of the loss.

As to the first proposition, it seems to be well settled law in this jurisdiction, and generally, that when it is shown that the property

in question has been delivered to the bailee, and is not returned, or cannot be returned, there is a *prima facie* case made for the bailor which is sufficient to carry the case to the jury and to authorize a verdict for him. 3 R.C.L. 150-151; *Hanes v. Shapiro, supra; Sprinkle v. Brimm,* 144 N.C. 401.

There is some reference in the briefs, and also in the argument before us, to the question of insurance, that is, as to the duty of the defendant to have kept the bonds insured to their full value in compliance with a request to that effect made by the plaintiffs, but we need not enter at large upon the consideration of this question, as we will briefly refer to it later in our conclusion as to the present disposition of the case; and in the same category must be placed the reference to the notice by defendant to plaintiffs of the arrival of the new bonds, it being contended as to that feature of this case that the doctrine of *Martin v. Culbertson,* 64 N.C. 328, applies, where it is held by the Court: "Where there is any material departure from the terms of the bailment, the bailee becomes a wrongdoer, and is liable for any injury which results from the departure, without regard to the question of negligence." And in this connection they also rely on 6 Corpus Juris, 1110 and 1111, as stating the rule of the most recent authorities, viz.: Where there is an express and valid contract the terms thereof control, since both bailor and the bailee are entitled to impose on each other any terms they respectively may choose, and their express agreement will prevail against general principles of law applicable in the absence of such an agreement. The bailee is liable for loss resulting from breach of his contract to keep the property in a particular manner, or to return it at a particular time, or other special stipulation in regard to (306) the property, without regard to whether he has been otherwise negligent. They refer also to *Carll v. Goldberg,* 110 N.Y.S. 318; *Cochran v. Walker,* 49 S.W. 403; *Sprinkle v. Brimm,* 144 N.C. 401.

Plaintiffs contend further that the defendant kept the bonds in the wrong place — an unsafe place — while it kept its own money in the "money chest," which proved to be a safe place for it, but this matter also may be deferred for additional treatment in our conclusion, and also the contention that defendant has virtually admitted its liability by collecting the $440 from the insurance company upon its representation, expressed or implied, that it was, at least to that extent liable to the plaintiffs.

We come now to the conclusion of the law upon all these matters and variety of contentions.

The concise question necessarily involved in this case is whether the defendant, as bailee of the bonds, has exercised that care which

the law requires of it, in the custody and preservation of them, and whether it gave the notice of their arrival at its banking house, and in other respects complied with the contract of bailment. We find ourselves unable to determine these questions and to decide fairly and correctly as to the rights of the one party, or the liability of the other, upon the case agreed as we find it to be in the record. Whether there has been negligence in the performance of any legal duty is generally a composite question of fact and law, and is in this case, as in nearly all others, one for the jury to decide under proper instructions from the court. The admissions of the parties, as stated in this case, are not so conclusive in their character, and not so comprehensive as to present the naked question of law, whether the defendant has broken the contract of bailment and the plaintiffs have been thereby proximately injured. We can well conceive of other elements or facts and circumstances additional to those stated in the case, which may well enter into the proper solution of this central and controlling question. The defendant does not expressly or impliedly admit its negligence, but denies it strenuously and conversely. The plaintiffs do not expressly or impliedly admit that there was no negligence. Neither could safely make such an admission. It would end the case against it (the bank or the college) should either be so indiscreet as to make the admission. Negligence is preëminently a question for a jury, with proper advice from the court as to the law, to pass upon, as the existence or nonexistence of it in the particular case depends upon the special facts and circumstances — and all of them.

We do not assert that the facts and circumstances can-
(307) not be so stated as to determine the rights and liabilities of the respective parties, but they are not apt to be, as it might require too grave and serious an admission, if not a fatal one, on the part of one or the other of the litigants. Sufficient it is to state that such a case is not presented here. The parties have selected the wrong method of presenting the true question involved in the case, or, to state it another way, they have not stated exhaustively all the facts and circumstances essential to a decision of the pivotal issue, whether there has been negligence.

We hold, though, that there is evidence of a consideration for the bailment, and if the latter is found by the jury to exist, the measure of care which the law requires to be exercised by the bank would be that of an ordinarily prudent person in like circumstances, and not merely slight care, and its responsibility would consequently arise without the presence of gross negligence.

The facts recited by us in this opinion, and partially repeated

elsewhere, are evidence of negligence indisputably, but only evidentiary in character, as the ultimate fact of negligence is not stated in the case, and whether the notice was given, or if given, whether the plaintiffs would have removed the deposit before the theft are also, and at least, but matters of fact, as is the question whether the plaintiff had actual knowledge that the bonds had come (*Bank v. Burgwyn,* 110 N.C. 267) and were in the bank for them, or their order, thereby dispensing with notice. We do not decide such questions, but only questions of law. A case agreed must state all the facts necessary to a decision, which this case does not do. In this, if not in other respects, the agreed case lacks completeness. This must be so, unless whether there is negligence, is not a mixed one of law and fact.

For the reasons given, the case is remanded, with directions to submit it to a jury to find as to the question of negligence, upon all the evidence, unless the parties agree to a reference for that purpose, or unless they can, and will, amend their case so as to present the bare question of law, which they are not likely to do.

Error, and remanded with instructions.

CLARK, C.J., dissenting, is of the opinion that the facts are sufficiently set forth in the case agreed and that judgment should be entered thereon in favor of the plaintiff. The bank solicited the business, and by reason of its representations the plaintiff did forego other safe and convenient methods of transmitting the bonds. The bank held itself out as having safe means of preserving the bonds. The plaintiff asked for insurance that would protect it, and offered to pay any expenses incident thereto. The defendant bank was in the insurance business, and but for its negligence (308) in acquainting itself with the terms of its own insurance policies, would have been fully protected, instead of being protected only to the extent of 10 per cent. The bank agreed to notify the plaintiff upon return of the bonds, but negligently failed for twenty-six days to do so. If it had been given notice as it should have done, the plaintiff would have taken the bonds from the bank and have placed them in the safe of the college "where it was the custom for the college to keep its bonds." The college safe was not robbed. The bank did not keep these bonds where it kept its own money, and if it had, they would not have been stolen, or if they had been stolen, the bank would have recovered from the insurance company 100 per cent of such loss. The bank, at the time of the loss, acknowledged its liability, and recovered $440 insurance money by admitting its liability.

Upon these facts which the defendant has admitted, it would seem clear that there was no negligence on the part of the plaintiff, and that there was negligence on the part of the defendant bank against whom judgment should be rendered upon the case agreed.

Cited: *Morgan v. Bank,* 190 N.C. 212; *Hood, Comr. v. Bd. of Fin. Control,* 203 N.C. 123; *Oil Co. v. Iron Works,* 211 N.C. 672; *Troxler v. Bevill,* 215 N.C. 644; *Falls v. Goforth,* 216 N.C. 503; *Buffalœ v. Barnes,* 226 N.C. 325; *Ins. Assoc. v. Parker,* 234 N.C. 23; *Vincent v. Woody,* 238 N.C. 120; *Ins. Co. v. Motors, Inc.,* 240 N.C. 185; *Credit Asso. v. Whedbee,* 251 N.C. 30; *New Bern v. White,* 251 N.C. 68.

R. H. WRIGHT v. IREDELL TELEPHONE COMPANY.

(Filed 2 November, 1921.)

Corporations—Certificates—Transfer of Shares—Limitation of Powers—Approval of Directors—Trusts—Telephones—Competitive Service.

Where a local telephone exchange has been organized for the purpose of excluding its control by trusts or combinations, or corporations hostile to its interests, under a certificate of incorporation obtained from the Secretary of State requiring any transfer of its stock to be favorably passed upon by its board of directors, and the certificates of stock contain this provision, the action of the directors declining to have the shares paid for by the applicant transferred to him on the books of the company and thus precluding his voting as a shareholder, passed in good faith, is valid, there being nothing therein against public policy, or other provisions of the law; and notwithstanding his averments that he was not interested in companies hostile to this one, or that he has no improper motive therein.

APPEAL by plaintiff from *Horton, J.,* at chambers, 6 May, 1921, from DURHAM.

Civil action for writ of *mandamus* to require the defendant to transfer and issue to the plaintiff certain certificates of its corporate stock. The facts are fully set out in the judgment of the Superior Court:

"This cause was regularly instituted in the Superior
(309) Court of Durham County by issuance of summons on 26 May, 1920, complaint and answer were duly filed, and it was agreed by the parties that the court should find the facts and enter judgment in accordance with such finding of facts, and after

hearing the pleadings and the testimony offered at the trial, the court finds the following facts:

"1. This is a proceeding by *mandamus* to compel the defendant to transfer to the plaintiff 116 shares of common capital stock of the defendant.

"2. That prior to the year 1906 the citizens of the city of Statesville and county of Iredell, North Carolina, enjoyed the benefit of a locally owned, independent, telephone system; that the Bell Telephone Company had repeatedly made application to the board of aldermen of said city for a franchise to establish its system in said community, and the said board of aldermen had from time to time refused to grant said franchise; that on the ..... day of....., 1906, the Bell Telephone Company, without notice to the board of aldermen or to the citizens of Statesville, bought out the independent system and undertook to control and monopolize the telephone business in Statesville, and thereafter charged rates greatly in excess of the rates formerly charged by the independent company for said service.

"3. That after the purchase of the local system by the Bell Telephone Company, the citizens of said community, in order to free themselves from what they believed to be a monopoly, and for the purpose of establishing and maintaining a local independent telephone system, organized the Iredell Telephone Company, the defendant in this case, and thereupon procured a certificate of incorporation under the general laws of the State on 22 August, 1906, said certificate of incorporation containing the provisions hereinafter set out: That said certificate of incorporation was approved by the stockholders of the defendant and was immediately recorded in the office of the clerk of the Superior Court of Iredell County, and under and by virtue of said certificate of incorporation the defendant since said time has and is now engaged in the telephone business in the city of Statesville, N. C., under its said certificate of incorporation; that the certificate of incorporation of the defendant, among other things, specifies the objects of the corporation as follows: 'To build, operate, maintain and own an independent telephone business in the city of Statesville, N. C., and generally to carry on an independent telephone system in said city and elsewhere.'

"4. That at the time of organizing said corporation the stockholders, realizing that unless the sale and transfer of its capital stock was safeguarded that there would be a possibility of a majority of the stock of the corporation being bought up by persons not in harmony with the independent telephone business, (310) and that the control of the corporation would pass directly

or indirectly into the hands of unfriendly and antagonistic interests, and that thereupon the stockholders, in order to safeguard their investment, and to prevent the said corporation falling into the hands of persons or corporations antagonistic to the objects and purposes of an independent telephone company, procured the Secretary of State to grant the defendant a certificate of incorporation or charter, containing the following limitations upon the sale and transfer of its stock, to wit:

"'(Section Eleventh) Shares of stock in this corporation shall not be transferred or sold until said sale or transfer shall have been reported to the directors and approved by them.'

"5. That to further safeguard the sale of its stock, as well as to give notice to parties who might attempt to purchase the same of the limitations contained in the charter and the terms upon which said stock was issued, accepted and held by the stockholders, the defendant caused its certificate of stock to be written in the following words and figures, to wit:

'Certificate of Common Stock.
Incorporated under the laws of the State of N. C.

No..... IREDELL TELEPHONE COMPANY, Shares .....
Statesville, N. C.

This certifies that ..... is the owner of..... shares of Twenty-five Dollars each of the Capital Stock of Iredell Telephone Company, which cannot be sold or transferred until reported to, and approved by, the Board of Directors, and then transferable only on the books of the corporation by the holder thereof in person or by attorney, upon surrender of this certificate properly endorsed.

In witness whereof, the said corporation has caused this certificate to be signed by its duly authorized officer and to be sealed with the seal of the corporation at Statesville, N. C.

This the ..... day of ....., A.D. 190.....

....., Sec. and Treas. ....., Pres.'

"6. That the stock desired by the plaintiff to be transferred to him on the books of the corporation in this action is in the identical language above set out.

"7. That none of the owners of the stock now held by the plaintiff have complied with the provisions of defendant's charter governing sales and transfers of its stock, and have never complied with the provisions and limitations set out in the certificates of stock, and

that none of said owners ever applied to the directors of the defendant for approval of said sale to the plaintiff or (311) the transfer of any of said stock to the plaintiff.

"8. That the plaintiff has no financial interest in the Southern Bell Telephone Company, but that plaintiff, a Mr. Martin, and two nephews of the plaintiff, own the Interstate Telephone and Telegraph Company, of Durham, N. C.; that at the time the plaintiff undertook to acquire shares of stock in the Iredell Telephone Company there was an agreement or understanding between the Interstate Telephone and Telegraph Company, of Durham, and the Southern Bell Telephone Company, and the American Bell Telephone Company could use the office of the Interstate Telephone and Telegraph Company, of Durham, N. C., for long distance, the Interstate Telephone and Telegraph Company, of Durham, N. C., receiving a commission on all outgoing long distance messages. The Interstate Telephone and Telegraph Company of Durham had under such agreement no right to build long-distance lines to points where the Bell Telephone had long-distance lines. The Interstate Telephone and Telegraph Company was doing the local business in Durham, and the Southern Bell and American Bell were doing the long-distance business. The Southern Bell and the American Bell had no local line in Durham; that the plaintiff knew there was competition between the Southern Bell Telephone Company and the Iredell Telephone Company, at Statesville, and the plaintiff and his associates bought out the Bell Company at Statesville, and that the Iredell Telephone Company has never paid any dividends on its stock, and that the plaintiff had no knowledge of what rates were charged by the Southern Bell Telephone Company in Statesville or anything about the controversy between the Iredell Telephone Company and the Southern Bell Telephone Company in Statesville, N. C., other than that there was competition between them.

"9. That the plaintiff is in the possession of more than 116 shares of the capital stock of the defendant, he having attempted to purchase said shares of stock, and has paid a valuable consideration therefor, and never purchased any stock in the Southern Bell Telephone Company; that the plaintiff has never been able to get the shares of stock in the defendant transferred to him on the books of the company, and has never been permitted to vote in any of the meetings of the stockholders of the defendant.

"10. That on the ..... day of August, 1917, the plaintiff applied to the defendant's directors to have the stock held by him transferred; that thereupon, in pursuance of power contained in the certificate of incorporation and also written in the face of each share of

stock issued by the defendants, the said directors met, and
(312) after carefully considering the matter, acting in good faith, declined to approve the transfer of said stock to the plaintiff, and declined to approve the sale or transfer of said stock to the plaintiff. The action of the board of directors was put in writing and was duly communicated to the plaintiff. The answer of the board of directors was as follows, to wit:

" 'This board, after duly considering the matter, disapproved the sale of said stock to Mr. Wright, but approved of the sale of stock by said stockholders at the price offered to the agents of Mr. Wright, and have secured purchasers therefor who are local citizens and stockholders of the Iredell Company, and in sympathy with the independent telephone business, and engaged in building up the Iredell Telephone Company as an independent telephone company, and are ready, upon delivery of said stock properly endorsed, to pay therefor in cash.'

"On the foregoing findings of facts the court is of the opinion that the plaintiff is not entitled to the relief prayed, and it is ordered and adjudged by the court that the writ of *mandamus* be, and the same is hereby denied, and the plaintiff taxed with the costs.

"J. LLOYD HORTON, *Judge*," *etc.*

From the foregoing judgment the plaintiff excepted and appealed.

W. D. Turner, Fuller, Reade & Fuller for plaintiff.
Bryant, Brogden & Bryant and H. P. Grier for defendant.

STACY, J. It appears from the facts found by his Honor and embodied in the judgment of the Superior Court, that prior to the year 1906, the people of Statesville and Iredell County enjoyed the benefits of a locally owned, independent, telephone system. The Southern Bell Telephone Company had repeatedly made application to the board of aldermen of the city of Statesville for a franchise to establish its system in said community, but this request had been consistently denied. Whereupon, in 1906, the Southern Bell Telephone Company, without notice to the board of aldermen or the citizens of Statesville, bought out the independent system and undertook to control and to monopolize the telephone business at rates greatly in excess of those formerly charged in said locality. In order to rid the community of this situation, and for the purpose of establishing and maintaining a local independent telephone system, the Iredell Telephone Company, defendant herein, was organized by a number of interested citizens who lived in the city of Statesville. For reasons which seemed compelling to the incorporators, and which

they deemed necessary to safeguard the interests of stockholders in the defendant company, there was embraced in the certificate of incorporation the following limitation on the sale (313) and transfer of stock:

"Shares of stock in this corporation shall not be transferred or sold until said sale or transfer shall have been reported to the directors and approved by them."

The charter was duly approved and issued by the Secretary of State, accepted by the corporators, and the certificate of stock, issued to each stockholder, contained a statement on the face of said stock that it could not "be sold or transferred until reported to, and approved by, the board of directors, and then only transferable on the books of the corporation by the holder thereof in person or by attorney," etc.

The plaintiff, a resident of Durham, has in his possession 116 shares of stock of the defendant corporation which in August, 1917, he demanded that the directors transfer to him. The directors met, and after carefully considering plaintiff's demand, and acting in good faith, declined to approve the sale and transfer of said stock, and made the following order in reference thereto, which was communicated to the plaintiff:

"This board, after duly considering the matter, disapproved the sale of said stock to Mr. Wright, but approves of the sale of said stock by said stockholder, at the price offered to the agents of Mr. Wright, and have secured purchasers therefor who are local citizens and stockholders of the Iredell Telephone Company and in sympathy with the independent business and engaged in building up the Iredell Telephone Company as an independent telephone company, and are ready, upon delivery of said stock, properly endorsed, to pay therefor in cash."

The plaintiff contends that the aforesaid restrictions and powers granted defendant in its charter, and set out in its certificates of stock, are against public policy, and therefore void. On the other hand, the defendant contends that said provisions are just, proper and reasonable limitations on the sale and transfer of its stock, and that the action of its directors, in refusing to transfer the 116 shares to the plaintiff, but approving said sales at the price offered by his agents, and securing purchasers therefor, who were in sympathy with the objects and purposes of the defendant, was within the rights granted to the defendant and did not, and does not, constitute any unreasonable restraint upon the power of alienation.

We have found no statute in the laws of this State forbidding restrictions and limitations in the sale and transfer of stock in cor-

porations. And it would seem that where the Legislature, in the exercise of its constitutional grant, or reservation (Art. VII, sec. 1, Const.), has authorized the Secretary of State to issue cer-
(314) tificates of incorporation and approve the application for charters, the provisions of such charters, not inconsistent with the legislative policy and so approved by the Secretary of State have, at least the force and effect of a valid agreement and binding as between the stockholders who take with notice of such provisions. *Dempster Mfg. Co. v. Downs*, 126 Iowa 80; 3 Amer. Cas. 187, and note. As bearing somewhat upon this point see, also, *White v. Kincaid*, 149 N.C. 415.

In the case of *Longyear v. Hardman*, 219 Mass. 405, Rugg, C.J., in an opinion of great force and clearness, states this position as follows:

"The absence of any definite limitation upon the power of the incorporators to impose restrictions must be taken to be a legislative determination that considerable latitude was intended. No such restrictions can be declared to be unlawful under these circumstances unless palpably unreasonable. A corporation bears some resemblance to a partnership. Plainly no new partner can be introduced into a partnership without the assent of all the partners. Said Chief Justice Holmes in *Barrett v. King*, 181 Mass. 476, at p. 479, when discussing a somewhat similar proposition: 'Stock in a corporation is not merely property. It also creates a personal relation analogous otherwise than technically to a partnership. . . . There seems to be no greater objection to retaining the right of choosing one's associates in a corporation than in a firm.' The motives for the retention of such right in a small business corporation, where substantial changes in ownership of stock well might be accompanied by a change of managing officers, are obvious. Subscriptions of stock sufficient to organize the corporation with adequate capital might be difficult to obtain unless permanency of management were secured in some way against possible changes arising from mutations in the ownership of a bare majority of the stock. Elements of importance both to the subscribers of capital stock and to the executive officers might render some such restriction a valuable security to the investment of money and to the personal devotion of individuals in building up the business. The characteristics of associated stockholders may be important. Harmony of purpose and of business methods and ideals among stockholders may be a significant element in success. The insertion of the restriction upon the right of transfer of the shares of stock in the agreement of association, the initial act in the organization of the company upon which depends all that comes af-

ter, is a limitation upon the corporation. It becomes a part of its being and enters into each share of stock as a part of its essence. The corporation comes into existence with this inherent qualifying restraint. It is agreed by all the original incorporators who in respect of determining the nature of the corporation speak (315) for future stockholders. It must be approved by the commissioner of corporations as representative of the commonwealth before the charter can issue. A copy of it is a public record in the office of the secretary of the commonwealth, where it may be read by all who contemplate becoming stockholders. . . . The owners of stock in a corporation thus organized cannot complain of such a congenital characteristic. Each stockholder takes his stock subject to this restraining condition. . . . That there is nothing inherently unconscionable in such a limitation upon the right of transfer is manifest from the very broad power exercised by organizers of companies under the English acts and in some of our states."

Mr. Thompson, in his work on Corporations (2 ed.), vol. 4, sec. 4135, states the general law as follows:

"The rule is well settled that a provision in the charter or articles of incorporation that no stockholder shall sell and transfer his stock, either without the consent of all other stockholders or that he will first offer it to the stockholders or to the corporation before selling to other persons, is binding on persons who become owners of stock. These provisions, which really amount to agreements between stockholders themselves, are not invalid as against public policy, nor do they amount to an improper restraint of the power of alienation. There seems to be no objection to a corporation reserving to existing members the right to choose their associates. Such a provision justifies the refusal of the corporation to transfer the stock." And this is supported by a number of authorities cited in the text. See, also, the following section 4136, and our own statutes, C.S. 1114, sub-sec. 7, and sec. 1128.

Counsel for appellant have called our attention to the decisions of this Court rendered in *Bridgers v. Bank*, 152 N.C. 293, and *Sheppard v. Power Co.*, 150 N.C. 776, as tending to establish a contrary doctrine, but we do not think these cases are in point. The questions there presented dealt with the validity of voting trust agreements.

Probably it should also be observed that we are not now considering a case where the restrictions and limitations are contained only in a resolution or by-law of the corporation, and not in the provisions of its charter.

In the case at bar the limitations under consideration are con-

tained in the defendant's charter, and they are also set out in its stock certificates. The corporation came into existence with this inherent qualifying restraint as one of the rights and powers which it might exercise. It was agreed to by all the original incorporators, and the same was approved by the Secretary of State. The
(316) board of directors have acted in good faith, and we think the judgment of his Honor, holding that such was permissible under the defendant's right of organization, must be upheld, in the absence of any allegation or proof of arbitrary, oppressive or unreasonable conduct.

Affirmed.

CYNTHIA PRINGLE ET AL., V. WINSTON-SALEM BUILDING AND LOAN ASSOCIATION ET AL.

(Filed 2 November, 1921.)

1. Mortgages—Deeds in Trust—Powers of Sale—Resale—Statutes.

A sale of land under the power in a mortgage or deed of trust is given the same status as if made under a judgment or decree of court, by the provisions of C.S. 2951, requiring the sale to be kept open for ten days and a resale ordered by the clerk of the court if within that period a raised bid has been offered in compliance with the statutory provisions.

2. Same—Clerks of Court—Jurisdiction.

C.S. 2951, does not require that all sales of land under mortgage or deed in trust be reported to the clerk of the court, but only when an advanced bid has been made and is properly safeguarded or paid into the office of the clerk of the court.

3. Same—Judicial Sales—Commissions—Allowances—Costs.

Upon the ordering by the clerk of the court of a resale of lands sold under the power contained in a mortgage or deed of trust, C.S. 2951, the original sale, under the power, becomes a nullity, and that part of the instrument providing a certain per cent as selling commission to the mortgagee or trustee is inoperative; and in lieu thereof he is entitled only to the costs and expenses of the sale and such sum to compensate him for his services actually rendered as may be approved by the clerk, subject to review on appeal, or by the court direct where a restraining order has issued.

4. Mortgages—Deeds of Trust—Sales—Commissions.

Where lands have been sold under a mortgage or deed of trust, *semble*, the per cent stated therein as commissions is allowable in conformity with the spirit of our statute, only on the amount of money collected and paid over on the indebtedness, and not upon the price the land may have brought at the sale. C.S. 2951.

PRINGLE *v.* LOAN ASSO.

APPEAL by Watson, trustee, from *Webb, J.,* at May Term, 1921, of FORSYTH.

On 18 January, 1919, the plaintiffs executed to Watson, trustee for Winston-Salem Building and Loan Association, a deed of trust to secure $800. This debt not being paid at maturity, upon the request of the beneficiary the trustee advertised the property for sale, and on 9 May, 1921, sold it for $3,000. Pur- (317) suant to C.S. 2591, an advance bid being filed with the clerk, on 12 May he ordered a resale, which was advertised to take place 4 June, 1921. After the resale was ordered, on 3 June, 1921, the plaintiffs tendered to Watson, trustee, the amount due on the note and the cost of advertising the two sales, amounting to $735.10, but declined to pay the trustee a commission of $150, which he demanded as 5 per cent upon the $3,000 bid, and on the same day paid into the office of the clerk of the Superior Court said sum of $735.10, and upon a summons issued procured a temporary restraining order against a resale, which was later continued to the final hearing by Webb, J., who also refused the prayer of the defendant Watson to dismiss the action, and he appealed.

Jones & Clement for plaintiffs.
Manly, Hendren & Womble for defendants.

CLARK, C.J. Ch. 146, Laws 1915, and amendments, now C.S. 2591, was intended for the protection of mortgagors where sales are made under a power of sale without a decree of foreclosure by the court. In the latter cases there was always an equity to decree a resale when a substantial raise in the bid, usually 10 per cent, had been deposited in court. There being no such protection as to mortgages with power of sale, this statute was passed to extend to mortgagors, whose property had been sold under power of sale without a decree of foreclosure, the same opportunity of a resale when there has been an increased bid of 10 per cent when the bid at the first sale did not exceed $500, and of 5 per cent when the bid of the first sale was more than $500.

This statute has been construed at this term, *In re Sermons, ante,* 122, not to require a report to the clerk of every sale made under a mortgage with power of sale, but that in all such cases if the prescribed amount of the raise in bid is guaranteed, or paid, to the clerk he shall require the mortgagee or trustee to advertise and resell on 15 days notice. In short, the condition of a mortgagor in a mortgage with a power of sale is assimilated to the condition of property sold under a decree of foreclosure so far as the right to

set aside the bid at the first sale and to require a resale. Therefore, the decisions upon the right of the commissioner to commissions on a sale under a decree of foreclosure is applicable in these cases.

In *Pass v. Brooks,* 118 N.C. 398, it was held that after the trustee had advertised, but before the sale day the trustor, with the knowledge and consent of the trustee, paid off the debt and interest and costs of advertisement, the trustee was not entitled to any
(318) commissions. In *Fry v. Graham,* 122 N.C. 773, where the trustees in a deed of trust with power of sale advertised the land for sale but the sale was postponed, and before the day of the adjourned sale the debt was paid in full, it was held the trustee could not recover commissions on the amount of the debt, but was entitled to a just allowance for time, labor, services, and expenses, and that these could be assessed in an action by the trustee for the same. In the present case the matter being before the clerk under C.S. 2591, by virtue of the order of resale made by him, we are of opinion that these charges can be assessed by the clerk, subject to review on appeal, or by the judge in this proceeding, as in *Fry v. Graham, supra.*

In *Whitaker v. Guano Co.,* 123 N.C. 370, it was held that where there is no sale a just allowance can be allowed the commissioner for his time, labor, and expenses. All these cases cite *Boyd v. Hawkins,* 17 N.C. 336. In *Turner v. Boger,* 126 N.C. 303, the above three cases were cited, and the Court affirmed the dissenting opinion in *Cannon v. McCape,* 114 N.C. 584 in which it was pointed out that originally, "when property was levied on and advertised for sale under execution, if payment was made before sale, the sheriff was allowed no commission on the sale. *Dawson v. Grafflin,* 84 N.C. 100, and it took a statute to change this (Code 3752), but there has been no statute as yet extending this rule to trustees or mortgagees when the debtor pays before sale. It is to be feared that such practice, if adopted, will result in oppression."

The order of resale vacated the first sale absolutely, and under the above authorities the trustee, at most, would be entitled only to an allowance for his trouble and expenses of advertising, which last has been paid into the clerk's office. The trustee claims that he was entitled to 5 per cent upon the $3,000 which the land brought at the vacated sale. The question is not before us whether if the sale had not been set aside the trustee would have been entitled to commissions on the $3,000 or only upon the amount collected and paid over on the indebtedness, in analogy to the sale by the sheriff upon execution who receives commissions not upon the price the property has brought, but only upon the amount collected, C.S.

3908, or like the allowance to an administrator who, in selling land under a decree to make assets, is entitled to commissions only on so much of the proceeds of the sale as is applied to the indebtedness of the intestate, and there are other instances. In *Smith v. Frazier,* 119 N.C. 158, it was held that formerly no commissions were allowed commissioners for making sale under judicial decree, but only a just allowance for time, labor, and expenses and a decree allowing 5 per cent on the purchase price instead of on the amount of debt collected, was reversed. This was cited and approved in *Turner v. Boger,* 126 N.C. 303, which intimated that by analogy to sales in partition the allowance (even when the sale is not (319) set aside) might follow the rate allowed by that statute, now C.S. 3896, *Ray v. Banks,* 120 N.C. 389; *Williamson v. Bitting,* 159 N.C. 321.

Though this matter is not strictly before us, and we do not decide it, it would seem that the spirit of the statute is to protect mortgagors like defendants in executions against the payment of commissions on more than the debt that is collected by the sale.

The restraining order against the resale was properly continued, and the amount of allowance to the trustee for his labor and trouble can be fixed by the judge at the final hearing, or if so advised, application for such allowance can be made by the trustee to the clerk, with the right of appeal.

Affirmed.

Cited: Lawrence v. Besk, 185 N.C. 199; *In re Ware,* 187 N.C. 694; *Trust Co. v. Powell,* 189 N.C. 375; *Briggs v. Developers,* 191 N.C. 787; *In re Hollowell Land,* 194 N.C. 224; *Cherry v. Gilliam,* 195 N.C. 235; *Banking Co. v. Greene,* 197 N.C. 537; *Koonce v. Fort,* 204 N.C. 430; *Land Bank v. Bland,* 231 N.C. 32.

E. E. HUNEYCUTT v. BOARD OF ROAD COMMISSIONERS OF STANLY COUNTY.

(Filed 2 November, 1921.)

1. Roads and Highways—Commissioners—Statutes — Constitutional Law —Local Laws.

A statute that abolishes two boards of road commissioners in a county and gives to another board, created by the same act, entire control and management of the public roads and bridges of the county, for working, repairing, maintaining, altering, and constructing such roads as were then

in existence or which may thereafter be built, does not violate Article II, section 29, of our State Constitution, prohibiting the passage of local, private, or special acts authorizing the laying out, opening, altering, etc., of highways, streets, or alleys, etc., and is a constitutional and valid enactment.

2. Same—Bonds—Taxation.

An act that abolishes two boards of road commissioners of a county and substitutes one central board for the entire county, authorizing it to take care of the indebtedness theretofore incurred for such purposes, and to incur obligations for the continuance of this work and to borrow money in pursuance thereof not to exceed a certain amount, is sufficient to imply the power to issue bonds by the new board to take care of this indebtedness incurred and to be incurred, at the rate of interest specified by the act, and to mature them within the forty years limited by C.S. 3768.

3. Same—Implied Powers.

The construction and maintenance of public roads and bridges is a part of the necessary expenses of a county for which the proper authorities may issue bonds, when the existing conditions make them desirable and proper, consistent with business prudence.

APPEAL by plaintiff from *Finley, J.*, at chambers, 1 (320) September, 1921, from STANLY.

Civil action to enjoin the defendant board of road commissioners of Stanly County from issuing certain bonds, to the amount of $200,000, in order to carry out the purposes of an act of the 1921 General Assembly (not yet published in book form), entitled "An act to provide road commissioners and for road improvement in Stanly County."

From a judgment dissolving the temporary restraining order, and holding that said bonds might be sold as valid and binding obligations, the plaintiff appealed.

G. D. B. Reynolds and Stack, Parker & Craig for plaintiff.

Cansler & Cansler, Brown, Sikes & Brown, J. R. Price, and R. L. Smith & Son for defendant.

STACY, J. The plaintiff assails the validity of the bonds in question upon the ground, first, that the act of 1921, creating the board of road commissioners of Stanly County, and giving to them the entire control and management of the public roads and bridges in said county, is void under Article II, section 29, of the Constitution; and, second, that even if said act be valid, it does not authorize the defendants to issue bonds in the name of the road commissioners of Stanly County.

Considering the objections in the order named, we may observe

that the section of the Constitution, against which it is contended the present enactment of the Legislature offends, in part provides:

"The General Assembly shall not pass any local, private, or special act or resolution . . . authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys. . . . Any local, private, or special act or resolution passed in violation of the provisions of this section shall be void. The General Assembly shall have power to pass general laws regulating matters set out in this section."

The act under consideration, among other things, provides as follows:

"SEC. 3. The road commissioners herein created shall have entire control and management of the public roads and bridges of Stanly County. That it shall be the duty of said board to take charge of working, repairing, maintaining, altering, and constructing all roads and bridges of Stanly County now maintained by the county as public roads and bridges, and such as may be hereafter built."

Thus it will be seen that the purpose of the act in question was not to authorize the laying out, opening, altering, or discontinuing of any given road or highway, but to provide ways and means by which the general road work of the entire county might be successfully carried on and maintained. The two highway (321) commissions hitherto existing in the county were to be abolished and one new central system established. It has been held with us in a number of cases that acts of this character do not fall within the constitutional prohibition against local or private legislation. *Brown v. Comrs.*, 173 N.C. 598, and cases there cited; *Mills v. Comrs.*, 175 N.C. 215; *Martin County v. Trust Co.*, 178 N.C. 27; *Comrs. v. Pruden*, 178 N.C. 394; *Comrs. v. Bank*, 181 N.C. 347, and cases there cited. The subject has been so thoroughly and fully discussed in these recent decisions that we deem it unnecessary to reiterate here the reasons upon which they are based.

We have also repeatedly upheld acts of this character incorporating boards of road commissioners and giving them full control and authority over the construction, maintenance, laying out, altering, and discontinuing of the public roads and highways. *Comrs. v. Comrs.*, 165 N.C. 632, and cases there cited. In *Highway Commission v. Webb*, 152 N.C. 710, the Court decided that the Legislature, in its discretion, might create a board of road commissioners and vest them with such authority over the roads as the county commissioners had theretofore possessed. "It is no objection to this legislation that the issuing of the bonds and the control and ordering of

road work are given to the local authorities, while the county commissioners are directed to levy and collect the taxes." *Trustees v. Webb,* 155 N.C. 383. Again, in *Hargrave v. Comrs.,* 168 N.C. 626: "The questions presented in this case are almost identical with those considered in *Comrs. v. Comrs.,* 165 N.C. 632, in which a similar act was upheld. In that case, and also in *Trustees v. Webb,* 155 N.C. 379; *Pritchard v. Comrs.,* 159 N.C. 636, affirmed on rehearing, 160 N.C. 476; *Tate v. Comrs.,* 122 N.C. 812; *Herring v. Dixon, ib.,* and in other cases, this Court has held that the construction and maintenance of public roads are a necessary public expense, and that the General Assembly may provide for the construction and working the same, and may create a board to do this, distinct from the county commissioners, and fix and authorize the levy of taxes for that purpose, as in this act, without a vote of the people. We know of no reason to question the correctness of those decisions."

Coming then to the second objection made by the plaintiff, to wit, that the defendants are without authority to issue bonds, we find the following provision in the act now before us:

"SEC. 6. The said road commissioners of Stanly County are hereby authorized and empowered to borrow money to an amount not exceeding two hundred thousand dollars, at a rate of interest not exceeding six per cent, to pay the current indebtedness now due by the two old boards of highway commissioners in Stanly
(322) County incurred for constructing roads and bridges in said county, for which the notes or bonds of the county have not been heretofore issued, and to meet the contracts now outstanding for road work and for further constructing, altering, and repairing the roads and bridges of said county. All notes or other evidences of debt given for any loan under this act shall be executed by and in the name of 'road commissioners of Stanly County,' by its chairman, and attested by its secretary and sealed with the seal of the board."

It is also provided in section 2 that the commission shall have "such other powers as are necessary to carry out any and all the provisions of this act." And further, in section 4: "All moneys spent and all obligations incurred by said board in constructing, altering, repairing, and maintaining the roads and bridges of said county shall be deemed to be for the necessary public expense and good of said county."

In addition to the specific provisions of the present act, it is the generally accepted position that the costs incurred in building bridges and constructing public roads constitute a part of the necessary expenses of a county. *Tate v. Comrs.,* 122 N.C. 812; *Herring v. Dixon,*

122 N.C. 420; *McKethan v. Comrs.*, 92 N.C. 243; *Evans v. Comrs.*, 89 N.C. 154. And whatever difference of opinion may be found in the decisions elsewhere, it has been held with us, in a number of cases, that "when the power to incur a debt for a necessary expense exists, there would seem to be no good reason of law to prevent the governing authorities of a town (or county) from making provision for the present or ultimate payment of such a debt by issuing bonds for the purpose, if good business prudence and existing conditions are such as to render this course desirable and proper." *Comrs. v. Comrs.*, 148 N.C. 120; *Jones v. Comrs.*, 137 N.C. 579. This was approved in *Bennett v. Comrs.*, 173 N.C. 625, where Hoke, J., writing the opinion, took occasion to say: "True, we have held in this jurisdiction that when county commissioners have power to contract a debt or to provide for valid debts already contracted, they may, in the exercise of good business prudence, issue county bonds in evidence of the obligation, the right of taxation, therefore, being restricted to the constitutional limitations as to debts incurred since the same was adopted," citing *Comrs. v. Webb*, 148 N.C. 120; *McCless v. Meekins*, 117 N.C. 34; *French v. Comrs.*, 74 N.C. 692; *Johnston v. Comrs.*, 67 N.C. 103. In *Johnston v. Comrs.*, 67 N.C. 103, Pearson, C.J., speaking to this question, said: "When the defendants, 'the board of commissioners,' succeeded to the office and duties of the justice of the peace in this regard, and found a very large amount of interest in arrear, was it the duty of the board of commissioners to levy and collect a tax in one year sufficient to pay off the accumulated interest for some fifteen years; or did they have a discretion to endeavor to break the force of (323) this burden upon the taxpayers of the county by issuing county bonds to raise a part of the amount called for, and levying a tax for the residue? We think the board of commissioners had this discretion, and it seems to have been exercised in a discreet manner."

Upon the foregoing authorities we think the objections made, and now insisted on by the plaintiff, must be resolved in favor of the validity of the bonds. But we are of opinion that the term of said bonds should not exceed a period of forty years, as provided by C.S. 3768. It was stated on the argument that this limitation would be observed. As thus modified, the judgment will be affirmed.

Modified and affirmed.

Cited: *In re Harris*, 183 N.C. 636; *Burney v. Comrs.*, 184 N.C. 277; *S. v. Kelly*, 186 N.C. 374; *Ellis v. Greene*, 191 N.C. 764; *Day*

v. Comrs., 191 N.C. 783; *Wolfe v. Mt. Airy*, 197 N.C. 451; *Airport Authority v. Johnson*, 226 N.C. 13; *McIntyre v. Clarkson*, 254 N.C. 517.

B. H. STOKES v. J. J. DIXON.

(Filed 2 November, 1921.)

Estates — Restraint Upon Alienation — Fee Simple — Deeds and Conveyances.

Where a life estate is given to B., and then to his heirs, after a reservation of a life estate in the grantor, "with no right to him to convey the same," the attempted restraint upon alienation of the estate is void, and it being the same as an estate to B. and his heirs, B. takes a fee simple after the falling in of the previous life estate, and may then convey the fee.

APPEAL by defendant from *Lyon, J.*, at the October Term, 1921, of CRAVEN.

Submission of controversy without action. C.S. 626.

The facts agreed are as follows:

1. That B. H. Stokes is in possession and claims title to two certain tracts of land described in a deed dated 11 March, 1910, which reads as follows:

STATE OF NORTH CAROLINA — CRAVEN COUNTY.

This deed, made this 11 March, 1910, by R. B. Stokes and wife, Rebecca Stokes, of Craven County and State of North Carolina, of the first part, to B. H. Stokes, of Craven County and State of North Carolina, of the second part:

Witnesseth, that the said R. B. Stokes and Rebecca Stokes, his wife, in consideration of parental love, and one dollar to them paid by the said B. H. Stokes, the receipt of which is hereby acknowledged, have bargained and sold, and by these presents do
(324) bargain, sell, and convey to the said B. H. Stokes and his heirs and assigns two certain tracts or parcels of land in No. 1 Township, Craven County, State of North Carolina, described as follows: . . .

With the exception the said R. B. Stokes reserves his life estate in the above two described tracts of land and the timber on the same. Also, if R. B. Stokes dies before his wife, Rebecca Stokes, she, the said Rebecca Stokes is to have and to hold a life estate in the home place or first tract above described, it being the home

place, the said Rebecca's life estate to cease in case she marries again. The said home place, it being the first tract described above, is hereby given to the said B. H. Stokes during his natural life, and then to his heirs with no right to him, the said B. H. Stokes, to convey the same; also, that he is to have no part in any future division of the said R. B. Stokes land.

To have and to hold, the aforesaid tract or parcel of land, and all the privileges and appurtenances thereto, belonging to the said B. H. Stokes, and his heirs and assigns, to their only use and behoof forever.

And the said R. B. Stokes and Rebecca Stokes covenant to and with the said B. H. Stokes, and his heirs and assigns, that they are seized of the said premises in fee, and have a right to convey the same in fee simple; that the same are free and clear from all incumbrances, and that they will warrant and defend the said title to the same against the claims of all persons whatsoever.

In testimony whereof, the said R. B. Stokes and Rebecca Stokes have hereunto set their hands and seals, the day and years first above written.

his
R. B. X STOKES. [SEAL.]
mark
REBECCA STOKES. [SEAL.]

Verified 11 March, 1910.

2. That R. B. Stokes and Rebecca Stokes are both dead.

3. That B. H. Stokes and J. J. Dixon have entered into an agreement by which the said J. J. Dixon agreed to purchase the said land and pay therefor the sum of $6,800, and B. H. Stokes agreed to sell said land and convey a good and indefeasible title in fee simple.

4. That B. H. Stokes has tendered to said J. J. Dixon a deed conveying the said land with the usual covenants of warranty, purporting to convey a fee-simple estate, and that J. J. Dixon has refused to accept said deed or pay for the land for the reason that he is advised that said B. H. Stokes cannot convey a good title.

Upon the facts agreed, his Honor rendered judgment declaring the plaintiff the owner in fee of the tracts of land described in the deed, with right to convey to the defendant a title in fee simple. The defendant excepted and appealed.

Moore & Dunn for plaintiff. (325)
Whitehurst & Borden for defendant.

ADAMS, J. R. B. Stokes, one of the grantors, reserved a life estate for himself in the two tracts of land described in the deed, and in case his wife Rebecca survived him, a life estate for her in the first tract, known as the "home place." Both R. B. Stokes and his wife are dead, and the reservation of the life estate, for the present purpose, is inoperative. The controversy, therefore, depends upon the proper construction of the following paragraph: "The said home place, it being the first tract described above, is hereby given to the said B. H. Stokes during his natural life, and then to his heirs, with no right to him, the said B. H. Stokes, to convey the same." The clause purporting to restrain the grantee's right of alienation is repugnant to the estate conveyed, and is void as in contravention of public policy. *Munroe v. Hall*, 97 N.C. 209; *Hardy v. Galloway*, 111 N.C. 520; *Pritchard v. Bailey*, 113 N.C. 521; *Latimer v. Waddell*, 119 N.C. 370; *Wool v. Fleetwood*, 136 N.C. 461; *Schwren v. Falls*, 170 N.C. 251. The grantors, then, conveyed the home place to B. H. Stokes during his natural life, and then to his heirs, and thereby vested in their grantee a fee simple under the rule in *Shelley's* case. *Tucker v. Williams*, 117 N.C. 119; *Nichols v. Gladden, ib.*, 498; *Tyson v. Sinclair*, 138 N.C. 24; *Smith v. Smith*, 173 N.C. 124; *Nobles v. Nobles*, 177 N.C. 243.

The judgment is

Affirmed.

Cited: Williams v. McPherson, 216 N.C. 566; *Whitson v. Barnett*, 237 N.C. 486.

WILLIE WALKER v. J. J. BURT.

(Filed 2 November, 1921.)

1. Accord and Satisfaction—Statutes.

Accord and satisfaction is a method of discharging a contract or settling a cause of action arising either from a contract or tort, by the parties compromising the matter in dispute between them, and accepting its benefits. C.S. 895.

2. Same—Issues.

Where the cropper sues for damages arising from the breach by the landlord of his contract to furnish certain lands for cultivation, selling plaintiff's crops without accounting for the proceeds, and retaining more of the crops than he was entitled to for the rent, and there is evidence on the trial of full accord and satisfaction between them, the submission of

the one issue as to the compromise and settlement will not be considered for error when the case has thereunder been presented to the jury, without prejudice to any of the appellant's rights.

3. Issues—Court's Discretion.

Where the issues submitted by the trial judge are directed to the material facts arising upon the pleadings, and afford full opportunity to the parties of presenting the various phases of the controversy, without prejudice, their number is within the discretion of the court.

4. Same—Evidence—Appeal and Error.

Where it is not controverted that the plaintiff had received the defendant's check stated to be in full of a part of a disputed account between them, and later a check stating that it was in full of the balance, evidence offered by the plaintiff as to the status of the affairs between them at each of these times is properly excluded, in the absence of fraud, imposition, or mistake. *Long v. Guaranty Co.*, 178 N.C. 507, cited and distinguished.

5. Instructions—Contentions—Appeal and Error—Objections and Exceptions.

An exception relating to the statement of the contentions of the parties by the trial judge in his charge to the jury will not be considered on appeal unless the alleged error had been brought to his attention at the time and before the case has been given to the jury.

6. Appeal and Error—Grounds of Appeal—Theory of Trial.

On appeal, the appellant is confined to the theory of the case on which it has been tried in the Superior Court.

APPEAL by plaintiff from *Connor, J.*, at the May Term, 1920, of WAKE. (326)

The plaintiff alleged that in December, 1918, he rented a farm from the defendant for the cultivation of certain crops during the year 1919; that he agreed to plant ten acres in tobacco, ten in cotton, ten in corn, and ten in wheat, on certain conditions or agreements, which are fully stated in the complaint. He alleged that the defendant in several respects had failed to comply with his contract; that he had sold a part of the plaintiff's crop of tobacco, and had refused to account for all the proceeds; that the defendant had declined to permit the plaintiff to cultivate in cotton the land agreed on, but had required the plaintiff to cultivate another tract about a mile distant; that the defendant had sold the plaintiff's cotton and failed to account for it; that the defendant had retained more rent corn that he was entitled to, and had wrongfully detained certain of the plaintiff's wheat. The plaintiff alleged further that sundry other dealings had taken place between him and the defendant, which need not be recited here, and that the defendant was in-

debted to him in the sum of $2,769.86, with interest from 1 January, 1920.

The defendant denied the material allegations in the complaint, setting out particularly his contentions as to the several matters relied on by the plaintiff, and alleged that the plaintiff had failed to cultivate the land according to the agreement, and in other particulars had failed to comply with the contract. The de-
(327) fendant, by way of amendment, incorporated the following allegation in his answer:

"That on or about 22 November, 1919, the plaintiff and the defendant had a full accounting and settlement between them of all their claims, accounts, and demands, except small remnants of ungathered crops, and that at said time and in connection with said settlement it was ascertained, determined and agreed between them that the total indebtedness of the defendant to the plaintiff was $872.65, and that accordingly at said time the defendant paid to the plaintiff the sum of $872.65, which said sum the plaintiff received ceived and accepted from the defendant in full settlement of all matters, except the said remnants of ungathered crops, and that thereafter, to wit, on or about 14 January, 1920, the plaintiff and the defendant had a full accounting and settlement of said remnants of ungathered crops not included in the said former settlement, and that thereupon upon a full accounting between them it was ascertained and determined that the full and final balance owing by the defendant to the plaintiff in adjustment, payment and settlement of all accounts, claims, and demands existing between them was the sum of $14.45, and that thereupon the defendant paid to the plaintiff the said sum of $14.45 in full settlement as aforesaid, and the plaintiff received and accepted from the defendant the payment of the said sum of $14.45 in full, complete, and final settlement of all claims, accounts, or demands whatsoever of the plaintiff against the defendant, and that the plaintiff is, by said settlement, barred and estopped to set up the claims and demands set forth in his complaint, and is barred to maintain his said action."

The plaintiff tendered the following issues:

"1. Was the check dated 22 November, 1919, for $872.65, given and received with intent on the part of both parties thereto that said check should be and was in full settlement of a disputed account and demand existing between the plaintiff and defendant on said date, except small remnants of ungathered crops?

"2. Was any check given by the defendant and received by the plaintiff on 14 January, 1920, in the sum of $14.25?

"3. If so, was said check given and received with intent on the

part of both plaintiff and defendant that said check should be and was in full settlement of disputed balance due from defendant to the plaintiff as of 14 January, 1920, as alleged in defendant's supplemental answer?"

His Honor submitted only one issue to the jury, which, with the answer, is as follows:

"Has there been a full and final accounting and settlement between the plaintiff and the defendant of the matters in controversy referred to in the pleadings, as alleged in the answer? Answer: 'Yes.'"

Thereupon judgment was rendered, adjudging that there had been a full and final accounting and settlement of all (328) matters referred to in the pleadings.

All the exceptions in the original brief of the appellant's counsel, not including the last three, which are purely formal, relate either to the issue submitted and the court's refusal to submit the issues tendered by the plaintiff, or to the admission and rejection of evidence, or to declining or giving instructions to the jury. At the trial defendant testified that on 22 November, 1919, he and the plaintiff had a settlement to date of all matters in dispute between them, and that he gave the plaintiff a check for $872.65, on which were written the words "in full settlement to date"; that the plaintiff thereupon delivered to the defendant a receipt, "In full settlement of all accounts and for all crops sold up to date"; and that on 4 January, 1920, there was a complete settlement, and that the defendant paid the plaintiff $14.45 by a check marked "In full settlement." There was evidence for the defendant tending to show that the alleged settlements included all matters in controversy.

The plaintiff contended that the defendant was due him more than $872; that he did not understand the transactions as purporting to be in settlement of all matters in dispute; that the defendant admitted owing the plaintiff about $1,500; and that defendant, in November or December, refused, after demand, to make further payment to the plaintiff. On each side there was corroborative evidence. The plaintiff appealed.

Fletcher & Lewis and J. W. Bailey for plaintiff.
Allen J. Barwick for defendant.

ADAMS, J. From the evidence, the charge, and the plaintiff's prayers for instructions, as well as his exceptions, it appears that the theory upon which the case was tried is that of accord and satisfaction. This doctrine is recognized as a method of discharging a

contract, or settling a cause of action arising either from a contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof, and an execution of such substituted agreement. 1 R.C.L., p. 177. C.S. 895, provides: "In all claims, or money demands, of whatever kind and howsoever due, where an agreement is made and accepted for a less amount than that demanded or claimed to be due, in satisfaction thereof, the payment of the less amount according to such agreement in compromise of the whole is a full and complete discharge of the same."

The defendant testified, it is true, that the plaintiff was satisfied with the settlement, and that there was no dispute, but in addition the defendant said in substance that after considering the
(329) claims of each party he finally agreed to make payment in settlement of all matters; and it is somewhat difficult to conform all the evidence to the conclusion that the settlement was not in the nature of an accord and satisfaction. We are, therefore, unable to see how the plaintiff could have been prejudiced by the court's embodying in one issue the substance of the three issues tendered by the plaintiff. It is obvious that the question whether the defendant gave, and the plaintiff accepted, the checks in part payment or in full settlement could easily have been presented under the issue submitted. In fact, this seems to have been one of the controverted questions, for the plaintiff distinctly testified that the checks were not accepted in final settlement, and that he thereafter made demand on the defendant for the remainder claimed to be due. If the issues are directed to the material facts arising upon the pleadings and afford an opportunity of presenting the various phases of the controversy, their number is a matter within the discretion of the court. *Millikin v. Sessoms,* 173 N.C. 723; *Drennan v. Wilkes,* 179 N.C. 512; *Dalrymple v. Cole,* 181 N.C. 285.

Only a few of the exceptions to the admission and rejection of evidence require discussion. The plaintiff contends that the court erroneously excluded evidence offered by him for the purpose of showing in connection with the receipt and the first check what had and what had not been sold, and for the purpose of showing in connection with the second check that the words "in final settlement" did not include all matters in controversy. We recognize the principle which, under certain circumstances permits the introduction of parol evidence for the purpose referred to, as, for instance, in *Long v. Guaranty Co.,* 178 N.C. 507; but we are of opinion that the principle is not applicable to the plaintiff's exceptions. The plaintiff accepted and collected both the checks, and signed and delivered the receipt. There is no allegation in the pleadings that the plaintiff

was induced by fraud, imposition, or mistake, to accept the checks or to sign the receipt, and he is therefore bound by their terms. In view of the limitation in the first check of "payment in full to date," and in the receipt of "full settlement of all accounts and for all crops sold up to date," it is not unreasonable to assume that the plaintiff accepted the second check "in full settlement" of all matters in controversy (*Kerr v. Sanders,* 122 N.C. 638), and hence, "will not be permitted to collect the check and repudiate the condition." *Aydlett v. Brown,* 153 N.C. 336; *Cline v. Rudisill,* 126 N.C 524; *Ore Co. v. Powers,* 130 N.C. 153; *Mercer v. Lumber Co.,* 173 N.C. 54.

We have carefully examined all the prayers for instructions, and find them untenable. The granting of some would have required the judge to invade the province of the jury, and the granting of others would have withdrawn the issue or directed an (330) answer.

In his Honor's instructions to the jury we find no reversible error. Several of the exceptions relate to statements as to the contentions of the parties, and the court was not advised at the time of the plaintiff's objection. *S. v. Foster,* 172 N.C. 960; *McMillan v. R. R., ib.,* 853; *S. v. Little,* 174 N.C. 801.

We are precluded from giving to a part of Mr. Bailey's interesting argument the consideration which ordinarily it would merit for the reason that it was based upon a theory distinct from and inconsistent with that upon which the case was tried before the jury. There is a uniform line of decisions which hold that after a party has elected to try his case on one theory in the lower court he may not be permitted to change his attitude with respect thereto on appeal. *Brown v. Chemical Co.,* 165 N.C. 424; *Lindsey v. Mitchell,* 174 N.C. 459; *Barcliff v. R. R.,* 176 N.C. 41; *King v. R. R., ib.,* 306; *Lipsitz v. Smith,* 178 N.C. 100; *Hill v. R. R., ib.,* 612; *Starr v. O'Quinn,* 180 N.C. 94. All the plaintiff's exceptions are disallowed.

No error.

Cited: Lamb v. Boyles, 192 N.C. 543; *S. v. Johnson,* 193 N.C. 704; *S. v. Fleming,* 204 N.C. 41; *Holland v. Burt,* 206 N.C. 214; *Potts v. Ins. Co.,* 206 N.C. 260; *Hargett v. Lee,* 206 N.C. 539; *Wilson v. Hood, Comr.,* 208 N.C. 201; *Pulverizer Co. v. Jennings,* 208 N.C. 236; *Gorham v. Ins. Co.,* 215 N.C. 198; *Switzerland Co. v. Hwy. Com.,* 216 N.C. 452; *Pue v. Hood, Comr.,* 222 N.C. 413; *Fleming v. Light Co.,* 232 N.C. 463; *Dickson v. Coach Co.,* 233 N.C. 173; *Leggett v. College,* 234 N.C. 597; *In re Will of McGowan,* 235

N.C. 409; *Dobias v. White*, 239 N.C. 413; *Crowell v. Air Lines*, 240 N.C. 34; *Allgood v. Trust Co.*, 242 N.C. 516; *Prentzas v. Prentzas*, 260 N.C. 103.

R. S. GRAVES v. REIDSVILLE, ETC., ET AL.

(Filed 2 November, 1921.)

1. Judgments—Process—Service—Record—Void Judgments—Motions to Set Aside—Procedure.

A judgment *in personam* without voluntary appearance or service of process within the jurisdiction is void, and when such facts appear upon inspection of the record it may be treated as a nullity or set aside on motion, and the party charged allowed to make his defense.

2. Same—Facts Proven.

Where a judgment has been entered against a defendant, who has neither been served with summons or waived service thereof, he may, upon the establishing of the fact, have the same set aside on motion in the cause, and his defense considered and passed upon by the court, according to law.

3. Same—Courts—Justices' Courts.

The principle both as to the right and procedure for a defendant against whom service of summons has not been made, or the same waived, to have the judgment set aside applies to the courts of justices of the peace as well as to those of more extensive jurisdiction.

4. Same—Fraud—Jurisdiction.

The ground upon which a judgment may be set aside on defendant's motion in the cause for lack of proper service is not affected by any element of fraud that may have been alleged to have entered therein; and the justice's court, notwithstanding that it has no jurisdiction where fraud enters into the controversy, may entertain a motion in the cause to set aside its own judgment for the lack of the required service of summons, the question of fraud being but an incident and not the ground upon which the motion was made.

5. Same—Statutes—Limitation as to Time of Motion.

Our statutes requiring a motion for a rehearing before a justice of the peace within ten days, etc., C.S. 1500, rule 12, and 1530, allowing fifteen days for appeal from the justice's judgment, etc., apply to final judgments regularly entered, and not to judgments irregularly taken upon defective service, or void for lack of service of summons on the defendant, or other proper process to bring him before the court.

MOTION to set aside three several judgments on a money
(331) demand entered against defendant lodge and others, heard on appeal from a justice's court before *Webb, J.*, at Feb-

ruary Term, 1921, of ROCKINGHAM. The justice having set aside judgment for lack of service, and on allegations tending to establish fraud. On appeal, his Honor being of opinion that the justice was without jurisdiction to entertain the motion for the reason that an issue of fraud was involved, dismissed the proceedings. The ruling of his Honor, and the reason for it, are more fully embodied in the judgment as follows: "The court finds as a fact that there is an issue of fraud arising upon the motion and affidavits in the bringing of said action and obtaining said judgment before the justice of the peace, and that fact appearing to the court, on motion of the plaintiff that the said motion of the defendant to set aside the judgment be dismissed, on the ground that the justice had no power to hear and determine the matter, and that said justice had no power to make his findings of fact and render said judgment as herein set out as to fraud, the court finding as a fact that an issue of fraud arises herein, and the justice had no jurisdiction of that issue.

It is further ordered and adjudged that the finding of fact and judgment of the said justice be overruled, and that the said motion be dismissed, and that the motion of the plaintiff to dismiss is hereby sustained; and that the defendant be taxed with the cost of this proceeding.

Defendant lodge excepted and appealed.

P. W. Glidewell and W. R. Dalton for plaintiff.
J. M. Sharp for defendant.

HOKE, J. It is the accepted principle here and elsewhere that a judgment *in personam* without voluntary ap- (332) pearance or service of process within the jurisdiction is void, and where the fact appears on inspection of the record, such a judgment may be treated as a nullity, or it will be set aside on motion and the party charged allowed to make his defense. And where the lack of service does not so appear, but is established, the party affected may have the same set aside on motion in the cause, that his defense may be considered and passed upon. *Herndon v. Autry,* 181 N.C. 271; *Stocks v. Stocks,* 179 N.C. 285-288; *Johnson, Trustee, v. Whilden,* 171 N.C. 153; *Massie v. Hainey,* 165 N.C. 174; *Flowers v. King,* 145 N.C. 234. The same principle, both as to the right and the procedure, prevails in reference to judgments in a justice's court as well as in courts of more extended jurisdiction. *Herndon v. Autry, supra; Lowman v. Ballard,* 168 N.C. 16; *Ballard v. Lowry,* 163 N.C. 488; *King v. R. R.,* 112 N.C. 318; *Whitehurst v. Transportation Co.,* 109 N.C. 342.

The position is not affected because there may be allegations and evidence of fraud presented. The gravamen of the application is the failure of service of process showing an entire lack of jurisdiction, and the court that has unwittingly countenanced the wrong is charged with the duty and has the power to right it. In such a case the fraud, and the evidence of it, is only an incident. The doctrine that a judgment can only be set aside for fraud by an independent action, of which a justice has no jurisdiction, applies only to final judgments which are otherwise, in all respects, regular, and does not prevail in reference to judgments that are irregular, or which are void for want of jurisdiction by reason of nonservice of process. And so in reference to other principles of law, statutory and otherwise, urged upon our attention in support of his Honor's ruling. In section 1500, rule 12, which provides that a judgment of a justice may be reheard when a party is absent from the trial and such absence is caused by sickness, excusable mistake or neglect of the party, and requiring that such an application be made in 10 days. And section 1530, which provides for an appeal from a justice's judgment on notice given within 10 days, and if on process not personally served allowing 15 days after personal notice of the judgment, they all contemplate and apply to causes of which the court has acquired jurisdiction, either by personal service or by attachment and publication, and do not affect a case like the present, which enables one to obtain relief from a judgment entered against him when the court, for lack of service, was without jurisdiction to make any orders in any way affecting his right of person or property. In *Lowman v. Ballard, supra,* it was held, as stated, "That where a judgment before a justice of the peace is sought to be set aside by the defendant for lack of service of summons, the remedy
(333) is by motion in the cause made before the court which rendered the judgment." And speaking to the question the Court, in the opinion, said: "Both in the Superior and justices' courts the statutory limits as to time within which motions of this character shall be made are cases where the proceedings are in all respects regular, and do not apply in cases where there is defective service of process or an entire absence of it," citing *Massie v. Hainey,* 165 N.C. 174; *McKee v. Angel,* 90 N.C. 60. It may be well to note that if on investigation it should be made to appear that service of process had been made giving the justice jurisdiction of the appellant that would present the case in a different aspect and some of the positions urged for appellee may be made available in his favor.

For the reason stated, the judgment of his Honor will be re-

versed, and the Superior Court will proceed to hear the motion on the affidavits and facts as properly presented.

Reversed.

Cited: Clark v. Hames, 189 N.C. 708; *McLeod v. Pearson,* 208 N.C. 540; *Dunn v. Wilson,* 210 N.C. 494; *Downing v. White,* 211 N.C. 42; *Denton v. Vassiliades,* 212 N.C. 515; *Adams v. Cline,* 218 N.C. 304; *Casey v. Barker,* 219 N.C. 467.

(334)

CITY OF DURHAM v. DURHAM PUBLIC SERVICE COMPANY.

(Filed 2 November, 1921.)

1. **Constitutional Law—Statutes—Legislature—Municipal Corporations—Street Improvements—Abutting Owners—Street Railways.**

Either directly or through its recognized governmental agencies, it is within the legislative authority to impose upon owners whose lands abut upon the streets of an incorporated city or town, an assessment for the change of grade of such street, grading them and like improvements, and the property and franchise of street railways laid along a given street or designated locality within the effects and benefits of the proposed improvements, may lawfully be brought within this principle as abutting owners.

2. **Same—Exemptions—Taxation—Constitutional Law.**

The power to impose assessments upon owners whose lands abut upon the street of a city to be improved, comes within the sovereign right of taxation, and no license, permit, or franchise from the Legislature or a municipal board will be construed to establish an exemption from the proper exercise of this power by future Legislatures, or in derogation of it, unless these bodies are acting clearly within their authority, and the grant itself is in terms so clear and explicit as to be free from substantial doubt. As to whether such powers could be exercised so as to exclude future legislation, *Quære?*

3. **Corporations—Interpretation of Franchise.**

The franchise granted by statute to a public-service corporation is usually prepared by those interested therein, and submitted to the Legislature with a view to obtain the most liberal grant of power obtainable, and such grants should be written in plain language, certain, definite in their nature, containing no ambiguity in their terms; and they are strictly construed against the corporation.

4. **Municipal Corporations—Cities and Towns — Franchise — Street Improvements—Assessments.**

A city ordinance granting a franchise to a street railway to operate upon its streets, requiring that it do certain grading and other things

enumerated in its construction at its own expense, and further states in direct and continuous connection with this subject that "nothing herein contained shall be construed to require said company to pave its road," is held to apply only to conditions then existing, and will not be construed to exempt the corporation from paying its part of future assessments that may be levied upon abutting owners for the paving and improvements of the streets. C.S. 2708.

5. Municipal Corporations—Cities and Towns — Street Improvements — Assessments—Discretion.

The necessity of proposed improvements upon the streets of a city and the apportionment of the assessments among the owners of lands abutting thereon, including street railways, are largely within the discretionary powers of the Legislature, and its subordinate agencies in charge and control thereof.

6. Same—Appeal and Error—Presumptions.

The presumption, on appeal, is against error committed in the Superior Court; and under the circumstances of this case, in which a street railway company attacks the validity of an assessment levied on its property as an abutting owner for street improvements, as being disproportionately large to those levied on other such owners, it is *held* that the evidence is insufficient to overcome the presumption.

7. Municipal Corporations—Cities and Towns — Street Improvements — Street Railways—Value of Franchise.

In making an assessment on the property of a street railway company as an abutting owner on the street improved, not only the value of its tangible property, such as tracks, etc., should be considered, but, also, the estimated value of the company's franchise under which it is operating, and which by fair apportionment should be included in the estimate.

8. Municipal Corporations—Cities and Towns—Street Railways—Assessments—Statutes.

C.S. 2708, specifying that the burden imposed upon a street railway company in assessing its property for street improvements shall not exceed "the space between the tracks, the rails of the track, and eighteen inches in width outside of the tracks," is not violated if including the length of the cross-ties, the statutory limitation of the width has not been exceeded.

9. Same—"Railroad Track."

The term "railroad track" includes both the rails and cross-ties upon which they are placed and extend to the roadbed.

10. Judgments—Street Improvements—Assessments—Payment by Installments—Statutes.

Where the abutting owner of land on the streets has refused to pay the assessments lawfully made on him for street improvements, a judgment allowing him to pay by installments may be entered. C.S. 2617.

APPEAL by defendant from *Devin, J.*, at the Spring Term,
(335) 1921, of DURHAM.

Trial by jury was waived by the parties.

The action is to recover the sum of $102,942.30, assessed against the defendant company for its proportion of the cost of paving the Main Street of said city on which the tracks of defendant, a street railway, are laid. Defendant having refused to make the improvement as required by a city ordinance, the work was done by the city and assessed against the company as the statute provides. There is no claim but that the proceedings were formally correct, but defendant resists recovery on the ground that the company is protected by a clause in the license or permit under which its tracks were laid, and which amounts to a contract on the part of the city that the costs of such an improvement shall not be imposed upon the company. Second, that the width of the improvement is in excess of the amount allowed by the statute.

There was judgment for plaintiff, and the defendant excepted and appealed.

S. C. Chambers and Fuller, Reade & Fuller for plaintiff.
J. S. Manning, W. L. Foushee, and W. J. Brogden for defendant.

HOKE, J. The charter of the Durham Traction Company, under which defendant holds and is operating the street railway (Private Laws 1901, ch. 25, sec. 2), contains the provision, "That said company may construct and operate railway lines upon and along the streets of said city, permission being first had from the board of aldermen," etc. And the ordinance of the city by which the permit or license was given, after conferring the privilege and designating the routes over which the tracks may be laid, etc., is in part as follows:

"As soon as the said tracks are completed and the poles, wires, and appliances are erected and placed, the portions of the streets and avenues that may have been used for these purposes shall be repaired and restored at said company's cost and expense to their former condition so far as they may have been damaged by the placing and erecting of the tracks, poles, wires, and appliances. The said Durham Traction Company, in laying its track upon the route herein described, on, over, and along the streets and avenues, shall follow the grade to be designated by the street commissioner,
and it shall be his duty, upon the application of said Dur- (336)
ham Traction Company, to furnish it with grades. The
said Durham Traction Company, whenever it shall be required so to do, shall cause its roadbed and track to be brought to surface grade at its own expense and costs, but nothing herein contained shall be construed to require said Durham Traction Company to

pave its roadbed, but it shall be required to restore its roadbed to the conditions in which it was at the time of laying of said track: *Provided, however,* that if the city decides to put in or change its sewerage pipes on any of the streets of the said city on which the tracks of said Durham Traction Company may be laid, the said city may require the said traction company to remove and replace, at its own expense, the said tracks, for said purpose, and said city shall incur no liability for any delays or interruptions of the business or traffic of said traction company caused thereby."

And in the act of the Legislature, more directly pertinent, which authorized the imposition of these assessments for local improvements, and in the portion appertaining to street railways, etc., C.S. 2708, it is provided: "That when any such company shall occupy such street or streets under a franchise or contract which otherwise provides such franchise or contract shall not be affected by this section except in so far as may be consistent with the provisions of such franchise or contract." And it is earnestly contended for the appellant that this clause in the ordinance referred to, fully recognized in the legislative proviso, amounts to a contract stipulation protecting the defendant company at all times from any charge for paving the streets, and that the burden here imposed upon it is without warrant of law, but, in our opinion, and on the facts presented, the position may not be sustained.

It is fully established that the Legislature, either directly or through its recognized governmental agencies, may impose assessments for these local improvements. *Raleigh v. Power Co.,* 180 N.C. 234; *Felmet v. Canton,* 177 N.C. 52; *Justice v. Asheville,* 161 N.C. 62; *Tarboro v. Staton,* 156 N.C. 504-509; *Kinston v. Wooten,* 150 N.C. 295; *Asheville v. Trust Co.,* 143 N.C. 360; *Raleigh v. Peace,* 110 N.C. 32; *Milwaukee, etc., R. R. v. State of Wisconsin, etc.,* 252 U.S. 100; *French v. Barber & Co.,* 181 U.S. 324.

And it is very generally held that the property and franchise of street railways laid along a given street or in a designated locality within the effects and benefits of the proposed improvement may be lawfully brought within the principle as abutting owners. *New Bern v. R. R.,* 159 N.C. 542; *Comrs. v. R. R.,* 133 N.C. 216; *Cicero R. R. v. City of Chicago,* 176 Ill. 501.

(337) The power to impose these assessments for local improvements is properly referred to the sovereign power of taxation, and it is the accepted principle of interpretation that no license, permit, or franchise from a municipal board or from the Legislature itself will be construed as establishing an exemption from the proper exercise of this power, or in derogation of it, unless

these bodies are acting clearly within their authority and the grant itself is in terms so explicit as to be free from any substantial doubt. *R. R. v. Alsbrook,* 110 N.C. 137, affirmed on writ of error in 146 U.S. 279; *Cleveland Electric R. R. v. City of Cleveland,* 204 U.S. 116; *Lincoln Street Railway v. City of Lincoln,* 61 Neb. 109; *Sioux City Street Railway v. Sioux City,* 78 Iowa, affirmed on writ of error, 138 U.S. 98; *Railway Co. v. Philadelphia,* 101 U.S. 528.

In *Alsbrook's* case it was held: "The power of taxation being essential to the life of Government, exemptions therefrom are regarded as in derogation of sovereign authority and common right, and will never be presumed.

"2. The grant of an exemption from taxation must be expressly by words too plain to be mistaken. If a doubt arise as to the intent of the Legislature, the doubt must be resolved in favor of the State."

And in *Cleveland v. Electric Railway Co.,* 204 U.S.: Grants of franchises are usually prepared by those interested in them and submitted to the Legislature with a view to obtain the most liberal grant obtainable, and for this and other reasons such grants should be in plain language, certain, definite in their nature, and containing no ambiguity in their terms, and should be strictly construed against the grantee.

Under a proper application of these decisions, and the principles they approve and illustrate, there is nothing in the ordinance that contains the exemptions contended for by the company. The terms relied upon for the purpose appear in the second section of the ordinance in the immediate connection with the provision, "The said Durham Traction Company, wherever it shall be required to do so, shall cause its roadbed and track to be brought to surface grade at its own expense and cost, but nothing herein contained shall be construed to require said Durham Traction Company to pave its road, but it shall be required to restore its roadbed to the conditions in which it was at the time of laying the track," etc. The ordinance is dealing, and intends to deal, only with the things there required and under conditions then existing. There is nothing that purports to affect the future, nor which could prevent the city government, under more advanced conditions, in the exercise of the powers conferred upon it for the public good, from enacting ordinances that its streets be paved, and that this railway, as an abutting owner, should bear its proper proportion of the cost. Several of the authorities already referred to are in direct approval of the (338) position. *New Bern v. R. R.,* 159 N.C. 542; *Sioux City Railway v. Sioux City,* 138 U.S. 98; *Railway Co. v. Philadelphia,* 101 U.S. 528, and numerous others could be cited.

We are confirmed in this view, if confirmation were needed, by the fact that there is grave doubt if either Legislature or city government, in abdication of the police powers conferred upon them for the public good, could enter into a valid contract binding on their successors that never under any circumstances and regardless of changing conditions could any future city government order that its streets be paved and the railway company, as abutting owner, bear its proportion of the costs. *Powell v. R. R.*, 178 N.C. 243; *R. R. v. Goldsboro*, 155 N.C. 356, affirmed on writ of error, 232 U.S. 548. In case of ambiguity permitting construction, the courts will lean against an interpretation that threatens the constitutionality of a statute. Black's Interpretation of Laws (2 ed.), p. 110.

It is further insisted for the appellant that the assessment is invalid because the same is excessive in amount and discriminative as between this company and other abutting owners, but in our opinion the facts in evidence do not support the objection. It is fully established that in the imposition of these assessments, both the necessity of the proposed improvement and its apportionment are very largely in the discretion of the Legislature, and its subordinate agencies in charge and control of the matter.

Speaking to the question in *Felmet v. Canton, supra,* the Court held: "The authority conferred by statute on municipal corporations to assess lands abutting upon the streets for public-local purposes comes within the power of taxation, and is largely a matter of legislative discretion, usually held to be conclusive as to the necessity of the improvement, and in respect to the apportionment and the amount only becomes a judicial question in cases of palpable and gross abuse." *Tarboro v. Staton*, 156 N.C. 509; *Kinston v. Wooten*, 150 N.C. 295, and authority generally on the subject is to the same effect.

True, the Court finds that the value of the property on this main street is only $100,000, but this is the objective or tangible property, constituting the 2.02 miles of trackage on that street, and contains no estimate of the value of the company's franchise under which it is operating, and which, by fair apportionment, must be included in the estimate. The only data presented on that subject is that the net earnings of the company for the year ending 31 December, 1920, was $147,000 from this and other activities under the franchise.

(339) There is a further finding to the effect that for the year ending 31 May, 1921, the operation of defendant's railway showed a loss of $17,388.73. Whether this results by reason of exceptional costs and charges accruing during that period does not definitely appear, but there is a presumption against error

and under the principles referred to as controlling and approved in the cases cited, the facts presented are entirely insufficient to justify the Court in upsetting the action of the municipal authorities having charge of the assessment, and this exception must be overruled.

Again appellant objects, contending that the width of the pavement charged against them exceeds the amount allowed by the statute under which the city government proceeded, the limitation being that the burden imposed shall not exceed "the space between the tracks, the rails of the tracks, and eighteen inches in width outside of the tracks of such company." C.S. 2708. The Court finds that the width of assessment where the track is single is eight feet and the crossties of company are seven feet and ten inches, so that if the language and meaning of the statute, "eighteen inches outside of the tracks of the company," by correct interpretation include the rails and the crossties, the width of the paving imposed upon the company is well within the statutory provision. The term "railroad tracks" in several dictionaries is defined to include both the rails and the crossties upon which they are placed, and to extend even to the roadbed. This definition has been approved in authoritative cases dealing with the subject. *Bird v. Common Council,* 148 Mich. 71; *Gates v. Chicago R. R.,* 82 Iowa 518, and in cases of this character there is every reason to include the crossties as coming within the meaning of the term.

The form of the judgment allowing payment by installments is expressly provided for in the statute, C.S. 2716.

On careful consideration, we find no reversible error, and the judgment of the Superior Court is

Affirmed.

Cited: Kinston v. R. R., 183 N.C. 18; *Tarboro v. Forbes,* 185 N.C. 62; *Durham v. R. R.,* 185 N.C. 245; *Power Co. v. Elizabeth City,* 188 N.C. 288; *Raleigh v. Bank,* 223 N.C. 298.

ABE LEFKOWITZ v. MILTON SILVER ET AL.

(Filed 2 November, 1921.)

1. Trusts—Parol Trusts—Statute of Frauds.

A parol trust may be established against the one holding the legal title, our statute not having enacted and being silent with regard to the seventh section of 29 Charles II., requiring that "all declarations or creation of trusts or confidences in any lands, etc., shall be manifested and proved by some writing signed by the party," etc.

2. Same—Evidence—Legal Title.

Where one of the parties to a parol agreement, acting upon the confidence he placed in another has orally agreed with him to purchase certain lands, to be held by them both jointly or in common, through their agent, chosen by the former, if it could be done at a price not exceeding a certain sum, and that other, acting independently and secretly, has fraudulently acquired the title through another source at the contemplated price, pending these negotiations, and has, himself, paid the purchase money, these facts may be shown by parol evidence, and engraft upon the legal title the trust that the owner hold it upon the terms of the parol agreement pending at the time of its acquisition.

3. Same—Ex Maleficio—Fraud—Intent—Contracts.

It is not required to engraft a parol trust *ex maleficio* upon a legal title held by another, that a consideration be shown, for this is done by the law itself to prevent the holder of the legal title acquired by his own fraud or wrong from taking advantage of his unconscionable act.

4. Trusts—Ex Maleficio—Evidence—Deeds and Conveyances — Quantum of Proof—Questions for Jury—Instructions—Trials.

In order to engraft an ordinary parol trust, or a trust *ex maleficio* by parol, upon the legal title to lands, it must be established by strong, cogent, and convincing proof, which is to be determined by the jury upon the evidence under a proper instruction from the court.

APPEAL by defendants from *Webb, J.*, at the May Term,
(340) 1921, of FORSYTH.

This action, in the nature of a suit in equity, was brought by the plaintiff to set up a parol trust in an undivided one-half of the tract of land described in the pleadings, and in order to pass upon the motion of the defendants to nonsuit the plaintiff, it will be advisable to state the issues and the contentions of the parties, which will be done almost in their own language, and, at least, substantially so. There was evidence, we think, to support the respective claims of the parties. The verdict was as follows:

"1. Did the defendant, M. Silver, verbally agree with the plaintiff that they would purchase and hold jointly the premises described in the complaint at the price of $40,000? Answer: 'Yes.'

"2. Did the plaintiff Lefkowitz, by any words or act on his part, or failure on his part to comply with the terms of his contract, waive or abandon his rights under the contract, if you find there was such a contract? Answer: 'No.'

"3. If so, did the defendant, M. Silver, in violation of that agreement, purchase said premises and take title to himself and to his co-defendant? Answer: 'Yes.'

"4. Was the plaintiff ready, able, and willing to pay his part of the purchase price? Answer: 'Yes.'

"5. Did the plaintiff demand of the defendant, M.
(341) Silver, that he convey, or cause to be conveyed to him,

the one-half undivided interest in said premises? Answer: 'Yes.'

"6. Did the defendant, M. Silver, acquire, and does he now hold title to one-half undivided interest in the premises described in the complaint, as a trustee for plaintiff, as alleged in the complaint? Answer: 'Yes.' (the court answered 'Yes')."

1. Plaintiff contended that the verdict of the jury establishes that the plaintiff and the defendants verbally agreed that they would purchase and hold jointly the premises described in the complaint at the price of $40,000; that the plaintiff did not waive or abandon his rights under that agreement by any words or acts on his part, or by his failure to comply with the terms of the contract; that the defendant, in violation of the agreement, purchased the premises, took title to himself and to his codefendant; that the plaintiff made demand on the defendant to convey to him, in accordance with the original agreement, a one-half undivided interest in the premises; and that the plaintiff was ready, able, and willing at all times to pay his part of the purchase price. Upon the foregoing findings of fact by the jury, the court, as a matter of law, by answering the sixth issue, adjudged that the defendant acquired and held title to a one-half undivided interest in the premises described in the complaint as a trustee for plaintiff. In support of the allegations of the complaint, and as a basis of the foregoing findings of fact by the jury, the plaintiff offered evidence showing that the defendant, a resident of High Point, came to the plaintiff's place of business in Winston-Salem, seeking a business location in that city. After discussing the matter generally, and in answer to defendant's inquiry as to whether the plaintiff knew of a piece of property in Winston-Salem that could be bought, the plaintiff told the defendant that he thought the property described in the complaint could be bought at $40,000. As a result of this conversation, the defendant proposed that they buy it together — the property belonging to Mr. Harris, of Baltimore. Whereupon, the plaintiff and defendant went to the office of Mr. Fletcher and employed him to negotiate the purchase with Mr. Harris. This visit to Mr. Fletcher's office was on 18 September, and that afternoon Fletcher called in Mr. Hurdle, of the Hurdle Loan & Insurance Company, and in the presence of Mr. Hurdle, Mr. Fletcher dictated a letter to Mr. Harris, which will be found in the record, and had Mr. Hurdle to sign it. A reply to this letter was received from Mr. Harris in two or three days, which was shown to Fletcher and by him communicated to Lefkowitz. Another letter was written under similar conditions on 22 September, and Harris' reply to that letter was shown to Fletcher.

(342) While these negotiations were going on, the defendant, through his brother, who was in Baltimore, opened up direct negotiations with Harris, and on 22 September, 1919, entered into a contract of purchase for the land in behalf of himself and his mother, which contract of purchase was later followed by a deed from Harris. Claiming that under the circumstances the defendant could not, without a breach of confidence and his agreement with the plaintiff, purchase the property for himself, plaintiff brought this suit, seeking to have the defendant declared a trustee to the extent of a one-half undivided interest and a conveyance from the defendant to the plaintiff for that interest in the land. Silver came to Lefkowitz seeking information as to where he could buy a store in Winston-Salem. Lefkowitz informed him that he knew of such a store, and that he desired to become associated with Silver in his purchase. Upon Silver consenting to this, Lefkowitz disclosed to him the property in question. It was agreed that if the property could be bought for $40,000, or less, that a *joint* purchase of it should be made. The parties went to Mr. Fletcher and arranged with him to negotiate with the owner for the property upon the terms just stated. While these negotiations were under way, Silver buys the property for himself. Silver secured the information which enabled him to make the purchase by agreeing with Lefkowitz that he should become a joint owner.

2. The defendants' version of the case was, and they so contend, that the defendant Silver was a resident of High Point; he called on the plaintiff Lefkowitz in Winston-Salem the latter part of August, 1919, and asked him if he knew of a store for rent. The plaintiff suggested renting the Winston Clothing Company's building, but the rent the defendant would have had to pay was considered too high. About the first week in September following the defendant returned to Winston-Salem and again saw the plaintiff; he suggested to plaintiff that the best thing to do would be to buy the Winston Clothing Company's place, but that he could not do so alone, and suggested that they buy it together. Defendant asked plaintiff where they could get information about the building, and plaintiff suggested going to see Mr. J. H. Fletcher. They went together to see Mr. Fletcher and secured from him the name of the owner, the size of the lot, and of the building, and such other information as Mr. Fletcher could give. Upon leaving Mr. Fletcher's office, defendant asked plaintiff if he meant business, and if he did, that each would put up $500 to pay cost of negotiating the trade, and they would get some one to go to Baltimore to see if they could buy the property. The plaintiff replied, according to the contention of the defendant, that he was not

able to buy the building, and the plaintiff and defendant had no further transactions in regard to the purchase. Two days later the defendant's brother went to a hospital at Balti- (343) more, and the defendant had him to get in touch with the owner. After several interchanges of messages, terms were agreed to, and on 22 September, 1919, the defendant went to Baltimore and bought the building for himself and mother at the price of $40,000. But he concealed the fact from Lefkowitz.

The plaintiff contends, however, that no suggestion was made to him by the defendant to put up any money to negotiate the trade with the owner, and that he did not waive any of his rights to become the purchaser with the plaintiff under the original agreement.

The court charged the jury as follows:

"The first issue submitted for your consideration is this, Did the defendant, M. Silver, verbally agree with the plaintiff that they could purchase and hold jointly the premises described in the complaint at the price of $40,000?

"How do you find that issue to be? The burden of that issue is on the plaintiff to satisfy you, by the greater weight of the evidence or by the preponderance of the evidence, that such an agreement was made by and between the plaintiff and defendant, and if the plaintiff has satisfied you by the greater weight of the evidence that such an agreement was made by and between the plaintiff and defendant, that is, that the plaintiff and defendant agreed between themselves that they would purchase the property in controversy, that they should be joint owners of it, that each one was to pay half of the purchase price, and it was agreed between them that the deed should be made to them as tenants in common, made to both of them — if plaintiff has satisfied you by the greater weight of the evidence that such a contract and agreement was made, though verbally, it would be your duty to answer the first issue 'Yes.'"

Judgment for plaintiff, and defendants appealed.

Hastings & Whicker, Holton & Holton, and Manly, Hendren & Womble for plaintiff.

Carter Dalton, Swink & Hutchins, and O. O. Efird for defendants.

WALKER, J., after stating the material part of the case: The substance of the plaintiff's contention is that there was an agreement between him and Silver that they should buy the land together for their joint benefit, each contributing one-half of the purchase money, the deed for the land to be made to them as tenants

in common, or each to own an undivided one-half thereof, and that the defendant, Milton Silver, thwarted their plan, and the consummation of their purpose, while Fletcher, as their agent, was negotiating for the purchase, by circumventing Fletcher and the
(344) plaintiff and buying the property for himself, taking the deed from Harris to himself and his mother in equal moities. Silver did not notify plaintiff of what he intended to do, and afterwards did not, but acted in that respect secretly and clandestinely, with a view of concealing his actions and enabling him thereby to secure the legal title before plaintiff was aware of what he was doing or had done. If the plaintiff can establish these facts, and there are other pertinent ones of which there was evidence, he is entitled to go to the jury upon the allegation of his complaint as to the trust. Whether there was such fraud and circumvention, or evil practice, on the part of Silver as would constitute him a trustee *ex maleficio* as to an undivided one-half of the land for the plaintiff, or not, we will discuss later in this opinion, as there is evidence of a parol trust created before the transmutation of the possession, or the conveyance of the legal title to Silver and his mother, which will carry the case to the jury. *Sykes v. Boone,* 132 N.C. 199-202. Why do not the facts thus appearing and found create a parol trust in favor of the plaintiff which is enforceable in a court of equity? We think they did. It is familiar learning that a trust may be created in any one of four modes:

1. By transmission of the legal estate, when a simple declaration will raise the use or trust.

2. By a contract based upon valuable consideration, to stand seized to the use or in trust for another.

3. By covenant to stand seized to the use of or in trust for another upon good consideration.

4. When the court, by its decree, converts a party into a trustee on the ground of fraud. *Wood v. Cherry,* 73 N.C. 110.

With reference to this classification by Chief Justice Pearson, we held in *Sykes v. Boone, supra:* "The trust in this case comes within the first class, as a declaration of trust was made at the time of the execution of the deed and the conveyance of the legal estate. A trust when so declared is not within the statute of frauds. Nor does it require a consideration to support it. If the declaration is made at or before the legal estate passes, it will be valid even in favor of a mere volunteer," citing *Blackburn v. Blackburn,* 109 N.C. 488; *Pittman v. Pittman,* 107 N.C. 159.

In the *Blackburn* case, *supra,* it was held:

1. The grantor, before the delivery of a deed which he had

signed conveying a tract of land to another, made, under seal, this endorsement: "I (the said E. B.) do hereby certify that S. B., a daughter of said E. B., doth hold a lifetime possession in the said deed": *Held*, to amount to a declaration of a trust in favor of the said S. B., and that the grantee took the title subject thereto.

2. An oral declaration of a trust, made contemporaneously with the transmission of the title, may be established, even without a consideration. No particular form of words is necessary. (345)

Justice Shepherd says substantially, in the opinion and referring to *Pittman v. Pittman, supra*, as deciding the same thing: We think, however (without passing upon the question whether the language used can be construed into a covenant to stand seized to uses), that the judgment of his Honor may be sustained on the ground that the endorsement, made before or at the time of the delivery, amounted to a declaration of trust, to wit, that the grantee should hold the land for the use of the said Sarah for life. Even without consideration, an oral declaration of trust in favor of a third person, made contemporaneously with the transmission of the legal title, will, when established by competent testimony, be recognized and enforced in a court of equity. *Pittman v. Pittman*, 107 N.C. 159. If this is so, *a fortiori* will the Court give effect to such a contemporaneous declaration when made in writing under seal and for a good consideration. No particular form of words is necessary to establish such a trust. The intent is what the courts look to, citing Fonblanque on Equity, 36, note 3; 3 Vesey, Jr., 9; Bispham on Equity, 98. He then adds: The language in our case is very similar to that used in *Fisher v. Fisher*, 10 Johns. 494, which was held to be sufficient, and, indeed, upon looking over the many cases in the reports, there can be no doubt upon the question. The grantee, then, taking the title accompanied with this contemporaneous declaration, must be declared seized of the land in trust for Sarah Blackburn for the term of her natural life. It will be observed that the very able justice (who was profoundly learned, both in the principles of equity as well as in those of the common law) states that an oral declaration, under our statute of frauds, which does not include trusts, as does the English statute, is just as valid and enforceable as one that is written, so that those cases are directly applicable here, and they may also be relied on as meeting fully another objection of the defendant that there was no consideration for the agreement upon which the trust is founded.

Justice Shepherd, who also spoke for the Court in *Pittman v. Pittman, supra*, said in substance in that well-considered case: Trusts

and uses were raised in the same manner, and if a feoffment was made without consideration, a use resulted to the feoffer, unless the use or trust was declared at the time of the conveyance. Now, it must be observed, that no consideration was necessary to a feoffment. The conveyance itself raised the use and separated it from the legal estate. The use so raised would, however, as we have said, in the absence of a consideration, result to the feoffer, unless declared at or before the time of the feoffment, and this
(346) declaration might be voluntarily made by parol, either in favor of the feoffer or of a third person. But there was a great difference in this respect between a conveyance which operated by transmuting the possession, and the covenant to stand seized, which had no operation but by the creation of a new use; and, as this was raised by equity, and equity never acts without a consideration, one was always necessary to the transfer of the interest by this conveyance; whereas, in the case of a feoffment or fine, the use arises upon the conveyance itself. . . . It seems, therefore, that at common law, only the solemn conveyance by livery or record could raise the use by its own virtue and dispense with the deed declaring it, as well as the consideration for raising it. Roberts on Fraud 92. It appears, then, that at common law no use or trust can be raised in lands without a consideration, except in the single instance of a conveyance operating by transmutation of possession, the character of the conveyance alone being sufficient to raise the use and to dispense with the necessity for a consideration. There are numerous cases approving and affirming those we have cited.

The same justice, in the *Pittman* case, considers very fully the effect upon parol trusts in this State produced by our failure or refusal to adopt the seventh section of the English Statute of Frauds, and he argues on the assumption that the writings in that case contained no evidence of a declaration of trust contemporaneous with the transmission of the legal title, *or of any other antecedent obligation.* He then states that we are confronted with the interesting question, whether the legal owner of land can be divested of his property by a simple voluntary parol declaration that he holds it in trust for another (which, of course, means after the legal title has vested in him). The seventh section of the statute of 29 Charles II, requiring that "all declarations or creations of trusts or confidence of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party," etc., has been very generally adopted in the United States, and the doctrine of the declaration of express trusts, as laid down by the various text-writers, is based almost entirely upon decisions of the courts

since the enactment of the said statute. As the above provision is not embraced in our statute of frauds it, therefore, becomes necessary that we should inquire into the manner in which express voluntary trusts in land could be created at common law. *Foy v. Foy*, 3 N.C. 131. Doubts were at one time entertained whether trusts could be created by parol, but it is well established that this could be done at common law, both as to real and personal property. A trust in realty, like a use, was, in technical language, averable, that is, could be created by word of mouth. The better opinion is, however, that this is only true of those cases in which the legal estate could be created by feoffment, where, of course, (347) no writing was necessary. But where a deed was requisite for the conveyance of the legal estate (as in covenant to stand seized to uses), these uses and trusts were not averable, but could be created only in the same manner as legal estates. Bispham's Pr. of Equity 95; Hill on Trustees 86; Gilbert on Uses 270. We must not overlook the fact that now, and for a long time past, registration operates in lieu of livery of seizin. Pell's Revisal, sec. 979, notes and cases.

The cases we have cited (*Sykes v. Boon* and others), as to parol trusts, have since been specially approved by this Court. *Avery v. Stewart*, 136 N.C. 426; *Gaylord v. Gaylord*, 150 N.C. 222; *Harrell v. Hagan, ib.*, 242, and other cases, some of them being cited in *Avery v. Stewart, supra*, 439-441. See, also, 39 Cyc. 82-85, and notes where the cases in this and other jurisdictions are collected. Justice Avery said in *Cobb v. Edwards*, 117 N.C. 245, at p. 251: "It is not material whether the proof in this case does or does not come up to the strict requirement in that class of cases (just considered), since a different rule is applicable where the plaintiff simply seeks by evidence of a previous or contemporaneous agreement to engraft upon the deed of a purchaser at a judicial sale a trust to hold the legal estate for others who are to repay the purchase money advanced by him. In such cases, the proof of an agreement existing at the time of the sale, that the purchaser was to buy for the benefit of the claimant must be strong, clear and convincing, and must be supported by evidence equally strong of facts or circumstances inconsistent with a purpose on the part of the purchaser to hold the land for himself, but the latter purpose may be manifested by conduct subsequent to the sale. As to the quantum of proof required, the rule is the same as where the equity grows out of furnishing the purchase money to another who takes title to himself, though, as already stated (and as this forms a resulting trust), no agreement need be shown in the latter class of cases," citing *Williams v.*

Hodges, 95 N.C. 32; *Ferguson v. Haas,* 64 N.C. 772; *Link v. Link,* 90 N.C. 235; *Mulholland v. York,* 82 N.C. 510; *Vestal v. Sloan,* 76 N.C. 127; *Vannoy v. Martin,* 41 N.C. 169. At page 253 it is added: "The judge has no more right, when the testimony, if believed, is sufficient to be submitted to the jury, to determine in the trial of civil actions what is strong, clear and convincing proof than he has in the trial of a criminal action to express an opinion as to whether guilt has been shown beyond a reasonable doubt." The rule as to strong, cogent and convincing evidence must be given to the jury, but they must say at least whether it is such.

But whether we should hold this to be a parol trust or a trust *ex maleficio* (that is, one growing out of fraud, misdoing or tort), which perhaps it more strictly is, the rule of evidence and
(348) intensity of proof is the same, because in both cases there is parol evidence, or may be. The latter kind of trust, called a trust *ex maleficio,* or *ex delicto,* is also known as a constructive trust, and arises entirely by operation of law without reference to any actual or supposed intention of creating a trust, and often directly contrary to such intention. It is entirely in *invitum,* and is forced upon the conscience of the malefactor, who will be declared a trustee because of his wrong or fraud, for the purpose of working out right and justice, or frustrating the fraud. It is otherwise defined as a trust not created by any words either expressly or impliedly evincing a direct intention to raise a trust, but by the construction of equity in order to satisfy the demands of justice; or a trust raised by construction of law, or arising by operation of law, as distinguished from an express trust; or one that arises when a person clothed with some fiduciary character, by fraud or otherwise, gains some advantage to himself; or is such as is raised by equity in respect to property which has been acquired by fraud, or where, though acquired originally without fraud, it is against equity that it should be retained by him who holds the legal title. 39 Cyc. 27, and notes 86 and 87.

Whether a parol, express, resulting or constructive trust, it is established by the same kind of evidence, not in the deed, but extraneous thereto, or dehors the deed, as we say. But the result is the same. It is not an attempt to set aside the deed. That relief is not prayed, but plaintiff asks that defendant be declared to hold the legal title he has acquired by his fraud "in trust for the use and benefit of the plaintiff, as to one-half interest in the said property, and that he be ordered to convey one-half fee simple interest in the same to him." If he had merely asked that the deed be set aside for fraud practiced upon him, the case of *Harding v. Long,* 103 N.C. 1,

would apply, and the evidence of plaintiff would be required to preponderate only. Justice Avery said in the case of *Cobb v. Edwards, supra,* 253: "If, as counsel insisted, there is any language used in the *obiter* statement of the rule in *Harding v. Long, supra,* or in *Ely v. Early,* 94 N.C. 1, repugnant to what we have said, such expressions must be considered so far modified as to bring those cases into perfect harmony with the law as it has been formulated in this case." Let us apply these principles.

The plaintiff contends that Silver holds the legal estate in trust upon these grounds, because of his wrong or fraud in betraying the plaintiff's confidence in him:

"1. There was an express agreement that the property should be purchased and held jointly.

"2. Silver obtained the information that enabled him to make the purchase as a result of the confidence Lef- (349) kowitz was induced to repose in him because of Silver's promise that the purchase should be joint.

"3. Silver was the agent of Lefkowitz to buy one-half interest," citing *Allen v. Gooding,* 173 N.C. 93; *Russell v. Wade,* 146 N.C. 116. See, also, 26 R.C.L. 1233 *et seq.; Wilson v. Jones,* 176 N.C. 205; *Brogden v. Gibson,* 165 N.C. 16. These positions may be well founded, and two of them perhaps are.

But we think the judge committed an error as to the intensity of the proof when he charged that a mere preponderance was sufficient to set up a parol trust, as the evidence must be strong, cogent and convincing. This has been thoroughly and finally established by our cases. *Cobb v. Edwards, supra,* and cases cited in the note to the annotated edition.

Justice Allen said in *Taylor v. Wahab,* 154 N.C. 219, at pp. 223 and 224: "We also think there was no error in the charge of his Honor, and that the rule laid down for the guidance of the jury, as stated in the part of the charge quoted, follows the decisions of this Court. *McNair v. Pope,* 100 N.C. 408; *Hamilton v. Buchanan,* 112 N.C. 471; *Kelly v. McNeill,* 118 N.C. 353; *Wilson v. Brown,* 134 N.C. 405. It is well settled in this State that where competent evidence is introduced to establish a parol trust, it is the duty of the judge to submit it to the jury, and it is for the jury to say whether it is 'clear, strong, cogent and convincing.' *Cobb v. Edwards, supra; Lehew v. Hewitt,* 130 N.C. 22; *Avery v. Stewart,* 136 N.C. 430. The enforcement of parol trusts is recognized in this State, but it is a jurisdiction in the exercise of which there is much danger. As said by Pearson, J., in *Kelly v. Bryan,* 41 N.C. 286: 'Courts of equity enforce parol trusts to prevent fraud, but the jurisdiction is exer-

cised sparingly, and many think with very doubtful policy.' The Court in *Avery v. Stewart, supra,* while discussing the rule as to the intensity of the proof required, says: 'The security of titles required the adoption of this rule.' As a further safeguard, the law clothes the presiding judge with the power to supervise the verdict and to set it aside in proper cases. The doctrine is fully and clearly discussed in the case of *Avery v. Stewart,* cited above, and in the case of *Sykes v. Boone,* 132 N.C. 199, both of which are conclusively against the plaintiff." And Cyc., Vol. 39, at pp. 84-85, thus summarizes the doctrine here and elsewhere: "A higher degree of proof than a mere preponderance of evidence is required to establish an express trust. Some of the cases go to the extent of requiring the evidence to be so conclusive as to exclude all reasonable doubt; but the most common requirement is that the evidence be clear, explicit and convincing, not only as to th existence of the trust, but as to its terms and conditions. The rule requiring the evidence to be
(350) clear and satisfactory is especially applicable where the trust is attempted to be proved by parol evidence, as well as where it is sought to convert into a trustee a person holding the legal title to property ostensibly as absolute owner," because according to this view, it tends to alter, add to or vary the deed. *Lehew v. Hewett,* 138 N.C. 6. where the rule of evidence is stated to be that the trust must be shown by proof strong, cogent and convincing, but after giving this rule to the jury, they must decide whether it measures up to the standard required, just as they decide in ordinary civil cases whether the proof of plaintiff preponderates, or in criminal cases whether the State has established the crime beyond a reasonable doubt. There are very many cases of this character, but we will cite only two more of them, *Lamm v. Lamm,* 163 N.C. 71, and *Boone v. Lee,* 175 N.C. 384, as the learned counsel for plaintiff supposed there was some inconsistency between the last two cases, but we are of the opinion that there is absolutely none, and that the supposition that there is must be more imaginary than real. The *Lamm* case was cited in the *Boone* case, as directly sustaining the rule as we have herein stated it to be, and in the very opening of the opinion, the learned judge who delivered it so states the distinction most clearly between the two classes of cases just as it is stated in the *Boone* case, and in all those cited by us, without any variableness or shadow of turning. Both the cases are in perfect line with our former decisions, without the least deviation therefrom.

The error of the court as to the intensity of the proof entitles the defendant to another trial, and it is so ordered.

New trial.

Cited: *Bank v. Scott,* 184 N.C. 315; *Sexton v. Farrington,* 185 N.C. 341; *Cunningham v. Long,* 186 N.C. 532; *Pridgen v. Pridgen,* 190 N.C. 106; *Tire Co. v. Lester,* 190 N.C. 417; *Reynolds v. Morton,* 205 N.C. 493; *Furniture Co. v. Cole,* 207 N.C. 844; *Wolfe v. Land Co.,* 219 N.C. 316; *Williams v. McLean,* 220 N.C. 505; *Embler v. Embler,* 224 N.C. 816; *Atkinson v. Atkinson,* 225 N.C. 125; *McCorkle v. Beatty,* 225 N.C. 181; *Strickland v. Bingham,* 227 N.C. 224; *Akin v. Bank,* 228 N.C. 456; *Walker v. Walker,* 231 N.C. 56; *Bowen v. Darden,* 241 N.C. 14.

(351, 352)

PERCY WELLS, S. MITCHELL, AND JAMES HOWARD, v. W. B. CRUMPLER ET AL.

(Filed 2 November, 1921.)

1. **Contracts—Deeds and Conveyances — Trusts — Purchase of Land for Resale.**

Where one of the parties for the purchase of lands to resell and divide the profits or share in the loss, has, by written agreement, taken title in himself, he holds it in trust for himself and the other party.

2. **Same—Cestui Que Trust—Waiver.**

Where the *cestui que trust,* in the purchase of lands for a resale and division of profits or loss, has failed to contribute his agreed part of the purchase money, which the holder of the legal title has been forced to assume and pay in whole, the former may waive all of his rights under the trust by his subsequent declarations and acts, which may be shown by parol, and estop him in an action to recover his alleged share of the profits.

3. **Same—Equity—Matters in Pais—Estoppel—Parol Evidence—Statute of Frauds.**

Under a written contract for the purchase of lands for the purpose of resale and a division of the profits, etc., one of the parties took title to himself, and was eventually forced to pay the full cash consideration, giving a mortgage to secure the balance due, and became the purchaser at the mortgage sale; and, to secure payment, gave a mortgage on his own separate realty. Thereafter the *cestui que trust* declared he was not further interested, and refused to pay his share of purchase money and expenses, and agreed that the purchaser should have all of the profits of the resale. In an action by him to recover his half of the profits: *Held,* he was estopped by his conduct and other matter *in pais,* which could be shown by parol evidence, and the statute of frauds had no application: *Held, also,* that there was a sufficient consideration to support the transaction.

4. Same—Deeds and Conveyances—Powers of Sale.

A written contract between the parties to purchase certain lands for resale and share in profits or loss, stating that F. should hold in trust for K. one-half interest therein; that the property should be purchased jointly at a certain price, and F. and K. should pay a certain part each, and F. mortgaged the land for the balance of the purchase price: *Held*, a power in F. to sell the land was at least implied by the terms of the writing: or, if otherwise, such implication could be shown by parol evidence to have arisen from such conduct of K. as created an estoppel upon him to deny it.

5. Same—Consent of Cestui Que Trust.

Where, under a written agreement, the parties have purchased lands with title taken in one of them, for the purpose of resale and a division of the profits or the sharing of the loss, the one holding the legal title does so for the use of them both, and creates a trust in himself, coupled with an interest, and not a mere naked legal title, nor one which would require the deed to be joined in by the *cestui que trust* to convey the legal title; and though it may not be done by the trustee without the latter's consent, this may be implied by his declarations and conduct, which may be shown by parol evidence thereof.

6. Trusts—Powers of Sale—Duty of Trustee.

Lands may be conveyed to a trustee in trust for sale, and it is not only his right, but his duty to sell when the terms of the power authorize and require it to be done.

7. Same—Deeds and Conveyances—Consent of Cestui Que Trust.

Where a trustee for the sale of lands coupled with an interest has not executed the power in conformity with its written terms, it is a valid conveyance of the title when the *cestui que trust*, the only other person having an interest, concurs with him in approving it.

8. Same—Failure of Consideration—Mortgages—Foreclosure—Trustee a Purchaser.

Where there is a trust created for the sale of lands coupled with an interest in the trustee, and the consideration for the interest of the *cestui que trust* has not been paid by him according to his agreement, or there is a complete failure thereof, and the land, being under a mortgage made by the trustee, has been sold at a foreclosure sale and purchased by the trustee, the failure or refusal of the *cestui que trust* to help carry the property longer, and his declaration that the trustee sell the property so acquired by him and have the whole profit therefrom, is an abandonment of his right thereto, based upon a sufficient consideration.

9. Trusts—Interests—Purchase of Lands—Prospective Profits—Evidence—Appeal and Error—Objections and Exceptions.

Where the land subject to trust to be resold for a division of the profits and the loss between the parties, has been mortgaged by the trustee, who also has an interest therein, to secure the balance of the purchase money, and the *cestui que trust* has failed to contribute his part of the cash payment and has obliged the trustee, who has paid his part, to assume all of the burden of the mortgage debt, and at the foreclosure sale the latter has become the purchaser: *Held*, exceptions to parol evidence, tending to show these facts, are untenable.

10. Same—Verdict.

Where the written contract to buy land for the purposes of a division of profits at a resale or the sharing of loss, provides that the title shall be in one of the parties, who thereafter buys at a foreclosure sale of a mortgage which he had given to secure the balance of the purchase price, and where, upon the evidence and proper rulings of law, the jury has found that there were no profits after all expenses had been paid by the trustee, it concludes the *cestui que trust* in his action to recover his alleged part of the profits, if any, he was to have received under the terms of the agreement.

11. Instructions—Construed as a Whole—Trusts — Trustee — Deeds and Conveyances—Parol Evidence—Statute of Frauds.

The words of a deed or other written instrument should be so construed in their relation to each other as to reasonably give effect to the intention of the parties to be thus ascertained, requiring in certain instances that it be taken more strongly against the grantor; and where an instrument, so construed, shows this intent to be that one of the parties should take title to lands in himself creating an active trust, coupled with an interest for the purposes of a resale for the purpose of sharing of the profits, or losses, as the case may be, an expression used, to wit, "the property is to be sold by us," considered in its relation with the context, does not when he has been estopped by matters *in pais*, require that the *cestui que trust* join in the deed of the trustee to convey a valid title to the purchasers at the resale, or fall within the inhibition of the statute of frauds. Upon a fair construction of the instrument, a sale, and deed by the trustee to the purchaser, were all sufficient.

12. Appeal and Error—Instructions—Admissions.

An exception to the charge as stating a fact alleged to be at issue is untenable when it is covered by an admission of the parties.

APPEAL by defendant King from *Kerr, J.*, at the March Term, 1921, of NEW HANOVER. (353)

This appeal is prosecuted by one of the defendants, B. F. King, Jr., from a judgment for plaintiffs in two cases which were consolidated and tried together by consent of counsel and order of the court.

The two cases were brought by the above-named plaintiffs, one against W. B. Crumpler and Ira Scott, partners trading as Crumpler & Scott, and B. F. King, Jr., and D. R. Foster, and the other by the same plaintiffs against Godfrey Hart, D. R. Foster, and B. F. King, Jr.

The purpose of both actions was the same, and was to have the court declare that the plaintiffs were the owners and entitled to convey the property, which had been conveyed to them by the defendant D. R. Foster, freed from any trust or other claim of B. F. King, Jr., and to compel the defendants Crumpler & Scott, and Godfrey Hart, to accept a deed and pay the purchase price of that portion

of the property purchased by each respectively, and which each had declined to take and pay for on account of an alleged claim by the defendant B. F. King, Jr., or alternately to make the defendant D. R. Foster liable on his covenants.

To better understand the case, it is necessary to make a short recital of the facts: D. R. Foster was engaged in the real estate business in Wilmington, and B. F. King, Jr., was working for him, and, at the instance of said King, and upon his assurance that he had already secured purchasers for the property, the said Foster purchased on 16 July, 1912, the tract of land, the title to which is in controversy, from A. D. Wessell and wife for the sum of $26,000, of which $6,000 was paid in cash, $1,000 by B. F. King, Jr., and $5,000 by D. R. Foster, who gave his note to the vendors for the sum of $20,000, with interest, payable two years after date, secured by mortgage upon the property for the deferred payments. At the same time D. R. Foster executed, and had recorded in the office of the register of deeds of New Hanover County the following paper-writing:

"To B. F. King, Jr., or his assigns. This is to declare that I, D. R. Foster, hold in trust for B. F. King, Jr., or his assigns an undivided one-half interest in the property on South Front street, described in a deed to me from A. D. Wessell, Sr., and wife. We have purchased the property jointly at the price of $26,000. I have executed a mortgage for $20,000 thereon and have advanced $5,000 in cash; King has advanced the balance of $1,000. The property is to be sold by us, and after the above cash advances are repaid, the net profits shall be divided equally, loss and expense shall be borne equally.

"In the event of my death or inability, I hereby appoint
(354) B. F. King, Jr., or the assignee whom he shall appoint, to execute proper conveyance and otherwise carry out the trust.

"Witness my hand and seal this 16th day of July, 1912.

"D. R. FOSTER. (Seal)."

The debt secured by the mortgage on this property was not paid, and the land was advertised and sold by the mortgagee, Wessell, and bid off, and a deed taken for it, by Foster, who erroneously thought he thereby became the sole owner of the property, freed from any trust or obligation which might have been created by the above-quoted paper-writing, but Foster at the same time offered to allow the said B. F. King, Jr., to retain his one-half interest in the profits on a resale, if he would put up $500 to help carry the loan, and this King at first promised, but found himself unable to do, and finally

told Foster that he was unable to raise the money, and would claim no further interest in the property, and that he could sell it or dispose of it as he saw fit.

The defendant Foster was unable to sell the property, and was compelled to carry it unaided and at considerable expense in the way of insurance, taxes and repairs, until the rise in price which took place generally in 1918, and on 14 May, 1918, sold and conveyed the property to the plaintiffs for the sum of $30,000, which the verdict finds to be the best price he could obtain, and that the sale was *bona fide.*

Plaintiffs caused this property to be subdivided into lots, and put up the same and sold them by public auction in the year 1920, and the defendants W. B. Crumpler and Ira Scott became the purchasers of one portion of the property and the defendant Godfrey Hart of another portion. After the sale by plaintiffs, King made claim to an interest in the property or the profits on these sales, arising out of the paper-writing dated 16 July, 1912; and Crumpler and Scott and Hart declined to accept deeds and pay the purchase money. Plaintiffs thereupon brought these suits as hereinabove referred to.

The answer of the defendants Crumpler & Scott, set up the fact that they are willing to take the property, but that plaintiffs cannot convey a good and indefeasible title free from trusts, etc., because B. F. King, Jr., claims an interest therein; the defendant Godfrey Hart in his answer, denies that plaintiffs had, and could convey, a good and indefeasible title in fee simple for the same reason; the defendant B. F. King, Jr., in his answer, claims that he was half owner of the property at the time that it was sold by plaintiffs to the defendants Crumpler & Scott and Godfrey Hart, but is willing to affirm the sale to them on condition that he is paid one-half the net profits of the purchase and sale of the property.

The cases were consolidated and tried together before a jury upon the issues set out in the record, and resulted (355) in a finding that King had no interest, by way of trust or otherwise, in said property, and was not entitled to any profits upon a just accounting between him and the defendant D. R. Foster.

The issues as submitted to the jury, with the answers thereto, were as follows:

"(1) Did the defendant B. F. King, Jr., assent to the sale of the Wessell property by the defendant Foster? Answer: Yes.

"(2) Did the defendant Foster make a *bona fide* sale of the property for the best price which he could obtain? Answer: Yes.

"(3) What amount, if anything, is due from the defendant Foster to the defendant B. F. King, Jr., upon a fair and equitable

accounting of the purchase and sale of the Wessell property? Answer: Nothing.

"(4) What amount, if anything, is due from the defendant B. F. King, Jr., to the defendant Foster upon a fair and equitable accounting of the purchase of the Wessell property? Answer: Nothing."

From this judgment the defendants Crumpler & Scott noted an appeal, as did also the defendant Godfrey Hart, but their appeals have been abandoned, and this appeal involves only the claim of B. F. King, Jr.

The defendants, B. F. King, Jr., and Crumpler & Scott, and Godfrey Hart, insisted that the deed from Wessell and wife to D. R. Foster, dated in 1912, together with the declaration of D. R. Foster hereinbefore recited, constituted Foster a trustee for themselves (Crumpler & Scott, and King), as beneficiaries, and this was freely admitted by the defendant Foster and not controverted by the plaintiffs. But the defendant King insisted, through his counsel, that he is the equitable owner of a one-half interest in the property and that his equitable estate, or interest in the property, could not be conveyed, terminated or otherwise disposed of otherwise than by a formal deed of conveyance by him, or by some act or conduct of his which would operate as an estoppel, and he denied that there was any such thing, and that he still owned the said interest.

On the other hand the defendant Foster contended, and a perusal of the record will show, that the jury decided that the property was purchased by Foster from Wessell at the instance of King, to be resold and the profits or losses divided equally. And this view of the case was concurred in by the plaintiffs and adopted by the court. So the whole controversy turns upon the simple point whether the interest of B. F. King, Jr., could be transferred, terminated or disposed of by a deed from Foster, the grantee and trustee, to a purchaser by and with the assent of King, expressed by word or conduct, or whether King must join in the deed.

(356) The assignments of error state and restate variously, and somewhat redundantly, the actual basis for a recovery on which B. F. King, Jr., relied in the court below, and which is clearly and sufficiently expressed in the second, sixth and seventh assignments of error, the seemingly unavoidable repetition being thought necessary to emphasize and clarify his main contention. Those are as follows:

"Second. That the court erred in allowing and permitting the plaintiffs to ask and have Mr. Foster to testify to what he, Foster, said was the exact contract and agreement he had with King re-

garding the handling and the sale of the property, the title to which is in dispute, as shown by the defendant's second exception, for the reason that it appears that the agreement was in writing under seal, signed and recorded, and that as a matter of law, after the said agreement was entered into, the defendant, B. F. King, Jr., could not convey his interest, or lose his rights in the property, or be cut off from his interest therein, by parol, or oral statement, or without a valuable consideration.

"Sixth. That the court erred in allowing the plaintiffs to ask the witness Foster, 'Now state to his Honor and the jury what authority he gave you to sell, and his abandonment of the agreement, if any?' and have the witness answer the same, as shown by the defendant's eighth and ninth exceptions.

"Seventh. That the court erred in allowing and permitting the plaintiffs and the defendant Foster to offer any evidence of the witness Meredith, which in any way tended to cut off the interest of B. F. King, Jr., in the property by parol declaration, as shown by the defendant's tenth exception."

On the trial counsel for Foster and for the plaintiffs admitted that Foster did not relieve himself of the trust, as he at the time erroneously supposed that he did, by purchasing the property at the mortgage sale of Wessell; and they further admitted that by the sale of the property by Foster to the plaintiffs, with the concurrence of King, the latter was still entitled to one-half of the net profits made, and was obliged to pay one-half of the net loss, if there should be a loss. As said above, this view of the matter was adopted by the presiding judge, and the case was tried on that theory.

The jury found by the answer to the third issue that on a just accounting, after making proper deductions, there were no profits and Foster owed King nothing.

Judgment upon the verdict, and the defendant, B. F. King, Jr., having reserved exceptions, appealed to this Court and assigned errors.

Herbert McClammy for plaintiffs.
Rountree & Carr for defendants. (357)
E. K. Bryan and J. C. King for King.

WALKER, J., after stating the material facts of the case: The decision of this appeal must turn largely upon the construction, or meaning, of the trust declared by D. R. Foster in the writing dated 16 July, 1912. If D. R. Foster purchased the property in his own name for no other purpose than that of a resale by him and a di-

vision of the net proceeds of such sale between him and B. F. King, Jr., there can hardly be any doubt that the trial proceeded correctly in the court below, but the defendant King contends that by that instrument an equitable estate was vested in him as to an undivided one-half of the land, and that the sale thereof was to be made jointly by Foster and himself, and consequently that the statute of frauds applied, and that no valid sale or transfer of his half interest or estate in the land could be made without his joinder in the deed, or other written instrument of conveyance.

We cannot concur entirely in this view. The title was validly in Foster, who bought at the Wessell sale, the deed having been made to him alone, with a declaration of trust, as contained in the writing of 16 July, 1912. It appears therefrom that Foster paid $5,000 on the purchase price of $26,000, and King $1,000, but the latter was to pay Foster $500 more to help him carry the loan, for which consideration Foster agreed that King might still enjoy the right to share with him in the net profits realized by a resale of the land, according to their prior agreement. But King did not comply with his part of this offer to let him in, so that he might participate in the net profits gained upon a resale of the property, and there is ample evidence to support the finding that B. F. King, Jr., finding that he was unable to carry out his part of the bargain, voluntarily and deliberately waived and abandoned his right thus to share in the proceeds of a resale, the consideration of which was that Foster should assume, and was compelled to assume, and pay King's share of the purchase price, and was otherwise forced to assume the burdens and inconveniences which, in law and in equity, rested solely upon King. There can be no question as to the sufficiency of the consideration, and King's claim might, perhaps, be otherwise met and overthrown by a resort to the principle of equitable estoppel. He should be thankful that he has been voluntarily let in by Foster at all, to enjoy the fruits of the resale, instead of imputing bad motives or conduct to him. He has been treated considerately, and even generously in the matter.

(358) There seems to have been but one motive in the purchase of this property, which was to hold the same securely for resale, and stripping the entire case of all irrelevant matter, it narrows itself down to the one pivotal thought in the mind of the defendant King, and that was, How much can I get out of it? King admits that the property was purchased for a resale, and admits that it was purchased for the purpose of making a quick return, for the evidence discloses a statement by him to the defendant Foster that he had the property as good as sold, or already sold,

at least as to one-half of it, with a good prospect for the sale of the other half, within thirty or sixty days. This was partly the consideration that moved Foster to buy, or to enter into the deal. When the title passed out of Wessell to Foster, and the sale was not made, as King had represented would be done, and King had surrendered all his right, Foster carried the burden, and in order to protect himself, had to mortgage other property of his own to prevent the loss of the $5,000 that he had paid on the first installment. Foster's and Meredith's evidence discloses what was done so that Foster might hold the property until the final sale.

There is little room for contention against the existence of a power of sale residing in Foster to sell the land he had bought at the Wessell sale. It is implied from the very language of the instrument itself, if not expressly given, and this is demonstrably so, without calling in aid any of the parol evidence. *Council v. Averitt,* 95 N.C. 131; *Maxwell v. Barringer,* 110 N.C. 76. But even if there was no express power contained in the writing, it could be shown by parol, either that there was such a power or it could be implied from King's conduct, creating an estoppel upon him.

We cannot imagine a case where the doctrine of equitable estoppel could more justly have been applied than to this one. Where a party who has, or claims, a right, either openly and unequivocally abandons it, or does not assert it when he should do so, and induces another by his silence or conduct to believe that the right does not exist, or that he makes no claim to it, if he has it, and abandons and surrenders it, and the other party, acting upon such conduct as it was intended that he should do, and is induced thereby to do something, by which he will be prejudiced, if the party who so acted is permitted to recall what he has done, equity steps in and protects the party thus misled to his prejudice, and will forbid the other to speak and assert his former right, when every principle of good faith and fair dealing requires, and even demands, that he should be silent. *Faw v. Whittington,* 72 N.C. 324, where Justice Bynum says for the Court: "Such a renunciation, however, would seem to operate, not as passing an estate or interest in land, which cannot be done strictly under the act without writing, but to operate (359) as an equitable estoppel on the vendee to assert a claim to specific performance, where his conduct has misled the vendor intentionally."

Let us a little more definitely state the real pith of the controversy, and incidentally the reasons advanced in support of B. F. King's position. It would seem that the pivotal question upon which the case must turn and be decided is stated in the latter part of the

second assignment of error, appearing in our statement of the case, which is as follows: "After the said agreement was entered into the defendant B. F. King, Jr., could not convey his interest therein by parol, or oral statement, and without a valuable consideration."

This embraces fully all that can be said in his behalf, and his learned counsel have lost nothing of its strength by condensing it in the clearcut paragraph of the assignment above quoted.

If the court was correct in its rulings upon this question, then all of its rulings on testimony must necessarily be sound, because the testimony was offered and received to explain the circumstances of the original purchase and throw light upon the meaning of the declaration of trust and, in addition to that, was offered and accepted for the purpose of showing that the defendant King had surrendered and abandoned all interest in the property and consented to its sale by Foster.

We will defer, for the moment, further discussion of the statute of frauds in its relation to this case.

So the question comes back to this: What was the nature of the trust declared by Foster in favor of King? What was its purpose, and how could it be executed?

As stated above, the defendant King contends that he could not divest himself of whatever interest he had in the property or its proceeds, save by a deed of conveyance. Is this so?

The defendant Foster held the property upon trust to sell it and divide the proceeds equally between himself and King. It was not a naked trust, but a trust coupled with an express power to sell and an interest of his own, and although it is admitted that the sale could not be made without the assent of King, expressed or implied, that assent might be expressed orally or implied by conduct. As a matter of fact, it is a common transaction, and business men naturally assume that when property is conveyed to one person, or speculation, for resale for the benefit of himself and another, both can orally assent to the sale. Indeed this is the primary meaning of the words of the declaration: "The property is to be sold by us, and after the above cash advances are repaid, the net profits shall be divided equally, loss and expense shall be borne equally."

(360) This language clearly does not mean that King was to join in the deed with Foster, because Foster alone holds the legal title, and it was so intended.

The contention of Foster then is, that the sale to the plaintiff conveyed a good title, free from all equities, and whatever rights the defendant King had were transferred to the proceeds, and this for the following reasons:

First. The defendant Foster held the property in trust to be sold by himself and King, and when the sale was made by the consent or concurrence of King this was a strict performance of the trust and an execution of the power of sale therein contained.

Second. That even if the sale to the plaintiff was a breach of trust, that is, was not a strict compliance with the declaration of trust by Foster, yet the assent, however, testified to by King ratifies the breach and makes the transfer valid.

Third. That even if the trust was not a trust for sale, but an equitable estate in the property, which could not be transferred by parol, yet whatever interest King had might have been abandoned by him without a deed.

We will consider briefly each of these propositions, because they seem to us to be almost self-evident, and if either one of them is sound, the sale to the plaintiffs was valid, and the only claim arising from said sale in favor of the defendant King is to share whatever net profits or losses there may have been arising out of the original purchase for $26,000, and the subsequent sale to plaintiffs for $30,000, and the latter conclusion seems to be conceded by King:

1. It is elementary that property may be conveyed to a trustee in trust for sale, and that it is not only the right of the trustee, but his duty, to sell if and when the terms of the power authorize it. 19 Am. St. Rep., note page 271 at bottom; 39 Cyc. 335; 28 Ency. of Law, p. 996; Flint's Lewin on Trusts, star page 424; *In re Bedingfield & Herrin's Contract* (1893), 2 ch. 332; *Eakle v. Ingram*, 100 Am. St. Rep., note p. 102.

In this case, as we have said and reiterated, it is clear to our minds that the purpose was for Foster to sell the property whenever he and King found a purchaser, and indeed it was understood in the beginning that King had already found a purchaser, and the sale to Foster was merely a means or process of transferring the property from the original vendor Wessell to the purchaser, by and with the consent of both Foster and King, and dividing the profits. This consent, the jury decided, after full hearing, King gave.

2. But even if the sale by Foster to the plaintiffs was not a strict performance of the trust and an execution of the power therein contained, he was justified in making the sale if the only other person having an interest in the property concurred (361) with him in desiring it.

This proposition is clearly stated by Mr. Maitland, who is generally regarded as one of the great law writers of the last quarter century, in his book on "Equity" (Ed. of 1909), at p. 106. The doc-

trine is well stated in *Butterfield v. Cowan,* 112 N.Y., p. 486, by Judge Danforth, as follows: "The strength of the plaintiff's case is in the doctrine which governs the relation of trustee and *cestui que trust.* Assuming, as, in view of our former decision, we must, that there would have been responsibility on the part of the trustee in omitting to follow the terms of the mortgage by which he undertook to be bound, and that his dealing with the other defendant was a violation of those terms, it was possible for the plaintiff to absolve both the trustee and the other defendant from liability, either by acquiescing in the consummation of the transaction or by a positive adoption of it. Here there was both. It is quite clear that no *cestui que trust* can allege that to be a breach of trust which has been done under his own sanction, whether by previous consent or subsequent ratification. The general rule is that, either concurrence in the act, or acquiescence without original concurrence, will release the trustees. And there are no circumstances to make the plaintiff's case an exception. Whatever the trustee did which might otherwise have been found the subject of our just complaint, was done by the assent and sanction of the plaintiff." See, also, Pomeroy Equity Jurisprudence, sec. 1083, last sentence. The jury, as we have before stated, have found that King authorized or concurred in Foster's act.

3. Whatever equitable interest King had in the property was given up, surrendered or abandoned by him when he refused or failed to help carry the property longer and informed Foster that he could do nothing further, and that he could go on and sell the property, as testified by Foster and Meredith, and found by the jury.

In *Gorrell v. Alspaugh,* 120 N.C. 362, Alspaugh sold land to Hine, and the latter then executed a bond for title to Alspaugh for the land, upon payment of certain loans evidenced by notes. Alspaugh could not pay these notes, and surrendered them to Hine. Subsequently Alspaugh's creditors sued him and attempted to reach this property. It was claimed that Alspaugh had no interest in it, but the property belonged to Hine. It was held that, "While an equitable interest in land may not be transferred by parol, it may be abandoned or released to the holder of the legal title by matter in *pais,* provided such intention is clearly shown; hence the settlement made in 1894 between H. and A., being in good faith, extinguished A.'s equitable right and vested in H. a fee simple title." In *Lewis v. Gay,* 151 N.C. 168, p. 170, the Court says: "Parties may
(362) by parol rescind or by matter *in pais* abandon rights in land." See, also, *May v. Getty,* 140 N.C. 310; *Burns v. McFarland,* 146 N.C. 382; *Matthews v. Thompson,* 186 Mass. 14; *Miller v. Pierce,* 104 N.C. 389, and *Faw v. Whittington,* 72 N.C.

321, where Justice Bynum explains this principle with great clearness and accuracy.

There was ample consideration, as we have shown, for the abandonment or surrender of this contract or interest in the property by King. The situation was this: King had induced Foster to purchase this property for the purpose of being resold, and relying upon King, Foster had done so; they were unable to sell, and it became an onerous burden to carry the property, and at the end of two years Wessell was pressing for the payment of his mortgage, and although repeatedly requested, King would do nothing to help Foster. Wessell agreed, however, that if they would raise $4,000 he would not foreclose, and Foster told King that if he would raise $500 of this amount he would raise the balance, and they could carry the loan on the property until better times came. This King failed to do, and told Foster that he could do nothing further, and to let it go. Then it was foreclosed, and Foster became the purchaser and himself raised $4,000 and gave a mortgage for $16,000.

Foster again offered to recognize the trust and to let King have his original share in the profits, in the event anything was made on the sale of the land, if he would raise $500 within six months, and this King thought he could do and promised to do. Foster, thinking it was necessary to put this agreement on the records had it, by the consent of King, written on the margin of the records, and King promised to sign it, but failed to do so. Foster continued to press King to put up the $500 to enable him to carry this loan from Wessell, which was secured by a mortgage on the property, and King kept promising, but finally told Foster that he could not raise any money to help, and that he could go on and dispose of the property as he saw fit, and that he hoped he would make something out of it. (This is shown by Foster's testimony, to be found in the record.)

In this connection King also told Meredith, who was then working with Foster, that he, King, who had been, and for some time theretofore ceased working with Foster, had left with Foster a souvenir in the shape of this purchase. Meredith also says that after King left Foster he often met King on the street, and he would ask if the Wessell property had been sold, and when he answered no, he would say, "I don't see why you don't sell it," and I suggested that he try to sell it himself, to which he replied something like this: that he had left a souvenir with Foster so that he could remember his days with him while he was there. King stated that he left a souvenir with Foster that would stay with him. King told me that he could not raise anything, and that he was out of it. (363) (This appears by Meredith's testimony in the record.)

Foster was compelled to assume the burden and carry the property upon his own shoulders because King not only would not help, but left the country.

If we are correct in the foregoing view (and we undoubtedly believe it to be the true one), assignments of error which challenge the correctness of the court's rulings upon evidence, both in admitting and rejecting it, are unsound, because the evidence was offered and received merely for the purpose of showing what the actual situation was, and what the conduct of all the parties to it was. The law permits some latitude in such cases.

This includes all assignments of error down to the tenth.

The tenth assignment is unsound for the same reason, as is also the eleventh.

The twelfth assignment cannot be sustained, because the proposition therein contained was admitted by the counsel for Foster and plaintiffs and adopted by the court, who charged the jury that Foster had not divested himself of the trust by his purchase at the foreclosure sale.

The thirteenth and fourteenth assignments were given in the general charge, so far as they were proper.

The fifteenth, sixteenth and seventeenth assignments of error are untenable for the reasons we have already stated.

So far as the eighteenth assignment is concerned, it lays down a rule of law correctly, but it is inapplicable to the case. We believe, and the jury so found, that Foster and King did both assent to the sale by Foster to the plaintiffs.

As to the nineteenth assignment of error, the general charge of the court to the jury contained all on this subject to which the defendant King was entitled, because the court charged that the purchase by Foster at the foreclosure sale did not divest King of his rights, and that he still had the right to share equally in whatever profits were made upon the sale, but was also under obligation to pay one-half of the expenses incurred in the maintenance of the property, and that the jury found upon sufficient testimony, in answer to the third issue, that there was nothing due to King under a just accounting, because the maintenance, upkeep, taxes, etc., of the property exceeded the rents which could be, and were, obtained by Foster by more than $2,000.

As to the twentieth assignment of error, in the statement of the record, it is manifest that the court could not have given this charge.

The twenty-first assignment of error: This assignment is a mere repetition of those discussed in the earlier portion of this opinion, and will not again be considered. The third paragraph of that as-

signment cannot be established as a matter of fact. We cannot agree that the court did what it stated in this as- (364) signment; but, on the contrary, the learned judge permitted the jury to find not only from King's own language, but from his conduct, that he had abandoned whatever equity he might have had. The remaining part of this assignment is without merit in law and in fact.

The twenty-second assignment of error is but a repetition of the same proposition already fully discussed.

We promised to revert to the question as to the statute of frauds. In this case there was no contract to convey land, or any interest therein, as between Foster and King; the precise agreement was (excluding all other questions which justify Foster's action) that the land should be sold to some third person, and the net proceeds divided. Foster had the legal title, which he held for the purpose of executing the trust imposed upon it by the written stipulation. It is spoken of therein as an undivided one-half interest in the property held in trust by Foster for King, and that "the property is to be sold by us" (them), that is, Foster and King, but it all plainly means, when the context is considered, that the property was bought at the sale on joint account and solely for the purpose recited therein, which is, that it should be resold to make what profit there was in the venture, and sold, too, by Foster, the trustee. It is again recited in the instrument that Foster had mortgaged the land, in his own name as mortgagor, for $20,000, and advanced $5,000 in cash, and King the balance of $1,000, and that they were to divide equally the net profits of a resale. There was no objection by King to Foster's mortgaging the property in his own name. The entire instrument when taken and considered within its four corners, shows conclusively what the parties meant, and that their only intention was that Foster should hold the land in trust to carry out their design of selling the land for the profit that was in it, and there was no thought that Foster should even convey one-half of the estate to King, but that the latter should have one-half of the net profits, "loss and expense, to be borne equally." Foster "held it in trust" for the consummation of the joint venture, and for no other purpose, and no one of the interested persons was justified in thinking that King had any other right in the transaction. Deeds and other writings are to be construed so as to effectuate the intentions of the parties, as that is ascertained from the language of the instrument. *Gudger v. White*, 141 N.C. 507; *Triplett v. Williams*, 149 N.C. 394; *Kea v. Robeson*, 39 N.C. 427, and especially *S. c.*, 40 N.C. 373. In *Gudger v. White, supra*, it was held, referring to what had been said

in prior cases: Courts are always desirous of giving effect to instruments according to the intention of the parties, so far as the law will allow. It is so just and reasonable that it should be so
(365) that it has long grown into a maxim that favorable constructions are put on deeds. 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, citing *Kea v. Robeson, supra; Rowland v. Rowland,* 93 N.C. 214; *Campbell v. McArthur,* 9 N.C. 38; *Ritter v. Barrett,* 20 N.C. (Anno.) 266. And Justice Ashe said for the Court, in *Rowland v. Rowland, supra,* at p. 218: *"Intentio inservire, debet legibus, non legis intentioni,* and as far as it may stand with the rule of law, it is honorable for all judges to judge according to the intentions of the parties, and so they ought to do (1 Coke, p. 19), and Justice Blackstone, in the Rules of Interpretation laid down by him, 2 vol. 286, says: 'That the construction be made upon the entire deed, and not merely upon the disjointed parts of it. *Num ex antecedentibus, et consequentibus fit optima interpretatio,* and therefore that every part of it (if possible) be made to take effect, and no word but what may operate in some shape or other, *Nam verba debent intelligi cum effectoe et res magis valeat quam pareat.* And in *Jackson v. Blodgett,* 16 Johnson 172, the same rule is announced, 'that the construction must be made on the entire instrument, after looking, as the phrase is, at the four corners of it.' See, also, 2 Smith's Leading Cases, 466, where numerous authorities are cited upon the subject.' "

So that upon this construction of the written trust, it is clear, as a conclusion, that the case, so far as respects the statute of frauds, falls within the principle of *Michael v. Foil,* 100 N.C. 178, at 188, where a similar agreement was made, and it was held that a contract to sell land and divide the profits was not within the statute. *Manning v. Jones,* 44 N.C. 368. Justice Davis says in *Michael v. Foil, supra:* "In *Trowbridge v. Wetherbee,* 11 Allen's Mass. Rep. 361, it is held that a parol promise to pay to another a portion of the profits made by a promissor on the purchase and sale of real estate, is not within the statute of frauds, and may be proved by parol. See, also, *Sherrill v. Hagan,* 92 N.C. 345." We have, in *Newby & Weeks v. A. C. Realty Co., ante,* 34, discussed fully this question as to the application of the statute of frauds to agreements of this kind, and we there held that the statute had no application whatever. Our

language was this: "The parties contracted with reference to the profits to be realized upon a resale of the land, and not with the view of acquiring title to any part of the land. They already had the title, and the land itself was to be held in trust, for the purpose of realizing the profits of another sale of it." No further comment is required. (366)

That King expected Foster to sell the land by himself, and without the joinder of Foster, can well be inferred from the last paragraph, but one, of the written agreement dated 16 July, 1912, where Foster designates King to act if Foster should die before consummating the matter, or bringing it to a final conclusion. Besides, it appears, as we have already stated in a former part of this opinion, that King was willing to affirm the sale if he is allowed one-half of the net proceeds, and whether he so expressly agreed or not, his words and conduct plainly demonstrate that it was all he expected to be done. There is no way of looking at the case that does not disclose that, in any event, the sale was to be valid, even if he had a legal or equitable estate in the land and was legally entitled to join in the sale of it. Judged by his own conduct throughout the course of his dealing with Foster, as to the land and its sale, his case is cut up by the roots.

The defendant Foster agreed to let King come in and share in the net profits of sale, but the jury have found that upon a fair and just accounting, when he is charged with his part of the costs and expenses, and what he agreed to contribute, there will be nothing left for him. Foster was generous towards him in agreeing to account to him, when he had clearly given up and abandoned his former right, but however this may be, the jury have settled the matter against him after he has had a fair opportunity to be heard and has been fully heard upon all questions involved.

There is no reason for disturbing the verdict or judgment.

No error.

Cited: Mote v. Lumber Co., 192 N.C. 464; *Scott v. Bryan*, 210 N.C. 481; *Oil Co. v. Jenkins*, 212 N.C. 144; *Hare v. Weil*, 213 N.C. 488; *Bell v. Brown*, 227 N.C. 322.

H. D. POINDEXTER v. C. R. CALL.

(Filed 2 November, 1921.)

1. Ejectment—Landlord and Tenant—Notice to Tenant.

A verbal notice to terminate a lease given by the landlord, in conformity with the statute, is sufficient.

2. Same—Term of Lease—Issue.

Where the controversy in a summary proceeding in ejectment between landlord and tenant, is whether the contract is by the month or by the year, as to the landlord's notice to terminate it, only one issue is required, as to the expiration of the lease at the time of the commencement of the action, with the burden of the issue on the plaintiff.

3. Same — Immaterial Issues — Burden of Proof — Appeal and Error — Harmless Error.

Where two issues are submitted to the jury in the landlord's action of ejectment, one as to the expiration of the term of the lease, as being by the month as plaintiff claimed; or by the year, as the defendant claimed, the second issue will be regarded as surplusage on appeal, and an instruction placing the burden of proof on this last issue on the defendant will be regarded as harmless error, it appearing that the jury, in answering the first issue in the affirmative, understood and intended to render their verdict in favor of the plaintiff.

4. Instructions—Theory of Trial—Evidence—Context.

Instructions to the jury are considered with reference to the theory upon which the case is tried, and the evidence and contentions of the parties, and are construed with the context.

APPEAL by defendant from *Webb, J.*, at the May Term,
(367) 1921, of FORSYTH.

Holton & Holton for plaintiff.
Jones & Clement for defendant.

WALKER, J. This is a summary proceeding in ejectment, brought by the plaintiff, as landlord, against the defendant, as his tenant.

There are only two questions presented for our consideration:

1. Can a tenancy be terminated by a verbal notice to quit?

2. Upon which party rests the burden to prove that the tenancy has come to an end?

First. The notice in this case was oral. The defendant contends that it should have been in writing, and for this he relies on Pell's Revisal, sec. 778, but that section applies to a different class of notices. In *Vincent v. Corbin*, 85 N.C. 108-111, it was held that a verbal notice to the tenant by his landlord is sufficient. This disposes of the first exception.

Second. As to this exception, it is necessary to state that the court below submitted two issues to the jury, as follows:

1. Was the tenancy existing between the plaintiff and the defendant from month to month, and, if so, when did such tenancy expire? The jury answered this issue "Yes, 1 January, 1921."

2. Was the tenancy between the plaintiff and the defendant from year to year; if so, when did the same expire? The jury answered this issue "No."

This action to eject the defendant was commenced in February, 1921. The court placed the burden as to the first issue upon the plaintiff, and as to the second issue upon the defendant. Submitting two issues was unnecessary. The defendant's counsel, Messrs. Jones and Clement, correctly insisted here, in their (368) brief and in their argument, that in no event could the burden of proof be placed upon the defendant Call, for that the burden of proof was upon the plaintiff from the beginning to the end of the trial. There was but one question for the jury to pass upon, and that was, "Had the defendant's term, or lease, expired when this action was commenced?" The burden of the issue could not rest on both plaintiff and defendant. The plaintiff became the actor at the institution of the suit, which placed the burden of proof on him, citing *Garris v. Harrington*, 167 N.C. 86; *Tillotson v. Fulp*, 172 N.C. 499. This, as we have said, is very true. There was only one issue, and that was the one stated by the learned counsel for the defendant, but that one was submitted by the first of the issues, and the judge properly placed the burden as to it upon the plaintiff.

The contention of the defendant that the tenancy was one from year to year, and required thirty days notice to end it, was not a separate or distinct defense, but was in the nature of a denial of plaintiff's allegation that it was one from month to month, and was involved in the general issue or traverse of plaintiff's allegation. If plaintiff failed to establish his contention that the tenancy was one from month to month, he failed to do what the law required him to do, and the verdict and judgment should have been against him. Defendant, though, should have stood his ground upon the general issue, simply denying the plaintiff's allegation. The form of the second issue may have placed the burden upon the defendant, as he was required to prove the affirmative of it. The Court said in *Walker v. Carpenter*, 144 N.C. 675: "However they may be arrayed on the docket, it is a fundamental rule of evidence that the burden of proof is on the party who substantially asserts the affirmative of the issue, whether he be nominally plaintiff or defendant. . . . The first rule laid down in the books on evidence is to the effect that the

issue must be proved by the party who states an affirmative and not by the party who states the negative." To the same effect is *McKeel v. Holloman,* 163 N.C. 135. But we regard the second issue as entirely immaterial and without any proper significance in the case. The jury having found, under the evidence and the charge, that the tenancy was one from month to month, and that it expired on 1 January, 1921, the plaintiff was entitled to recover. Having found that the tenancy was from month to month, in response to the first issue, the jury would hardly have found, in response to the second, that it was a tenancy from year to year. They evidently found, and intended to find, for the plaintiff. While there was a formal error in the respect indicated, it was harmless, as the case turned out, and was not, therefore, prejudicial.

(369) It was held in *Cotton v. Mfg. Co.,* 142 N.C. 531, that instructions to the jury are to be considered with reference to the theory upon which the case is tried, and with reference to the evidence and contentions of the parties. And Chief Justice Ruffin once said that the language of the judge is to be read with reference to the evidence and the point disputed on the trial, and of course is to be construed with the context.

When thus considered, there is no room for doubt that the jury fully understood the real and only issue, decided with the plaintiff, and intended their verdict to be for him.

No error.

Cited: Stein v. Levins, 205 N.C. 306; *Benner v. Phipps,* 214 N.C. 16.

C. L. BLACKNALL v. F. W. HANCOCK, TRUSTEE, BLALOCK MOTOR COMPANY, AND JOHN HARVEY.

(Filed 9 November, 1921.)

1. Deeds and Conveyances—Registration—Notice.

No notice, however full or formal, can supply that of the registration of conveyance of land required by statute to give priority over creditors or purchasers for value. C.S. 3311.

2. Same—Liens—Priorities—Filing—Indexing.

The priorities between two mortgages or deeds of trust on land, appearing upon the index of the register of deeds to have been registered on the same month, exact date not given, nothing else appearing, may be deter-

mined by the time of filing for registration, and their relative position on the index. Attention is called to ch. 68, Laws 1921, amending C.S. 3553, though not applicable to the instant case.

3. Equity—Subrogation.

The principle of subrogation does not prevail in favor of a mere volunteer.

4. Same—Liens—Priorities—Mortgages—Registration.

Where there is an implied agreement between the mortgage debtors that the one taking a subsequent mortgage should pay off and discharge the first one and acquire the benefits of the lien, and it appears that the prior mortgage was never registered, but that a third mortgage had also been given on the same lands and registered prior to the second mortgage, there is no existent equity in favor of the first and unregistered mortgage upon which subrogation can rest in favor of the second mortgagee whose mortgage has been registered subsequent to the registration of the third one.

5. Deeds and Conveyances—Mortgages—Prior Mortgages — Registration —Liens—Recitations in Warranty of Prior Liens.

Where the lands have been subjected to three mortgages, one for the balance of the purchase price, which has not been registered, and the third merely refers to the first mortgage lien in omitting it from the warranty clause, and is recorded before the second, the mere reference to the first mortgage in the third one, is not such a recognition of its valid existence and binding effect as to postpone the third mortgage lien to that of the second and last registered mortgage. *Hinton v. Lee*, 102 N.C. 28, cited and distinguished.

APPEAL by plaintiff from *Cranmer, J.*, at chambers, 17 March, 1921, from VANCE. (370)

Civil action, heard on motion to dissolve a restraining order and counter motion by plaintiff to make same permanent, by consent. Plaintiff, holding a debt of $1,579.87, secured by a deed of trust on realty in said county, brings the action to restrain the sale by defendant Hancock under a deed of trust on same property, to secure two notes of $850 each, and have the latter deed declared a lien subsequent to that of plaintiff and to remove same as a cloud to plaintiff's claim and interest under his deed. The facts more directly pertinent, and the ruling of the court thereon, are embodied in the judgment as follows:

"This action, coming on to be heard before Hon. E. H. Cranmer, judge, at chambers, in Henderson, N. C., on 17 March, 1921, and the same being heard on the motion of the plaintiff for a permanent injunction against defendants foreclosing a trust deed executed by J. T. Harvey and wife on 20 March, 1920, to F. W. Hancock, trustee, which trust deed was filed for registration on 23 March, 1920, unless or until the said trustee or Harvey shall pay to plaintiff the sum of $1,579.87, with interest from 24 March, 1920; the court hav-

ing heard the evidence and arguments of counsel, doth find the following facts:

"That J. H. Harvey contracted to buy 64 acres of land from Miss Martha Edwards, and paid the purchase money therefor, except the sum of $1,075, as of 8 March, 1920, before the transaction was closed, Miss Edwards died, and, after her death, her heirs executed a deed in fee for said land, which deed was dated 8 March, 1920, upon the execution of the said deed to said Harvey he at once executed and delivered to T. T. Hicks a deed in trust upon said land to secure the balance of the purchase money, $1,075, with six per cent interest thereon, said trust deed bearing date 8 March, 1920; the said deed and trust deed were both duly probated, the registration fees paid, and they were filed for registration contemporaneously in the office of the register of deeds for Vance County on 10 March, 1920; the trust deed was never actually recorded upon the books, and no index thereof was made.

"On 20 March, 1920, the said J. H. Harvey and wife executed and delivered to F. W. Hancock a deed in trust upon the said land to secure the payment of two notes for $850 each, due 1 November, 1920, and 1 November, 1921, being the balance purchase price due for one Kline automobile. The said trust deed was duly
(371) probated and filed for registration in the office of the register of deeds for Vance County on 23 March, 1920, at 5 o'clock p.m., and appears of record in said county in Book 99, at page 317; the date of actual registration on the book is not given, but it is indexed and the word 'March' is written on the line of its index at the beginning of the line. A deed in trust filed 8 April, 1920, is recorded on the page next before it. The Hancock trust deed is indexed three lines above the $1,579.87 trust deed, which also has the word 'March' at the beginning of its line. On 24 March, 1920, the said J. H. Harvey and wife executed and delivered to T. T. Hicks a deed in trust upon the same above mentioned land to secure the payment of the sum of $1,579.87. This trust deed was duly probated and filed for registration in the office of the register of deeds for Vance County on 26 March, 1920, at 4:30 o'clock p.m., and appears of record in said county in Book 95, page 415; the date of actual registration on the book is not given, but it is indexed in March, 1920, after the trust deed to F. W. Hancock.

"The plaintiff paid off the amount of balance due for purchase money on said land out of the $1,579.87 loaned said Harvey, and on 26 March, 1920, the date the trust deed securing said $1,579.87 was filed for registration, and after its filing the trustee finding the $1,075 trust deed was not recorded, withdrew it from the office of

the register of deeds, that is, the one which had been filed for registration 10 March, 1920, but which had never been actually registered or indexed upon the record. The debt secured in the trust deed to Hancock has not been satisfied.

"Upon the foregoing findings of fact the court doth adjudge that the restraining order issued in this action by Hon. John Kerr, judge, be, and the same is hereby dissolved, the court being of opinion that the trust deed executed by said J. H. Harvey and wife to F. W. Hancock on 20 March, 1920, and filed for registration on 23 March, 1920, is a first and prior lien on the land described in the complaint herein, and that plaintiff is not entitled to be subrogated to the rights of Edwards under the $1,075 trust deed.

"The plaintiff is taxed with the costs of the action."

Plaintiff excepted and appealed.

T. T. Hicks & Son for plaintiff.

F. W. Hancock, Jr., and A. C. & J. P. Zollicoffer for defendants.

HOKE, J. The statute applicable, C.S. 3311, provides in effect that no deed of trust or mortgage on real estate, etc., shall be valid to pass any property as against creditors or purchasers for value from the donor, bargainor, or mortgagor, but from the registration thereof in the county where the land lies, and the Court decisions in this State construing the law have insistently (372) held that no notice, however full or formal, shall avail to defeat a prior registration. *Fertilizer Co. v. Lane,* 173 N.C. 184; *Blalock v. Strain,* 122 N.C. 283; *Quinerly v. Quinerly,* 114 N.C. 145.

From a perusal of the facts stated in the judgment it appears that the deed of trust under which plaintiff directly claims, being the deed to secure $1,579.87 from Harvey and wife to T. T. Hicks, trustee, was executed 24 March, 1920, proven and filed for registration 26 March, indexed in March, 1920, exact date not given, but appearing on the index docket after the deed under which defendant claims. That the deed of trust to defendant F. W. Hancock, trustee, to secure the $850 notes, executed 23 March, 1920, was duly proven and filed for registration 23 March, 1920, appearing on the index docket of the county registry as of March, 1920, above the deed to T. T. Hicks, trustee, and presumably prior thereto.

From these findings, therefore, and by express provision of the statute, as between the two, the deed of defendant has the prior lien, and in any event, on the facts of this record, the priority of defendant's deed should prevail by reference to the time of filing, 23 March, 1920, as against 26 March, the date when plaintiff's deed

was filed. *Power Co. v. Power Co.*, 175 N.C. 668; *Glanton & Cotton v. Jacobs*, 117 N.C. 427.

It is urged on behalf of plaintiff that inasmuch as a portion of the money advanced on the security of plaintiff's present deed of trust to the amount of $1,075 was used in payment of the original purchase money to the Edwards heirs, and that a deed of trust to secure the same had been proved and filed for registration 10 March, 1920, to that extent plaintiff should of right be subrogated to this claim as a prior lien on the property, but, in our opinion, the position cannot be maintained. It is recognized that the principle of subrogation does not prevail in favor of a mere volunteer, but if it be conceded that the position might arise to plaintiff by reason of a permissible inference that he paid off the Edwards debt at the request of the debtor and under an implied agreement that he might thus acquire the benefits of the lien (see *Liles v. Rogers*, 113 N.C. 199, citing 2d Beach on Modern Equity Jurisprudence, sec. 801), the position would not avail plaintiff on the facts of this record, for as against defendant, holding under a duly registered instrument, the Edwards heirs never acquired any lien, and there is none to which plaintiff can be substituted. The facts showing that before same was ever put on the registry, or indexed, the deed securing the Edwards debt was withdrawn from the files and the purchase money paid in full.

(373) The position referred to is very well stated in 27 American Encyclopedia of Law (2 ed.), at p. 206, as follows: "The rights acquired by a party entitled to subrogation cannot be extended beyond the rights of the party under whom subrogation is claimed, subrogation contemplating some original privilege on the part of him to whose place substitution is claimed and where no such privilege exists or where it has been waived by the creditor, there is nothing on which the right can be based."

Again, it is insisted that plaintiff's claim to the extent of the purchase money debt paid to the Edwards heirs should be held superior because the deed of trust under which defendant claims is in recognition of the Edwards lien, and under the principle approved in *Hinton v. Leigh*, 102 N.C. 28, but on the facts presented, this exception also must be overruled. In *Hinton v. Leigh, supra*, the Court held that the claim under a later registered mortgage should be preferred to claims secured by a subsequent deed of trust, but which had been first registered, but this was on the ground that by correct interpretation the deed of trust fully recognized the validity of the mortgage and conveyed the land to the trustee only as subject to the mortgage lien. But the position does not prevail from the fact that

in the instant case the deed of trust to defendant in the covenant against encumbrances merely excepts the claim then existent in favor of the Edwards heirs. The present comes clearly within *Piano Co. v. Spruill,* 150 N.C. 168, and that class of cases which hold that a mere reference to the existence of a prior encumbrance does not recognize its validity as a superior lien except as it may comply with requirements of our registration laws.

We deem it not improper to refer to a statute of the recent session of the Legislature, chapter 114, amending C.S. 3553, and which may have an important bearing on the priority of liens as determined by the date of filing in connection with the indexing and cross-indexing of instruments. The matter is not further pursued, as the law does not seem to affect the rights of the parties to this controversy. We deem it desirable, however, that the attention of the profession and officials shall be called to the existence of the statute.

We find no error in the present record, and the judgment for defendant is

Affirmed.

Cited: Allen v. Stqinback, 186 N.C. 78; *Bank v. Smith,* 186 N.C. 642; *Davis v. Robinson,* 189 N.C. 601; *Trust Co. v. Godwin,* 190 N.C. 517; *Hardy v. Abdallah,* 192 N.C. 48; *Hardy v. Fryer,* 194 N.C. 422; *Story v. Slade,* 199 N.C. 598; *Lawson v. Key,* 199 N.C. 665; *Wallace v. Benner,* 200 N.C. 130; *Case v. Arnold,* 215 N.C. 594; *Turner v. Glenn,* 220 N.C. 625; *Reed v. Elmore,* 245 N.C. 237; *Bourne v. Lay & Co.,* 264 N.C. 36.

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(374)

T. M. THOMAS ET AL., V. CARTERET COUNTY ET AL.

(Filed 9 November, 1921.)

1. Contracts—Writing—Conditions Precedent—Parol Evidence.

Where a contract is reduced to writing to be held subject to the performance of a condition precedent by one of the parties, the existence of the contract depends upon the performance of the condition, and the failure of its performance may be shown by parol, as such does not tend to vary, alter, or contradict a written instrument.

2. Same—Written in Part.

The principle upon which the parol part of a contract may be shown in evidence, when the other part thereof has been reduced to writing, is inapplicable when the law requires a writing in relation to the subject-matter which is sought to be shown by parol.

3. Contracts—Writing—Conditions Subsequent—Parol Evidence—Waiver —Mortgages — Deeds and Conveyances — Embezzlement — Criminal Law.

Where the plaintiffs have made a note secured by a mortgage on their lands, given on condition that a pardon be unconditionally granted by the Governor to a relative who has embezzled county funds, and the pardon was delivered and the note and mortgage delivered to the proper county officials, and the plaintiffs in their action seek to show by parol as a condition precedent to the validity of the written instruments that the county should first collect from the bondsman of the defaulter, the allegation of a conditional delivery is waived by an admission of the plaintiffs on the trial that the defendant county was entitled to a judgment on their note and mortgage.

4. Contracts—Writing—Admissions— Conditions Precedent — Parol Evidence.

Where a valid delivery of a binding, written contract has been established, or admitted upon the trial, neither a condition subsequent nor a reservation or cotemporaneous trust in favor of the grantor resting in parol, may be shown, in direct contradiction to the written terms.

5. Judgments—Statutes—Mortgages—Deeds and Conveyances—Sales — Confirmation of Sales—Courts—Appeal and Error.

A judgment appointing commissioners to sell land under mortgage and apply the proceeds to the defalcation of a county official of county funds, which the mortgage was given to secure, will be modified on appeal to provide for a report and confirmation of the sale by the court, when this provision of the statute has not been incorporated therein.

STACY, J., not sitting; WALKER, J., dissenting.

APPEAL from *Horton, J.*, at June Term, 1921, of CARTERET.

Action to determine the extent of plaintiffs' liability on a certain note and mortgage, executed and delivered to Thomas Thomas, and by him given as security to the county of Carteret. A brief history of this litigation is set out in the judgment of the Superior Court, entered at the June Term, 1921:

"This cause coming on to be heard before J. Lloyd Horton,
(375) J., and a jury, and it appearing to the court that at the June Term, 1920, of said court, this cause had been tried before his Honor, Connor, J., and a jury, and at said term the following issues, with their answers, were submitted and found by the jury as follows, to wit:

"1. In what amount, if any, is Thomas Thomas, trustee of the courthouse bond sinking fund, indebted to Carteret County? Answer: '$13,236.49, with interest.'

"2. What sum, if any, is Carteret County entitled to recover of the United States Fidelity & Guaranty Company as surety for Thomas Thomas, treasurer of Carteret County? Answer: 'Nothing.'

"3. What sum, if any, is Carteret County entitled to recover of W. A. Mace, administrator of Alonzo Thomas, deceased, on the bond of Thomas Thomas, trustee? Answer: '$5,000.'

"4. Were the note and mortgage of T. M. Thomas and wife, Laura, executed to Thomas Thomas and assigned to Carteret County, taken and accepted with the understanding and agreement that the same should be used only after the other securities, held by the county for Thomas Thomas, trustee, had been exhausted, as alleged in the complaint? Answer: 'No.'

"5. What sum, if any, is Carteret County entitled to recover of T. M. Thomas and wife on account of the note for $13,500 secured by mortgage assigned to said county by Thomas Thomas? Not answered.

And it further appearing to the court that the presiding judge of said court in his discretion set aside the answer to the fourth issue and failed to answer the fifth issue, which he instructed the jury the court would answer after they had answered the other issues, and permitted the plaintiffs to file a reply and further pleading upon which the following issues were submitted and answered at this, the June Term, 1921, of CARTERET, before his Honor, Horton, J., and a jury, as follows, to wit:

"4. In what amount, if any, is W. A. Mace, administrator, etc., of Alonzo Thomas, indebted to Carteret County on account of the term of said Alonzo Thomas as treasurer of Carteret County, beginning on the first Monday in December, 1914, and ending at the death of said Alonzo Thomas on 18 November, 1915? Answer: '$5,000, and interest.'

"5. What amount, if any, is Carteret County entitled to recover of defendant United States Fidelity & Guaranty Company as surety for said Alonzo Thomas as treasurer of Carteret County for said term, beginning on the first Monday in December, 1914? Answer: '$8,236.49, and interest.'

"6. Were the note and mortgage given to Thomas Thomas by plaintiff given as an accommodation paper to (376) said Thomas Thomas, as alleged by plaintiffs? Answer: 'Yes.'

"7. Is the defendant, Carteret County, a holder for value as between it and the plaintiffs of the $13,500 note and mortgage made by plaintiffs? Answer: 'Yes.'

"8. Were the note and mortgage of plaintiffs executed to Thomas Thomas and assigned to Carteret County taken and accepted with the understanding and agreement that the same should be used by the county only after the bonds of said Thomas Thomas and of said

Alonzo Thomas had been exhausted, as alleged by plaintiffs, and then applied to the balance unpaid due said county on account of the Thomas Thomas trusteeship of the sinking fund and the treasurership of said Alonzo Thomas? Answer: 'Yes.'

"9. What sum, if any, is Carteret County entitled to recover of plaintiffs on account of the note for $13,500, secured by mortgage assigned to said county by Thomas Thomas? Answer: '$13,236.49, with interest from 1 October, 1916, to be credited with $5,000 and interest on same from 13 June, 1921, due by the estate of Alonzo Thomas as surety for Thomas Thomas, trustee of the courthouse bond sinking fund,' the last issue having been answered by the court by consent of all parties that the court might answer same after verdict as a matter of law.

"It is now considered and adjudged by the court that the answers to the issues number 4 and 5 be, and are on motion of defendants, other than Carteret County, set aside as a matter of law for the reason that the jury found, at the June Term, 1920, by its answer to the first issue, that Thomas Thomas, trustee of the courthouse bond fund received and misappropriated the funds.

"It is further ordered and adjudged by the court that Carteret County recover nothing against United States Fidelity & Guaranty Company as surety, and that said defendant United States Fidelity & Guaranty Company go without day and recover its costs.

"It is further considered and adjudged by the court that Carteret County recover of W. A. Mace, administrator of the estate of Alonzo Thomas, deceased, the sum of $5,000, with interest from 13 June, 1921, as surety on the bond of Thomas Thomas, trustee of the courthouse bond sinking fund, said Mace, administrator, having tendered judgment for said amount in open court, said amount to be credited on the amount due Carteret County by T. M. Thomas and wife, Laura P. Thomas.

"It is further considered and adjudged by the court that Carteret County recover of T. M. Thomas and wife, Laura Thomas, the sum of $13,236.49, with interest from 1 October, 1916, at the rate of 6 per cent per annum, to be credited with the sum of
(377) $5,000, and interest on same from 13 June, 1921, due by Mace, administrator of Alonzo Thomas, deceased, the said Alonzo Thomas having been surety on the bond of Thomas Thomas, trustee of the courthouse bond sinking fund.

"It is further considered and adjudged that the note and mortgage given by T. M. Thomas and wife, Laura P. Thomas, to Thomas Thomas, and assigned by Thomas Thomas to Carteret County, be foreclosed to pay said indebtedness, and that Luther Hamilton and

Leslie Davis be, and are appointed commissioners to sell the lands described in the mortgage of T. M. Thomas and wife, Laura P. Thomas, to Thomas Thomas, recorded in the office of the register of deeds of Carteret County, in Book 22, page 339, after due advertisement and in accordance with the law governing sales of real estate under execution.

"It is ordered that such advertisement shall not be made until sixty days after the adjournment of this court, and then only in the event plaintiffs shall not have fully discharged the liability of this judgment.

"It is further adjudged that defendant Mace, administrator, pay the costs of the action, to be taxed by the clerk.

J. LLOYD HORTON, *Judge Presiding.*"

Upon the second trial the following admission was made in open court, and entered of record:

"Counsel for plaintiffs, having so admitted in open court, the court finds the following facts:

"In this case, the plaintiffs, T. M. Thomas and wife, Laura Thomas, agree that, pursuant to the issues found in the trial of this case before Hon. George W. Connor, judge, at the June Term, 1920, the defendant, Carteret County, is entitled to a judgment against the plaintiffs, T. M. Thomas and wife, Laura Thomas, in the sum of $13,236.49, with interest, said judgment to be credited for such amounts as had been or would be found by the jury in the case that the defendant Mace, administrator, and others are indebted to said Carteret County."

His Honor set aside the verdict on the 4th and 5th issues, as a matter of law, and rendered the judgment appearing above. Plaintiffs and defendant Mace, administrator, appealed.

Ward & Ward, H. S. Ward, and Luther Hamilton for plaintiffs.

Julius F. Duncan for Mace, administrator.

D. L. Ward and J. F. Duncan for United States Fidelity & Guaranty Company.

No brief filed on behalf of Carteret County.

CLARK, C.J. The case at bar has been tried twice in the Superior Court, and this is the second appeal here. (378) Former opinion reported in 180 N.C. 109. It is doubtful if the allegations of the complaint and the wording of the 8th issue, by correct interpretation, amount to a charge and finding that plaintiff's note and mortgage were not intended to take effect absolutely and unconditionally at the time of their delivery. It was only upon

the allegation of a conditional delivery that plaintiffs were permitted to show the "understanding and agreement" upon which the note and mortgage were "taken and accepted." Indeed, on the facts of the present record — the mortgage having been delivered to the mortgagee and by him in turn assigned to Carteret County — it is not altogether clear or certain that this position was ever open to the plaintiffs. *Buchanan v. Clark,* 164 N.C. 56; *Huddleston v. Hardy,* 164 N.C. 210; *Bond v. Wilson,* 129 N.C. 325; note: 16 L.R.A. (N.S.) 941. But as the point is not raised by any specific exception, we shall not pass upon it now. It is unnecessary for us to do so.

The principle applicable to a conditional delivery has been sanctioned and approved by us in a number of carefully considered decisions; and it is now very generally recognized in this and other jurisdictions. *Farrington v. McNeill,* 174 N.C. 420; *Bowser v. Tarry,* 156 N.C. 35; *Gaylord v. Gaylord,* 150 N.C. 222; *Hughes v. Crooker,* 148 N.C. 318; *Aden v. Doub,* 146 N.C. 10; *Pratt v. Chaffin,* 136 N.C. 350; *Kelly v. Oliver,* 113 N.C. 442, and *Ware v. Allen,* 128 U.S. 590. It is said in Anson on Contracts (Am. Ed.) 318: "The parties to a written contract may agree that until the happening of a condition, which is not put in writing, the contract is to remain inoperative." And again, in *Wilson v. Powers,* 131 Mass. 539: "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the instrument, but that it never became operative and that its obligation never commenced." These excerpts are quoted with approval in *Garrison v. Machine Co.,* 159 N.C. 285, where the same doctrine is announced by Walker, J., in an elaborate review of the authorities on the subject in hand.

We are of the opinion, however, that the admission, made in open court, to the effect that the defendant county was entitled to a judgment on the note and mortgage in question (though subject to certain credits), takes these instruments out of the class of conditionally delivered contracts, if, indeed, they were ever entitled to be styled as such. To admit their present validity and binding force for any purpose, in advance of the happening of the contingent event upon which it is alleged they were to take effect, is at variance with the theory of a conditional delivery, and brings into operation other principles of law.

(379) "It is fully understood that although a written instrument purporting to be a definite contract has been signed and delivered, it may be shown by parol evidence that such delivery was on condition that the same was not to be opera-

tive as a contract until the happening of some contingent event, and this on the idea, not that a written contract could be contradicted or varied by parol, but that until the specified event occurred, the instrument did not become a binding agreement between the parties." *Bowser v. Tarry, supra.* The question is controlled very largely by the intention of the parties. *Waters v. Annuity Co.*, 144 N.C. 670. But plaintiffs have abandoned this position (if they were ever entitled to take it) by their admission in open court, for it is only upon the strength and validity of the note and mortgage that any judgment at all could be rendered against them and in favor of Carteret County.

A valid delivery and binding contract having once been established, or admitted, the plaintiffs may not thereafter be permitted to annex a condition subsequent, resting in parol, and in direct contradiction to the express terms of their written obligation, for this would infringe upon the well settled rule that oral evidence will not be admitted to vary or contradict the terms of a written instrument. *Mfg. Co. v. McCormick*, 175 N.C. 277, and cases there cited.

This doctrine was well stated by Smith, C.J., in *Ray v. Blackwell*, 94 N.C. 10, as follows: "It is a rule too firmly established in the law of evidence to need a reference to authority in its support, that parol evidence will not be heard to contradict, add to, take from, or in any way vary the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose, for the reason that the parties, when they reduced their contract to writing, are presumed to have inserted in it all the provisions by which they intend to be bound," citing 1 Greenleaf Ev., sec. 76; *Etheridge v. Palin*, 72 N.C. 213. And to like effect are many decisions in our Reports, too numerous to be cited here.

In *Walker v. Venters*, 148 N.C. 388, it was said: "It is true that a contract may be partly in writing and partly oral (except when forbidden by the statute of frauds), and that in such cases the oral part of the agreement may be shown. But this is subject to the well established rule that a contemporaneous agreement shall not contradict that which is written. The written word abides, and is not to be set aside upon the slippery memory of man." See, also, *Moffitt v. Maness*, 102 N.C. 457, one of the leading cases on this subject, and *Sykes v. Everett*, 167 N.C. 600. This last citation contains an interesting and illuminating discussion of a kindred and closely allied subject which supports and is in full accord with our present decision.

Kernodle v. Williams, 153 N.C. 475, and others like it, have no application either to the law or the facts of this (380)

case. That case held: "Where a contract is not required to be in writing it may be partly written and partly oral, and in such cases, when the written contract is put in evidence it is admissible to prove the oral part of it." But the instrument here in question a conveyance of land, to be applied to the payment of the defalcation of public funds by the grantor's nephew, is required to be entirely in writing, and no oral agreement or private understanding can years afterwards be written into the contract in order to relieve the grantor of the responsibility he assumed and upon the execution of which he procured the release of his nephew.

In *Gaylord v. Gaylord,* 150 N.C. 222, the Court held that "the doctrine of engrafting an oral agreement upon a written instrument which is required by the statute of frauds for the conveyance of land cannot be established *in favor of the grantor* in the deed." That case has been very often cited since with approval. See citations thereto in Annotated Edition.

In *Campbell v. Sigmon,* 170 N.C. 351, the Court held: "If, notwithstanding the solemn recitals and covenants in a deed, the grantor could show a parol trust in himself it would virtually do away with the statute of frauds, and would be a most prolific source of fraud and litigation. No grantee could rely upon the covenants in his deed," citing, among other cases, *Gaylord v. Gaylord, supra.*

In *Walters v. Walters,* 172 N.C. 330, the same matter was fully discussed again, and it was held, "The grantor cannot set up a parol trust in his own favor against the grantee, saying the ruling in *Gaylord v. Gaylord,* 150 N.C. 222, that a parol trust cannot be set up by the grantor as to the conveyance in fee to his grantee, is not only upheld by the reasoning and authorities therein cited, but that case has since been upheld and reaffirmed in *Ricks v. Wilson,* 154 N.C. 289; *Jones v. Jones,* 164 N.C. 322; *Cavenaugh v. Jarman, ib.,* 375; *Trust Co. v. Sterchie,* 169 N.C. 22; *Campbell v. Sigmon,* 170 N.C. 351, and *Walters v. Walters* (when here before), 171 N.C. 313." In very recent cases, *Allen v. Gooding,* 173 N.C. 96, and *Chilton v. Smith,* 180 N.C. 472, *Gaylord v. Gaylord* has been again cited with approval. In the latter case the Court overruled a previous decision of this Court, *Fuller v. Jenkins,* 130 N.C. 554, which had mistakenly held that a deed absolute on its face could be converted into a mortgage because of an oral agreement between the parties at the time that it should operate as a mortgage, and said that it "stands alone and is expressly overruled."

If a negro or some poor white man is convicted of stealing a side of meat for his starving family the doors of the State's Prison usually lie open before him, but Thomas Thomas, having

been convicted of appropriating thousands of dollars en- (381)
trusted to his care for safe keeping, and sentenced to the State Penitentiary, it was made to appear to the Governor of the State, who has the unrestricted power of pardon, that it was more advisable to secure the return of this money to the taxpayers of Carteret County than that the criminal should be punished, and upon assurance that by this instrument his uncle had insured the payment of this fund to the taxpayers the pardon was granted. That was the consideration for this deed and, according to the custom, this reason was given out to the world as the ground for the pardon. There is no provision in that deed that the grantor therein, who on the faith thereof procured the release of his nephew from the sentence of the law, should be "exempted from payment if some one else could be sued to recover the sum embezzled." There could be no oral agreement in favor of the grantor that notwithstanding, in fact, the public must collect the money, if they could, out of other people. On the written agreement that out of the land conveyed the county treasurer would be reimbursed, the pardon was given and the convict released. The State performed its part of the contract. The written agreement on the other hand was unequivocal that the property conveyed in the deed should be applied to reimburse the county and protect the people of the county from raising additional taxes to make good the loss their treasury had sustained by the defalcation. Upon the facts in the present record the mortgage was delivered to the mortgagee, and by him assigned to Carteret County in consideration of his pardon, and the conveyance was as unconditional as the pardon which he received.

The admission having been made in open court in this case, to the effect that the defendant county was entitled to a judgment on the note and mortgage in question, takes this instrument out of the class of conditional and conditionally delivered contracts, if indeed it had ever been entitled to be so styled. There was no reservation in the conveyance now sought to be set aside that it was "not to be valid if any one else could be sued for the money." It will not be charged by any one that the Governor in granting the pardon ever understood that this was a part of the instrument executed by the plaintiff. It was absolutely represented to him as an unconditional security to the county that the funds would be replaced by sale of the property conveyed, and in open court in this case it was admitted that the county was entitled to judgment on the note and mortgage.

Instead of that, these funds which were taken out of the public treasury eight to ten years ago are still withheld, and we are asked by the mortgagor to hold that there must be a long, weary chase

taking the time of the courts at great additional expense
(382) to the county to ascertain whether or not there was some private unwritten agreement with some one by which other people should first be sued to recover the money which the plaintiff contracted to pay, if his nephew were released.

The pardon was unconditional, based upon the security of this conveyance for the unconditional payment of the money. The property of the citizens of Carteret County may be advertised for the payment of the enhanced taxes caused by the defalcation, but the property pledged for the repayment of that sum is still unsold, and the only visible result so far has been the added cost of the courts in investigating the plea of an oral understanding that the property of the mortgagor is to be exempted from liability, if some one else can be found who can be sued. The public burdens are increased by protracted litigation in the metaphysical round of legal technicalities in the effort by learned counsel to

"Distinguish and divide a hair between south and southwest side,"

with the ultimate result possible that if any one ever pays anything there will be little, if any, of it that will get into the treasury for the benefit of the people who have lost it.

Applying these principles, his Honor might well have excluded all the evidence offered on the second trial and rendered judgment on the verdict as returned and left undisturbed at the June Term, 1920. But as the same result has been accomplished, though somewhat irregularly, by the judgment as entered, we have concluded to let it stand, as it is a matter of public interest to all the people of Carteret County that this litigation should be disposed of as speedily as possible. It is their money which has been misused and misappropriated, and embezzled; and, up to the present time, nothing has been refunded or paid back. The note and mortgage in question were given to make good this shortage and to save the county harmless from defalcations of one of its officers. These transactions occurred in the year 1916. The plaintiffs' obligation matured on 7 February, 1917. Nothing further seems to have been done until this suit was instituted on 3 February, 1919, to require the commissioners to proceed with the collection of the prior securities in exoneration of plaintiffs' undertaking. Plaintiffs also allege that the county authorities have been negligent in this respect, and they have sought to be relieved from any further liability by reason of such delay and inaction. It would seem that this surreptitiously

taken money, to say the least, should have been made good long ago. Public funds belong in the public treasury, and we are unable to find any warrant of law for such indulgences as are disclosed by the present record.

This opinion will be certified to the Superior Court of Carteret County, to the end that the judgment entered at the June Term, 1921, may be modified so as to provide for a report and confirmation of the sale as required by statute; and, as (383) thus amended and changed, the judgment will be

Modified and affirmed.

STACY, J., not sitting.

WALKER, J., dissenting: As much as I deprecate it, I am constrained to dissent from the opinion and impending judgment of this Court, as I think that upon the issues found by the jury (including the two numbers 4 and 5 of the second series of issues), which were set aside by Horton, J., for error in law, and which should be reinstated, as there was no error in law or in fact, there should be a judgment against Mace, administrator of Alonzo Thomas, for $5,000, and against the United States Fidelity Company of Baltimore for $8,500, and only if there is any balance due after applying these sums as credits on the whole amount due the county, should there be any judgment against the county. A brief history of this case will demonstrate what a grave injustice we are about to inflict upon the plaintiffs, who have unquestionably the highest and strongest equity in this case as against all of the other parties.

The county of Carteret was about to lose a large sum of money ($13,500) by the defalcation of Thomas Thomas, as special agent of the courthouse fund, and as treasurer of the county, and also by the defalcation of Alonzo Thomas, as treasurer of the county. Alonzo was surety on the bond of Thomas Thomas, and hence the judgment against Mace, his administrator, and the United States Fidelity Company of Baltimore, was surety on the bond of Alonzo Thomas as treasurer of the county. When the debt to the county had been incurred by the said defalcation, the plaintiffs, Thomas M. Thomas and his wife executed their note with a mortgage, or deed of trust, on their land to secure it, and payable to Thomas Thomas for the purpose of having it deposited by him with the county to secure the debt he owed the county, with the contemporaneous understanding, and express stipulation, that the note and mortgage should not take effect until the county had exhausted the securities it already had for said debt, which securities consisted, at the time, of the bond of

Thomas Thomas, on which Alonzo Thomas was security for $5,000, and the bond given by Alonzo Thomas himself as treasurer of the county, on which the United States Fidelity Company was surety for $12,000. No other securities were intended than those just mentioned. In other words, the county was required to exhaust the bonds of Thomas Thomas as agent and as treasurer, and that of Alonzo Thomas as treasurer, before the note and mortgage of the plaintiffs handed to Thomas Thomas with the understanding that it
(384) should be deposited with the county, but upon the contingency that it should not become effective, or resorted to as security, for Thomas Thomas' defalcations of all kinds until other securities were first exhausted.

The authorities are very numerous to the effect that a note and mortgage, or contract, may be made to depend upon a contingency, or condition, and that it is a full defense to an action upon the note that the contingency has not happened or the condition not performed. It makes no difference what the contingency or condition is so that it is lawful and has some relation to the contract, or perhaps even if it does not, but is purely collateral. *Kelly v. Oliver,* 113 N.C. 442, which has often been approved as a good illustration of the principle. It is also held that such a contingency or condition stipulated for at the time of the execution of the contract, bond or deed, does not contradict or vary the terms of the latter, and is merely a contemporaneous agreement postponing its legal operation. It is said in *Kelly v. Oliver, supra,* to be competent for the defendant (plaintiff here) to show that although he signed and delivered the instrument, it was not to go into effect, as to him (or them) until a certain condition was performed, and that this does not violate the rule as to contradicting or varying a writing, but has only the effect of a purely collateral undertaking postponing the effectiveness of the written contract, etc., until the happening of the contingency or the compliance with the condition, citing *Penniman v. Alexander,* 111 N.C. 427, which, in its turn, cites *Kerchner v. McRae,* 80 N.C. 219; *Braswell v. Pope,* 82 N.C. 57; *Woodfin v. Sluder,* 61 N.C. 200. The learned reporter thus head-notes the case of *Penniman v. Alexander, supra:* "The maker of a promissory note, or other similar instrument, if sued by the payee may show as between them a collateral agreement putting the payment upon a contingency, and it is competent also for a defendant sued as acceptor of such instrument to show in defense the conditions of his acceptance." And to the same effect is *Aden v. Doub,* 146 N.C. 10, where we held: "The position taken by the plaintiff, that the evidence tended to contradict a written instrument, and, besides, a negotiable instrument

is clearly without any support in law. In the first place, the written agreement was made at the very time the note was given, as a part of the same transaction (and the plaintiff had notice of the condition on which it was delivered). This does not bring the case within the rule of evidence by which it is forbidden to vary or contradict a written instrument, nor within the other rule protecting an innocent purchaser for value of a negotiable instrument. It is not a correct proposition in law, as stated in the plaintiff's prayer for instructions, that a negotiable instrument is of such high dignity as a medium of exchange that the parties cannot annex any lawful condition to its payment at the time it is given, when the action to recover it is between the original parties to it," (385) or the holder of the note is fixed with notice of the agreement, for he is not then a *bona fide* purchaser. (The case of *Penniman v. Alexander, supra,* was reaffirmed in 115 N.C. 555.) The question is fully discussed, as to this and other features of this case, in *Evans v. Freeman,* 142 N.C. 61, where we said that "Applying the rule we have laid down, it has been adjudged competent to show by oral evidence a collateral agreement as to how an instrument for the payment of money should in fact be paid, though the instrument is necessarily in writing and the promise it contains is to pay so many dollars. In support of the proposition, as thus stated, we may refer specially to comparatively recent decisions." *Hughes v. Crooker,* 148 N.C. 318 (opinion by Connor, J.), held that when a promissory note is given in pursuance of the terms of a written contract, evidence can be introduced of a contemporaneous oral agreement, made as a part thereof, to the effect that the note and contract were executed and given upon a condition, which has not been performed. This does not vary by parol the terms of the written instrument, but postpones its operation until the happening of the contingency. I could cite additional authorities in this and other jurisdictions to the same effect, and almost without number, but will add only a few in this Court: *Garrison v. Machine Co.,* 159 N.C. 285, 289-290; *Sykes v. Everett,* 167 N.C. 600; *Bresee v. Crumpton,* 121 N.C. 122 (opinion by Clark, J.); *Gazzam v. Ins. Co.,* 155 N.C. 330; *Bowser v. Tarry,* 156 N.C. 35, at pp. 38-39; *Pratt v. Chaffin,* 136 N.C. 350; *Mercantile Co. v. Parker,* 163 N.C. 277. No case states the principle more strongly or clearly than *Bowser v. Tarry, supra* (opinion by Hoke, J.), and he adds that "it is now very generally recognized."

But I am not bound to sustain that proposition in order to show that the plaintiff cannot be proceeded against until the county fulfills its part of the agreement so solemnly entered into by it.

My second contention is this, and I think that there can be no

question as to its correctness if our own decisions are of force or value as authorities, or precedents: Whether or not the condition which was annexed contemporaneously with the delivery of the notes to the county, affects the operation or validity of the contract, is not essential to the protection of the plaintiffs from the injustice of making them pay what others owe. We may waive, or pretermit this view, and yet, they are still without any liability unless, and until, the county has shown its compliance with the condition, for if the condition was annexed by parol, as a collateral part of the contract, not in writing and not intended to be, or to be more accurate, if it is the other part of the contract (and does not contradict the written part), the county is just as much bound to perform
(386) the condition before suing the plaintiffs as if it affected the operation going into effect, validity, or enforcibility of the contract. Mr. Clark in his Treatise on Contracts (2 ed.), at p. 85, says: "Where a contract does not fall within the statute the parties may at their option put their agreement in writing, or may contract orally, or put some of the terms in writing and arrange others orally. In the latter case, although that which is written cannot be aided by parol evidence, yet the terms arranged orally may be proved by parol, in which case they supplement the writing, and the whole constitutes one entire contract." Commenting upon the quoted passage, we substantially said in *Evans v. Freeman, supra,* that in such a case there is no violation of the familiar and elementary rule we have before mentioned, because in the sense of that rule the written contract is neither contradicted, added to, nor varied; but leaving it in full force and operation as it has been expressed by the parties in the writing, the other part of the contract is permitted to be shown in order to round it out and present it in its completeness, the same as if all of it had been committed to writing. The oral evidence tends to insert by parol the complement of the written terms so as to present the whole of it as the parties intended it should be.

All the cases hold, and there are many of them, that in so doing there is no contradiction of the written terms, but they can coexist in perfect harmony. I have already referred to some of that class of cases. Justice Hoke states the general proposition well in *Typewriter Co. v. Hardware Co.,* 143 N.C. 97, and citing Broom on Parol Evidence, sec. 117, he says that parol evidence is admissible to show an agreement or method of discharging the contract other than that specified in the bond. He discusses the matter fully and assigns the reason for the rule, citing *Woodson v. Beck,* 151 N.C. 144, and *Walker v. Venters,* 148 N.C. 388 (relied on in the opinion of the Court in this case) as necessarily excepted from the operation of

the principle by the peculiar terms of the contracts upon which those suits were brought. I also refer to *Cobb v. Clegg*, 137 N.C. 153, where the subject is fully discussed. If we should not follow the principle stated, we might shake the validity of many transactions in our banks which have been recognized as entirely within the law, for deposits, of collaterals to secure debts are conducted in the same way and accompanied by similar parol agreements to the one in this case. No one has ever doubted their legality. As pointed out in *Evans v. Freeman, supra,* and *Typewriter Co. v. Hardware Co., supra,* the promise by note or otherwise, to pay so many dollars at a specified time is not contradicted by, nor does it conflict with, oral terms as to how the money should be paid, or by showing that something was to be done by the other party before the money should be forthcoming. But there is a more recent case which fully and completely covers our case and upon similar facts. *Kernodle v. Williams*, 153 N.C. 475, at p. 476 and 477, where the Chief (387) Justice says: "While it is true that a contemporaneous parol agreement is not competent to vary, alter, or contradict a written agreement, still when a contract is not required to be in writing, it may be partly written, and partly oral, and in such cases when the written contract is put in evidence, it is admissible to prove the oral part thereof. *Nissen v. Mining Co.*, 104 N.C. 310. This is not varying, altering, or contradicting the written instrument, but merely showing forth the entire contract that was made." He then instances the conditions of a mortgage, and a penal bond, and says: "So also, with a penal bond, which is generally in a large sum, with a condition annexed by which it is of no effect unless a certain event happens, and even then the obligor is usually called on to pay a much smaller sum. There are many other instances which might be given of a like nature." Referring to the special facts of his case, the Chief Justice puts our case, in principle, when he says further: "In the present case the contract, as alleged by the defendants and found to be true by the jury, in its entirety, was that the plaintiff gave his daughter $500 absolutely, and took her note for the other $915, upon which certain payments were to be made (which are admitted to have been made) and the balance was given conditionally that it was to be accounted for with the father's executor, *i. e.*, to be required only if needed for the payment of the debts of the estate. Such an agreement is not a contradiction of the terms of the bond, for the full amount would be paid, if necessary, upon the happening of the conditions stipulated for. Agreements of this nature have often been held valid." But he goes on and refers to our cases as decisive of the question, such as *Penniman v. Alexander, supra;*

Evans v. Freeman, supra, and *Typewriter Co. v. Hardware Co., supra.* He continues: "In *Evans v. Freeman, supra,* it is said that if an agreement is partly in writing and partly oral, evidence is competent 'for the purpose of establishing the unwritten part of the contract, or even of showing the collateral agreement made cotemporaneously with the execution of the writing.'" He then adds that this has been repeatedly held by this Court, and "it has been adjudged competent to show by oral evidence a collateral agreement as to how an instrument for the payment of money should, in fact, be paid, though the instrument is necessarily in writing, and the promise it contains is to pay so many dollars." To same purport, *Typewriter Co. v. Hardware Co., supra;* and finally he collates the law in this wise: "The subject is thus summed up by Browne on Parol Evidence 252, who, quoting the last-named case (*Brook v. Latimer,* 44 Kan. 431), and many others, says that parol evidence is competent between the original parties to show that the consideration was illegal, or to show the real consideration and purpose, or to show that it was fraudulent, or to show an additional
(388) collateral consideration, giving many instances — among them the most common being to show that a note given by a child to a parent, though absolute in terms, was by parol agreement to be deemed an advancement." Justice Manning dissented in that case, but at page 485 admits the correctness of the principle we have stated, but says it is confined to a certain class of cases, and "it will be discovered, I think, that none of these written instruments were based upon a present consideration or that the maker executed them as evidence of an existing liability, *but for accommodation of the payee and without consideration.*" The learned justice largely bases his dissent upon the ground that in that case the oral evidence would not only contradict the written part of the contract, but destroy the bond. But that would not be the case here, as if the county prosecuted the defaulting parties and their sureties with proper diligence and failed to recover, it would have complied with the condition (or contingency), and the bond and mortgage would immediately come into full operation as a security for the county (as said by the Chief Justice in the *Kernodle* case); for the latter, even under the entire contract, written and parol, was only a guarantor for collection, and subject only to the obligation of such a guarantor. So it comes to this, that in the *Kernoodle* case the Court was practically unanimous as to the question we have here for decision. Other authorities are *Wilson v. Powers,* 131 Mass. 539; *Pym v. Campbell,* 6 El. & Bl. 88; 1 Elliott on Evidence, sec. 575. So that I say finally, as to this part of the case, that in either of the views

presented by me, the judgment of the court below, and the opinion of this Court, about to be promulgated, in which it is affirmed with slight modification, are erroneous, and fly in the face of every well considered case of this Court upon the subject.

Now let us look at this case from another viewpoint, and this concerns the larger equity involved. The jury, by their verdict at June Term, 1920, found as follows:

1. That Thomas Thomas, trustee of the sinking fund, misappropriated $13,236.49, and is indebted to the county in that amount.

2. That the United States Fidelity and Guaranty Company, as surety of Thomas Thomas, as treasurer of the county, owed nothing.

3. That Mace, administrator of Alonzo Thomas, as surety for Thomas Thomas, trustee, etc., is indebted to the county in the sum of $5,000.

4. That the note and mortgage of T. M. Thomas and wife, Laura, delivered to Thomas Thomas and assigned to the county, were not taken and accepted by the latter with the agreement that they should be used only after the other securities held by the county for Thomas Thomas, trustee, were exhausted, as alleged in the complaint. (This part of the verdict set aside by Judge Connor.)

5. The fifth issue as to the indebtedness of T. M. Thomas and wife to the county on the note for $13,500 was not an- (389) swered.

The court at June Term, 1920, gave no judgment, but merely set aside the answer to the fourth issue and allowed the plaintiffs to amend generally, and it will be seen now that the issues submitted by Horton, J., at June Term, 1921, are different from those submitted by Connor, J., at June Term, 1920. They are as follows:

"4. In what amount, if any, is W. A. Mace, administrator, etc., of Alonzo Thomas, indebted to Carteret County on account of the term of said Alonzo Thomas as treasurer of Carteret County, beginning on the first Monday in December, 1914, and ending at the death of said Alonzo Thomas on 18 November, 1915? Answer: '$5,000, and interest.'

"5. What amount, if any, is Carteret County entitled to recover of defendant United States Fidelity and Guaranty Company as surety for said Alonzo Thomas as treasurer of Carteret County for said term, beginning on the first Monday in December, 1914? Answer: '$8,236.49, and interest.'

"6. Were the note and mortgage given to Thomas Thomas by plaintiff given as an accommodation paper to said Thomas Thomas, as alleged by plaintiffs? Answer: 'Yes.'

"7. Is the defendant, Carteret County, a holder for value as

between it and the plaintiffs of the $13,500 note and mortgage made by plaintiffs? Answer: 'Yes.' (But it had notice of the condition because it agreed to it at the time.)

"8. Was the note and mortgage of plaintiffs executed to Thomas Thomas and assigned to Carteret County taken and accepted with the understanding and agreement that the same should be used by the county only after the bonds of said Thomas Thomas and of said Alonzo Thomas had been exhausted, as alleged by plaintiffs, and then applied to the unpaid balance due said county on account of the Thomas Thomas trusteeship of the sinking fund, and the treasurership of said Alonzo Thomas? Answer: 'Yes.'

"9. What sum, if any, is Carteret County entitled to recover of plaintiffs on account of the note for $13,500, secured by mortgage assigned to said county by Thomas Thomas? Answer: '$13,236.49, with interest from 1 October, 1916, to be credited with $5,000, and interest on same from 15 June, 1921, due by the estate of Alonzo Thomas as surety for Thomas Thomas, trustee of the courthouse bond sinking fund,' the last issue having been answered by the court by consent of parties that the court might answer same after verdict as a matter of law."

The court then entered the following as a part of its judgment: "It is now considered and adjudged by the court that the answers to the issues numbered 4 and 5 be, are on motion of defendants, other than Carteret County, set aside as a matter of law,
(390) for the reason that the jury found at the June Term, 1920, by its answer to the first issue that Thomas Thomas, trustee of courthouse bond fund, received and misappropriated the funds. It is further ordered and adjudged by the court that Carteret County recover nothing against the United States Fidelity and Guaranty Company as surety, and that said defendant United States Fidelity and Guaranty Company go without day and recover its costs."

Judgment was then given against Mace, administrator of Alonzo Thomas, for $5,000, and the costs. A judgment against the plaintiffs for $13,236.49, less the $5,000 adjudged against Mace, administrator, and the mortgage of the plaintiffs assigned to the county was ordered to be foreclosed and the land therein described sold to pay the said debt of plaintiffs to the county.

It will be observed that Horton, J., set aside the fourth and fifth issues of June Term, 1921, *as matter of law*, because the jury at June term, 1920, had found, in answer to the first issue that Thomas Thomas, trustee of the courthouse fund, had received and misappropriated the same.

How the fourth and fifth issues of June Term, 1921, could be set aside, as matter of law, because of the finding on the first issue, I fail to perceive. Nobody doubted that Thomas Thomas, as trustee of the courthouse fund, had defaulted and was indebted to the county in the sum of $13,236.49, but this did not prevent Alonzo Thomas, as treasurer of the county, from being indebted also to the county if, as treasurer, he had received the funds from Thomas Thomas, no matter where they came from, so that he received them by virtue or by color of his office. Having received them in that way, he became responsible for them to the county, and it appears from the evidence in the record, and the finding of the jury, that Thomas Thomas, as trustee, and the same as treasurer, and also Alonzo Thomas, as treasurer, had jointly and by their indiscriminate use, and misuse, of the county funds in their hands, made themselves liable for the same. It makes no difference from whence the money came, or how they juggled with those funds, so that they received them "by virtue of" or "by color of" their several offices, the two terms having very different meanings. Judge Reade has said: "The defendants insist that by virtue and under color mean the same thing. They mean very different things. For instance, the proper fees are received by virtue of the office; extortion is under color of the office. Any rightful act in office is by virtue of the office. A wrongful act in office may be under color of the office. Color in law means not the thing itself, but only an appearance thereof; as, color of title means only the appearance of title." *Broughton v. Haywood*, 61 N.C. 383.

If the position of the United States Fidelity Company is correct, then the county could not have recovered money (391) belonging to it, as its courthouse fund, if Thomas Thomas, the original defaulter, who was insolvent, had paid it over to either Thomas Thomas, treasurer, or Alonzo Thomas, treasurer. But that is not the law, as *Broughton v. Haywood, supra*, shows, and it is upon the principle as therein stated that the sureties of the two defaulters were charged with liability by the jury, and really also by the referee. They were manipulating the county's money as if it belonged to them, for their own benefit and advantage, playing fast and loose with the county finances, whereas the proper place, as said in the opinion of the court in this case, for the county's money to be was in the county treasury, and but for the malfeasance of these two officers, who forgot that they were fiduciaries, it would have been there long ago, but it should not get there, and the county, as shown by its answer, does not want it to get there, by a gross injustice to the plaintiffs, who as a mere gratuity, helped to secure it

to the county, upon its sacred promise that it would not call on the plaintiffs, by suing on the note or foreclosing the mortgage, until it had exhausted all other securities held by it in law or in equity, and it has expressly asked that such be not done. The good people of Carteret County would prefer that the treasury be empty than to subject the note and mortgage to the payment of the amount due by the default of its officers, in violation of its agreement not to fall back upon the note, and it expresses itself as ready and willing to comply with its part of the agreement. It would not have received this security, but for this promise on its part, and which it is asking now that it may be permitted to keep and perform.

The plaintiffs are volunteers, while the United States Fidelity Company, though professing to be a benefactor to our people, has come into this State to ask for the patronage of its citizens, for a consideration, and a good one, which it has been receiving from them for years and filling its coffers, and now is asking to transfer its obligation, purchased for a consideration by the defaulting officers, to the shoulders of the plaintiffs, who acted gratuitously to help the county out of its difficulty and financial embarrassment. Which of the two is entitled to the first consideration of this Court, or any court as far as that is concerned. The law is with the plaintiffs, and the highest and strongest equity which appeals to a court of conscience for its aid by executing justice. Judge Connor very properly set aside the answer to the original fourth issue, as being against the clear weight of the evidence, the eighth of the new issues, relating to the same question, that is, the manner in which the note and mortgage were held by the county, was answered in favor of plaintiffs that the bonds of the two Thomases should be first exhausted before plaintiffs should be compelled to pay anything, and only used to pay any balance due after such bonds were exhausted.

(392) The jury further find that the note and mortgage were strictly accommodation papers. There was no conflict between the answer to the first issue, and the answers to the new fourth and fifth issues. They related to different matters and were not in any way inconsistent, but can well stand together. His Honor's order setting them aside was not only error in law, but also error in fact, and I have already demonstrated that this is true by showing that both Thomas Thomas, as trustee, and Alonzo Thomas, as surety, could be indebted to the county at one and the same time, and even if there was error in law, he could *only* order a new trial as to those issues, and not vacate them and stop there, if it was competent at all for the judge to render a judgment upon two verdicts returned before different judges and especially after there had

been a general order to replead. Such procedure might produce great confusion, if followed as a precedent. But I contend that, if we take both verdicts into consideration, the answers to the fourth and fifth issue should be reinstated, and judgment thereon rendered for the county. This is the safest, shortest and swiftest method by which the county can be restored to its own, and has the great advantage of enabling the county to discharge its legal, equitable and moral duty to the plaintiffs by redeeming the promise upon the faith of which it obtained their note and mortgage. It is asking that it be allowed to do so, and why not let it do so, and make the United States Fidelity and Guaranty Company pay its share of the liability, which it assumed for a valuable consideration.

Reverting now to a more intimate and particular discussion of the issues, and evidence to support them, Horton, J., did not set aside the third and fourth issues because they were against the weight of the testimony, and he let the other issues stand unchallenged, and especially the eighth, which found the agreement made contemporaneously with the delivery of the note and mortgage to be as alleged by plaintiffs. Connor, J., also believed there was evidence to support the plaintiff's contention, and he set aside the fourth of the first set of issues as being against the clear weight of the testimony. The fourth issue of that set corresponds somewhat with the eighth of the second set, though the last is broader and more comprehensive. So we have the concurrent opinions of Judges Connor and Horton to the effect that there was evidence to be considered by the jury on the material issues. In this contention I will refer to *Palmer v. Lowder,* 167 N.C. 331, at p. 333, where the Chief Justice says: "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. Indeed, no proposition of law can be better settled." He cites many cases, including *Kernodle* (393) *v. Williams, supra; Nissen v. Mining Co.,* 104 N.C. 309; *Colgate v. Latta,* 115 N.C. 138, and says Abbott's Trial Evidence, p. 294, thus states the same principle: "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, where it appears that the instrument was not intended to be a complete and final settlement 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." This passage from

Abbott's book is quoted with approval in *Buie v. Kennedy,* 164 N.C. 298. Allen, J., states the rule very aptly in *Brown v. Mitchell,* 168 N.C. 312, and actually sustained the introduction of a brand new stipulation into a written contract, citing *Wilson v. Scarborough,* 163 N.C. 384, and other cases already mentioned by me, and he further held the consideration of the contract to be amply sufficient. See, also, *Potato Co. v. Jenette,* 172 N.C. 1.

The contention in the Court's opinion by the Chief Justice that *Kernodle's* case has no application here, is based upon a total misconception, both as to what that case decides and as to what is involved in this case. This is not an attempt to reform a written instrument, contradict or vary it. Pearson, J., with his usual legal acumen, accuracy and vigor of perception, makes it very clear in *Shelton v. Shelton,* 58 N.C. 292, 294, 295, that the rule of evidence as to altering a written instrument by parol is not at all violated or infringed. Besides, the deed of mortgage was not the only paper deposited as collateral, but the note was the principal thing and the deed would go with it, if it had not been deposited, as an incident to it. *Hyman v. Devereux,* 63 N.C. 624. Nor is the deposit of a collateral required to be in writing. The deposit of a note as collateral is generally by parol, and the commercial world will be amazed to know that this proposition is even disputed. But a complete answer to the contention is, that this kind of transaction is not required to be evidenced by a writing, as the statute of frauds has nothing to do with it, and the Court travels far afield to support its untenable position when it advances such a reason. Nor has the doctrine of trusts any bearing whatever on the question. It is not a parol or oral trust, and this excludes from the case all that is said about *Gaylord v. Gaylord,* 150 N.C. 222; *Campbell v. Sigmon,* 170 N.C. 351; *Walters v. Walters,* 172 N.C. 330, and the other cases cited in this connection. This is distinctly, and only, the deposit of collaterals, that is, the note secured by the mortgage, upon a contingency, or a condition, which may lie in parol, and is not required to be in writing. Colebrook on Collateral Securities, pp. 376 and 377,
(394) thus states the well-known rule of law and the commercial custom and practice: "Parol testimony is received to establish the fact that the transfer of certificates was intended as collateral security only, although absolute in terms. This principle was applied to a stock transaction, where the assignment of title was absolute, the rule excluding parol testimony to vary or contradict a written instrument having reference only to the language used therein and not forbidding inquiry into the object of the parties in executing and receiving the same," citing many cases in the notes in sup-

port of the text, and among them *McMahon v. Macy,* 51 N.Y. 155; *Lathrop v. Kneeland,* 46 Barb. 432; *Jones v. Portsmouth R. R. Co.,* 32 N.H. 544; *Pittsburg R. R. Co. v. Stewart,* 41 Pa. St. 54; *Tonica R. R. Co. v. Stein,* 21 Ill. 96. The contingency or condition is, that the county shall first exhaust its other securities before resorting to the notes and mortgage, a transaction not unusual, as our reports will clearly and fully show. See Mickie's Digest, title "Contracts," and *Kelly v. Oliver, supra; Evans v. Freeman, supra; Hughes v. Crooker, supra,* to which we add *Hinton v. M. R. F. Life Asso.,* 135 N.C. 314, where Justice Connor, at p. 326, said: "The testimony was competent. It is said, however, that to permit the testimony to be introduced violates the rule excluding parol evidence to contradict a written instrument. The proposed testimony in no manner contradicted the terms of the policy. It was offered to prove an agreement collateral to the policy." Also *Blair v. Security Bank,* 103 Va. 762, where the Court held it competent to prove that a paper delivered to the payee, or to any other person who is the holder thereof, on agreement that it was not to take effect except in a certain contingency or on condition, the latter must first happen or be performed before the holder can sue or recover on it. And this we add is true in all cases, except where the writing itself is contradicted or varied, which is not the case here, and even not as much so as in *Cobb v. Clegg, supra,* and some of the other cases we have mentioned. See, also, *Hicks v. Critcher,* 61 N.C. 353.

I wish it to be clearly understood that I do not challenge the correctness of *Gaylord v. Gaylord,* and the other numerous cases supposed to be like it, because I am not required to do so to establish my contention, as they bear no likeness to this case, and are not pertinent authorities. I have only adverted to these matters because they are set forth in the opinion of the Court as the grounds upon which it attempts to support what I consider to be a very unfortunate ruling. It is all beside the real merits of the case and the law involved in its proper decision, because, in any view, the plaintiffs are entitled to have the judgment against Mace, administrator, and the United States Fidelity Company entered upon the verdict. The eighth issue establishes their right, and has not been reversed, or impaired in its force, nor have any of the other (395) issues essential to the enforcement of plaintiffs' right. The county says in its answer: "Said Carteret County and M. Leslie Davis, treasurer, join with the plaintiffs in asking the court to fix liability upon the estate of Alonzo Thomas and upon the United States Fidelity and Guaranty Company in such amounts as the evidence and law in this case will fix them with, on account of the de-

fault and embezzlement of the said Thomas Thomas as hereinbefore set out, and asks the court, if such liability is fixed in any amount against the estate of Alonzo Thomas or the United States Fidelity Company, that said amounts, as fixed, be paid in exoneration upon the said $13,500 note executed by the said T. M. Thomas and wife and endorsed for value by Thomas Thomas to Carteret County; and the said Carteret County and M. Leslie Davis, treasurer of Carteret County, do not in any way or manner waive any of their rights hereby against the plaintiffs in this action." Even where a contract is required by the statute of frauds to be written, if it is admitted in the pleadings, the statute is thereby waived and proof by parol will answer instead of a writing, and so also with the rule as to oral evidence, to prove the entire contract, part of which is in writing. The cases already cited show this conclusively. Nor is this an effort to convert a deed absolute on its face into a mortgage, and nothing like it. There is not even a suggestion in the mortgage as to the conviction of Thomas Thomas of embezzlement, nor as to his pardon and the condition of it. Nobody expected anything to be said in the mortgage about T. M. Thomas' nephew being exempted, if some one else paid the debt or was sued for it, as it was not intended to be in there, but to take the form of a solemn collateral promise of the county (which admits it) that its other securities should first be exhausted, nor is there anything akin to a Pickwickian promise, which is purely imaginary, and rather far fetched, but, on the contrary, it is a promise expressly made by the county, and which it is anxious to perform in spirit, and in letter, if the court will only give it a chance to do so. There is nothing wrong in this — at least the county does not think so, and refuses to assent to such a suggestion by asking now to perform the condition. It makes no difference how long litigation is protracted. It was not the fault of the plaintiffs, but of the United States Fidelity Company, who, if any one, has prolonged the litigation, but if anybody has done so, it surely is not the plaintiffs.

Counsel and parties will be surprised to find that they are accused of protracting litigation unnecessarily by trying to defend and protect their clients' rights, and of invoking the invective of Samuel Butler in this couplet from Hudibras, "He could distinguish and divide, A hair 'twixt south and southwest side." This was intended for a particular class of reformers, and not for the lawyers.

(396) That famous poem was conceived and written to satyrize a certain officer who lived in the time of the Commonwealth, and who was enforcing too drastically the observance of laws by Parliament for the suppression of the innocent sports and

amusements of the people, and it did not apply to the weightier matters of the law. If there is any excuse for the reference, a more appropriate one would be Dickens' Satire of Lord Eldon, the Chancellor, in his Bleak House, "but even the noble Lord, while a little slow, preserved and protected equitable rights, though he was called the great procrastinator." People who believed in the rights of others, as well as their own, or of the mind that nothing is ever finally decided until it is decided right, but after all is said, the county has the money owing to her, within her grasp, if it is only allowed to take it, as we have before shown. Thomas' pardon has nothing to do with this case, which concerns only the enforcement of a clearly worded and admitted contract, with the equities of all kinds on the plaintiffs' side.

There is no agreement in the record that militates at all against my views, but the one that is there accords fully with them, and itself recognizes and submits to the enforcement of the conditions, upon which the papers were delivered to the county, and it does not rely on any such agreement to defeat the plaintiffs' action. The agreement expressly provides that the plaintiffs are only to pay what is left of the debt after applying as credits the amounts due from Mace, administrator, and the Fidelity Company, which does not appear in the opinion of the Court. But the cases of *Kelly v. Oliver, supra,* as to the condition upon which the note and mortgage were taken by the county, and *Kernodle v. Williams, supra,* as to the admissibility of parol evidence to show the unwritten part of the agreement, are conclusive as to plaintiffs' equity. Those cases have been approved frequently since they were decided.

In conclusion, I call attention to the manifest error in setting aside the fourth and fifth issues. This error was a clear misapprehension of the nature of the issues with which they were supports to be in conflict.

The plaintiffs are not attacking or criticizing the issues and answers thereto as they now appear in the record, but the action on the two set aside by the judge, and the answer to the ninth by him, which, as a matter of law, depends upon the ones set aside. His Honor was evidently misled by the second issue of 1920, which was on another bond, and cause of action, set out in the original complaint against another principal with the same surety company, for a different term and a different office. It had no reference to the cause of action set out in issues four and five, June Term, 1921, against another treasurer, Alonzo Thomas, on other bonds, with the same surety, introduced in the action by the further pleadings, filed by permission of the court after June Term, 1920, under the order at that

(397) term. There is no inconsistency between the two causes of action and the issues, though the surety involved is the same company. His Honor also seemed to be under the impression that two different men and their sureties could not be liable for the same defalcation, which is of course erroneous.

Whatever may be said, the outstanding fact remains that the defendant in its answer admits the contemporaneous agreement to exhaust other securities, and asks of the court, that whatever may be done, that agreement should not be violated. The case is exceedingly plain, and there is but one conclusion to be drawn from it, not that the people will be taxed one cent more, as stated in the Court's opinion, but that the county, which is asking equitable relief, is itself willing to do full equity in the premises. Nothing that can be said, pro and con, as to the facts or the law, can overcome the force of its admission and its willingness to abide by it.

The county should have a judgment on the issues as returned by the jury, but the court refuses its request that the plaintiffs, if they are required to pay, be subrogated equitably to its rights, as against the Fidelity Company.

While the county was not the original payee named in the note and mortgage, it took both with notice of the stipulation touching the contingency or condition as to exhausting the securities, and in truth it was a party to that stipulation. So that it was not an innocent purchaser and does not pretend that it is.

While I really believe, and confidently insist, that the judgment should be as I have indicated, it should, in any event, be so modified as to provide that the plaintiffs, if they are required to give up their note and mortgage and pay this debt to that extent, should be equitably subrogated to all the rights of the county as against the United States Fidelity and Guaranty Company, with the verdict on the third and fourth issues restored. And that is what it asks should be done.

It is hard — very hard measure — that the plaintiffs should be made to carry this heavy indebtedness, and the really responsible party should be allowed to go free, when the eighth issue and the answer to it now stand unreversed and unimpaired, and alone establish that the note and mortgage were given upon a contingency which had not happened, or a condition which has not been performed.

Cited: *White v. Fisher,* 183 N.C. 231; *Building Co. v. Sanders,* 185 N.C. 331; *Watson v. Spurrier,* 190 N.C. 730; *Hughes & Ray v. Mitchell County,* 196 N.C. 344; *Hill v. Ins. Co.,* 200 N.C. 506; *Kind-*

ler v. Trust Co., 204 N.C. 201; *Galloway v. Thrash*, 207 N.C. 166; *Reynolds v. Reynolds*, 208 N.C. 428; *Ins. Co. v. Morehead*, 209 N.C. 175; *Lerner Shops v. Rosenthal*, 225 N.C. 319; *Perry v. Trust Co.*, 226 N.C. 670; *Hall v. Christiansen*, 241 N.C. 397.

(398)

IN RE WILL OF LETILLA M. EDENS.

(Filed 9 November, 1921.)

1. Appeal and Error—Evidence—Questions and Answers.

Exceptions to the exclusion of questions from the evidence must show what the contemplated answers would have been, or what the appellant expected to prove, so that the Supreme Court may pass upon their materiality or relevancy, or they will not be considered on appeal.

2. Appeal and Error—Harmless Error—Prejudice.

Error committed in the Superior Court must appear on appeal to have been material and prejudicial to the appellant, amounting to a denial of a substantial right, and a new trial will not be granted for mere error otherwise.

3. Appeal and Error—Opinions—Case Presented.

Opinions of the Supreme Court must be understood in connection with the case presented there on appeal.

4. Wills—Evidence—Witness to Will.

The importance attached by the law to the testimony of a subscribing witness to a will, and their duty to observe the condition of the testator and to prevent fraud, is confined to the time of their attestation of the will, and their observation at other times, especially at a subsequent date, has only the force of that of other witnesses who may testify thereto.

5. Same—Instructions.

Where the subscribing witnesses to a will have not only testified as to the mental condition of the testator at the time, but have also testified to their observations at other times, a request for instruction that places all of this testimony upon the same probative footing as to the weight to be attached to the testimony of witnesses of the law, is erroneous and properly refused.

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

The appellant may not successfully complain for error of the admission of the testimony of the appellee's witness, when it lends color to his own contentions.

7. Appeal and Error—Misconduct of Juror—Supreme Court—Motions—New Trials.

The alleged misconduct of a juror, discovered after the trial, and upon which a motion for a new trial is made in the Supreme Court, is *held*

upon the examinations of the affidavits filed on this appeal, to be insufficient.

APPEAL by caveators from *Daniels, J.*, at May Term, 1921, of ROBESON.

Issue of *devisavit vel non* raised by a caveat to the will of Letilla M. Edens. Alleged mental incapacity and undue influence are the grounds upon which the caveat is based.

(399) Allen Edens, a bachelor, and his maiden sister, Letilla M. Edens, whose will is the subject of this controversy, owned as tenants in common a valuable farm situated in Robeson County, upon which they lived and worked together for quite a number of years. From time to time they took into their home some young men to act as overseer of their farming interests. W. W. Rowland was employed in this capacity for many years, then Alton McGirt, and finally John C. Crawford, one of the propounders, who came to them when quite a young man and remained with them until they died.

Allen and Letilla Edens had but one living brother, Frank Edens, who likewise was never married. They also had two sets of nieces and nephews, children of two deceased brothers, and these nieces and nephews are the caveators in this action.

The record is replete with evidence tending to show an estrangement between the testatrix and her relatives from the time of the death of her brother, Allen Edens, in 1917, until her own death in 1919. There is also evidence of John C. Crawford, one of the beneficiaries, having ingratiated himself in her favor and acting somewhat in the capacity of a confidential adviser in relation to her business affairs. And, further, there is evidence appearing on the record tending to show that, prior to the making of her will, the testatrix became so embittered and allowed her prejudices to become so aroused that at times she would work herself into a frenzy, fly into a violent rage, and abuse her relatives, calling them "knaves, robbers, thieves, kings, kaisers, and the celebrated heirs and gang." She was seventy-one years of age at the time of her death, and she left a considerable estate.

Mrs. Ward testified: "She was an unusually good conversationalist, very intelligent until the last few years of her life. I began to notice a change in her habits decidedly in 1915. From then on the change in her condition grew worse."

There was a strain of hereditary insanity in the family of the testatrix.

Under the will the old Edens home place was devised to John C.

Crawford, a stranger in blood, and this is urged as evidence of an unnatural mind.

There was much evidence, pro and con, on the question of mental capacity, and some evidence on the issue of undue influence; but, upon these controverted matters, the jury's answer established the validity of the will.

From a verdict and judgment in favor of the propounders, the caveators appealed.

Johnson & Johnson, McNeill & Hackett, Sinclair, Dye & Clark, and McLean, Varser, McLean & Stacy for cav- (400)
eators.

C. W. Tillett, Stephen McIntyre, G. B. Patterson, and Britt & Britt for propounders.

STACY, J. There are a number of exceptions appearing on the record relating to the admission and exclusion of evidence, but none apparently raises any new question of law which would seem to merit an extended discussion. In several instances it does not appear what answer the witness would have made to the excluded question, nor what the caveators proposed to prove by the evidence which they wanted to offer. Therefore, as we cannot determine what bearing these rulings may have had upon the result, the exceptions must be overruled. *Armfield v. R. R.*, 162 N.C. 24; *Fulwood v. Fulwood*, 161 N.C. 601; *Dickerson v. Dail*, 159 N.C. 541, and numerous cases to like import. The other evidentiary exceptions, or those relating to the court's rulings on questions of proof, are not sufficiently meritorious to warrant a reversal or new trial. Verdicts and judgments are not to be set aside for harmless error, or for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling was erroneous, but that it was material and prejudicial, amounting to a denial of some substantial right. *Cotton Mills v. Hosiery Mills*, 181 N.C. 33; *Burris v. Litaker*, 181 N.C. 376; *S. v. Smith*, 164 N.C. 476; and *Cauble v. Express Co.*, at the present term.

In apt time, and in due form, the caveators requested his Honor to give the following special instruction:

"The court charges you that you may attach, because the law attaches, such importance to the testimony of the subscribing witnesses to the will, for that they are known as the witnesses of the law, and the law requires them, not only for the purpose of witnessing the signature of the instrument as to form, and requires them to take certain precautions as to signing in each other's

presence and in the presence of the testator, and that they see the testator sign, to protect against fraud, but they are required especially to see that the testator is of sound and disposing mind and memory, and is of such mind and memory at the precise point of time when the papers are executed, and that in passing upon the testimony of the witnesses to the will you may observe this rule and consider their testimony in the light of the duty which the law casts upon them with reference to her mental capacity in executing the will."

It is stated that this prayer was taken from the opinion of this Court in the case of *Cornelius v. Cornelius*, 52 N.C. 593, and the caveators contend that his Honor's refusal to give it should be held for reversible error. Marshall, C.J., in *U. S. v. Burr*, 4
(401) Cranch 470, says: "Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered."

The facts of the two cases thus presented for comparison are quite different. In *Cornelius v. Cornelius* the testator had been badly wounded some two weeks before he made his will. Having grown worse from his injury, he sent for a physician and the two subscribing witnesses. At the request of the testator, the doctor prepared his will, and the witnesses duly attested it. Upon the question of mental capacity — it being alleged that the testator was in extremis when his will was signed — the witnesses testified in detail as to what occurred, and the observations they made of the testator's condition, at the time of declaration and publication. Under these circumstances it was clear that the subscribing witnesses were in a better position to know the mental condition of the testator at the precise time in question than any one else, and their testimony related only to his condition at that particular time. In the case at bar, however, the subscribing witnesses not only testified as to the mental condition of the testatrix at the time of the execution of her will, but they were also examined about other matters and things, which existed and transpired at other times and places, before and after the date of attestation.

The law charges a subscribing witness with the duty of observing the condition of the testator at the time his will is executed and to see that no wrong is committed, but as to what may transpire at some other time and place, especially at a subsequent date, when the witness is under no special duty to observe the testator, the law would attach no peculiar importance to his testimony in regard to these matters, simply because he was a subscribing witness to the will. Attesting witnesses are witnesses of the law in regard to

matters occurring at the time of attestation. They are therefore charged with the duty of observing the attendant circumstances and conditions surrounding the making of a will, but we apprehend they stand on the same footing with other witnesses when they undertake to speak of matters not coming within the scope of their knowledge and observation as such witnesses.

As the prayer of the caveators is general in its terms, and not confined to that part of the testimony of the subscribing witnesses which related only to what transpired when they were charged with this special duty, we think his Honor's refusal to give it, as requested, should not be held for reversible error. On the other hand, if the prayer, by correct interpretation was intended to apply to the testimony of the subscribing witnesses only when they were charged with this special duty as witnesses of the law, still we think the caveators are not in position to complain, because the evidence of these witnesses, in this particular, was favorable to the propounders. It was only when they spoke of other matters (402) that their testimony seemed to lend color to the contentions of the caveators.

The remaining exceptions are without special merit; and, upon a perusal of the entire case, we conclude that the judgment on the verdict in favor of the propounders must be upheld.

No error.

PER CURIAM. There was a motion for a new trial filed in this cause, upon the ground of the alleged misconduct of a juror. Caveators aver that the information, concerning the instant matter, came to their attention after the adjournment of the term of court at which the case was tried, and after the same had been docketed here. Upon an examination of the affidavits, filed by both sides in regard to the present motion, we are of opinion that it must be overruled, and it is therefore disallowed.

Cited: S. v. Beam, 184 N.C. 744; *S. v. Jester,* 185 N.C. 736; *Hosiery Co. v. Express Co.,* 186 N.C. 557; *Smith v. Myers,* 188 N.C. 552; *Newbern v. Hinton,* 190 N.C. 111; *Perry v. Surety Co.,* 190 N.C. 292; *Power Co. v. Taylor,* 194 N.C. 233; *In re Will of Efird,* 195 N.C. 91; *Morris v. Y & B Corp.,* 198 N.C. 722; *S. v. Casey,* 201 N.C. 625; *Caldwell v. R. R.,* 218 N.C. 86; *Ryals v. Contracting Co.,* 219 N.C. 495; *Call v. Stroud,* 232 N.C. 480.

F. M. TRANSOU, ADMINISTRATOR, v. DIRECTOR GENERAL ET AL.

(Filed 9 November, 1921.)

Evidence—Nonsuit—Trials—Railroads—Director General — War — Railroads—Questions for Jury.

In an action for a wrongful death, C.S. 160, against the Director General of Railroads and a railway company under his control as a war measure, there was evidence tending to show that a wood yard had its warehouse located about five feet from an industrial track of defendant, continuing from which was a platform extending up to within ten inches from the passing trains, and a truck several feet long and four feet wide, used for hauling the wood about, was customarily left there by day and night, when not in actual use, sometimes on the platform and at others on the ground. In pursuance of his duty and under the immediate order of his superior, the plaintiff's intestate, a brakeman, was required, at night, to cross over between the cars of defendant's freight train and to get upon the cars by end ladders thereon; and after a backing movement of the train, without light on the lead end of the car, was found dead, badly mutilated, at the end of a car where was also found the truck which had been caught on one of these ladders and splintered to pieces on an edge of the platform which had been broken into by the impact. Viewing this evidence most favorably to the plaintiff, as required on a motion as of nonsuit: *Held*, the evidence was sufficient as to the Director General, but the motion was properly allowed as to the railroad company. *Mo. Pac. R. R. Co. v. Ault*, U. S. Supreme Court (opinion filed 1 June, 1921).

APPEAL by plaintiff from *Webb, J.*, at March Term, (403) 1921, of FORSYTH.

Civil action to recover damages under C.S. 160, for an alleged wrongful death.

Plaintiff's intestate on the night of August 15, 1919, was brakeman on the Winston-Salem yards of the Southern Railway Company, which, at that time, was being operated by the Director General of Railroads.

Just north of Seventh street in Winston-Salem a switch track branched off from the main line of the railroad running south, and on the west side of this industrial track, as it was called, after it crossed Seventh street, was a woodyard building belonging to the defendant Hicks. This building was about eighteen feet high. Beside the switch track, for a part of the distance of this building, is a platform several feet long and about four feet high that extended up to within ten inches of passing trains. The part of the building where there was no platform stood about five feet from the track. Hicks' woodyard used a truck for hauling wood around the yard and carrying wood to load and unload cars. The truck was several feet long and four feet wide. For some months this truck was left at night, and during the day when not in use, on the platform and

on the ground beside the track within eight or ten inches of passing cars, and was so placed for some time before the death of plaintiff's intestate.

There was a string of twelve cars on this industrial track, and at about 1 o'clock at night of August 15th the switch engine and crew were to get out two of these cars. The engine backed in, coupled up to this string of cars, pulled out and cut the twelfth car down the main line. The train was to then back into the switch with eleven cars remaining. Plaintiff's intestate was ordered by the conductor in charge to set the brakes on the car placed on the main line and to come over and catch the backing train on the switch track, get on top, give, receive and pass signals to the engineman. There was no light on lead end of backing cars, though all members of the train crew had lanterns and it was a clear night. The ladders going to the top of all box cars at the front end as the cars were backing in were on the west side next to the woodyard building.

The deceased set the brakes on the car on the main line and the train backed into the switch track. The truck was caught by a ladder of the backing train, torn to pieces, and parts of the broken truck were scattered along the track for fifteen or twenty feet. The top of the platform at one place was torn up and the deceased was found on the ground beside the train, right at a car ladder that had parts of this broken truck hanging to it. His clothes were torn to pieces, his legs, arms, head and entire body bruised and broken, and he was covered with blood.

At the close of plaintiff's evidence the court entered judgment of nonsuit as to the Director General of Railroads and the Southern Railway Company, and from this ruling plaintiff appealed. (404)

Raymond G. Parker and J. C. Wallace for plaintiff.
Manly, Hendren & Womble for defendant.

STACY, J. Considering the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, we think the case should have been submitted to the jury. True, no one testified with exactness as to how the deceased met his death. But the objective and physical facts speak louder than witnesses. Can there be any doubt of the truth of the allegation that the moving train, the demolished truck and the torn up platform all played a part in producing the injury which resulted in Transou's death? It would seem that an affirmative answer might be entirely permissible, and not altogether unlikely. At least, such is a reasonable inference

arising from the attendant conditions and surrounding circumstances. Maybe the jury will take a different view of the matter, and maybe not. At any rate, upon the record — it appearing that the deceased was at the time engaged in the discharge of his duties as a brakeman — we think the question of liability is one for the jury under proper instructions from the court. But of course, we express no opinion as to how it should be found. *Southern Ry. Co. v. Diseker*, 81 S.E. 269.

In *Brown v. Missouri K. & T. Ry. Co.*, 212 S.W. 27, a case somewhat similar to the one at bar, the Supreme Court of Missouri states the law as follows:

"Railroad companies will not be held to have exercised ordinary care to provide reasonably safe conditions for their employees to do their work when they permit standpipes, telegraph poles, fences, buildings, and other structures to be maintained so close to their tracks that employees being on the outside of their moving cars or engines, in the performance of their duties, are crushed by them," and to which should be added, "unless due care is used and proper means are employed to prevent such injuries."

To like effect are our own decisions. *Heilig v. R. R.*, 152 N.C. 469; *Williams v. R. R.*, 168 N.C. 363, and cases there cited. The question has been so fully discussed in *Williams v. R. R.* that we deem it unnecessary to repeat here what has so recently been said there. See, also, *Virginia Ry. Co. v. Halstead*, 258 Fed. 428, and *Sanderson v. Boston & M. R. R.*, 101 Atlantic 40, cases directly in point.

With the case going back for a new trial, we refrain from further discussion, as we do not wish to prejudice the rights of any of the parties.

(405) The judgment of nonsuit as to the Southern Railway Company will be sustained under authority of the recent decision of the United States Supreme Court in *Mo. Pac. R. R. Co. v. Ault*, decided 1 June, 1921, and reported in the Advanced Opinions of that Court at page 647, No. 16, 1 July, 1921. But as to the Director General of Railroads, the judgment will be reversed and a new trial ordered.

Affirmed as to the Southern Railway Company.

Reversed as to the Director General of Railroads.

IN RE WILL OF JOHN NEAL.

(Filed 9 November, 1921.)

1. Public Administrators—Estates—Rights to Qualify—Statutes.

The public administrator of a county has no right or interest in the estate of the deceased which would entitle him to administer, unless and until he has been appointed and qualified by the clerk upon the specific estate, C.S. 6, and after the period allowed for the relatives to qualify in the order specified by the statute, or some other person on their letter of renunciation. C.S. 20.

2. Same—University of North Carolina.

Where those claiming the estate of the deceased by descent and distribution have filed a caveat to a paper-writing purporting to be his will, and the questions at issue not only relate to the validity of the will, but the rights of the caveators as lawful claimants, the University of North Carolina, to whom the estate may eventually escheat, is a proper party, and not the public administrator.

3. Escheat—University of North Carolina—Statutes—Constitutional Law—Descent and Distribution.

The University of North Carolina, under its charter, since confirmed by our State Constitution, Art. IX, sec. 7, and now embraced in C.S. 5784-5-6, has the right by escheat to the property of a decedent, who has died intestate, leaving no one else to whom it would go under our statutes of descent and distribution.

STACY, J., concurs in result.

APPEAL by Charles E. Hamilton, caveator, from *Long, J.*, at the September Term, 1921, of FORSYTH.

John Neal, born in Winston, N. C., a *nullius filius*, died in Omaha, Neb., leaving an estate estimated to be of the value of $800,000 or over. On 19 October, 1920, what was claimed to be a copy of a lost, or destroyed, will disposing of his property and appointing the Wachovia Bank and Trust Company executor and trustee, was admitted to probate in the Superior Court of Forsyth.

The caveat was duly filed to said will by Jenny Beckerdite, of Washington, D. C., claiming to be the mother of (406) said John Neal, and by one Mary Harbin McCoy and her son, Tharry McCoy, of Okmulgee, Okla., claiming to be the wife and son of said John Neal, and in addition, on 19 April, 1921, the appellant, Charles E. Hamilton, public administrator of Forsyth, filed his petition for caveat, upon the ground that he was entitled to qualify and that his interest in the commissions which would accrue was such "interest in the estate" as would entitle him to maintain a caveat to contest the validity of the copy of the alleged will and also to contest the claim of Jenny Beckerdite to be the mother

of the deceased, and of Mary Harbin McCoy and her son to be the wife and son of the deceased. The court dismissed the petition of said Charles E. Hamilton, public administrator, and he appealed.

Lindsay Patterson and H. G. Hudson for appellant.

Manly, Hendren & Womble for Wachovia Bank and Trust Company.

L. M. Swink and B. S. Royster for residuary legatees.

M. L. Learned and Craig & Vogler for special legatees.

CLARK, C.J. The petition was properly dismissed. A party entitled to file a caveat under C.S. 4158, must be some one "entitled under such will or interested in the estate." It being admitted that the deceased was *nullius filius*, there could be no one coming within that designation except: (1) His mother, if living; (2) his wife and child, if proven to be such; and (3) the University of North Carolina, should it be found that the deceased left neither mother, nor wife nor children.

A public administrator is a position created by ch. 113, Laws 1868-9, now C.S. 17. He has no interest in or control over any estate until appointed thereto by the clerk, and qualified, C.S. 20. It is not necessary to discuss whether his prospective commissions is such an interest as would entitle him to caveat the will, for he has not been appointed administrator of this estate, and has no interest whatever therein.

Under C.S. 20, the public administrator can apply for letters of administration "when the period of six months has elapsed from the death of any decedent, and no letters testamentary or letters of administration or collection have been applied for and issued to any person," and even then such public administrator is not entitled in all cases to be appointed. See citations under that section.

In this case the Wachovia Bank and Trust Company has already been appointed, and there is no ground upon which the public administrator can be entitled to qualify unless such administration is set aside upon a caveat of the will or by order of the clerk for other sufficient cause.

In the trial of the caveat now pending, it must be determined whether the mother is living, or whether the deceased left a wife and child, as alleged, and in the trial of such caveat the Uni-
(407) versity of North Carolina, in view of the claims of the first two parties being negatived, is a proper party, the University would be entitled to the property if the will is set aside, by the terms of the charter of that institution in 1789, which conferred

upon it all property escheating for lack of heirs and distributees or otherwise. If the contest should be decided in favor of either of these three parties, and the alleged will should be set aside, the administration would be conferred upon the successful contestant, or some one selected at the request of such party. In no event has the public administrator any right to be appointed to administer until the successful party has waived its right to do so. C.S. 29 and 30. The position of public administrator confers no right to administration until the parties having the prior right to qualify have waived their right or been adjudged unfit by the clerk. He has no interest in the estate and no right to qualify unless and until appointed to the particular estate by the clerk. Until so appointed he is simply an "eligible" for appointment upon the default of the parties who have a prior right to appointment. 24 Corpus Juris, p. 1201, sec. 2873, note (a).

The right of succeeding by escheat to all property when there is no wife, or parties entitled under the statutes of descent and distribution, was conferred upon the University by its charter in 1789 (ch. 306, sec. 2), and has been confirmed since by the State Constitution, Art. IX, sec. 7, and has been extended by several statutes which are now C.S. 5784, 5785, and 5786. This is a most valuable right which will become more and more a source of revenue to the University as the State grows in wealth and population. One of the first cases in which the matter was presented is *Tindall v. Johnston*, 2 N.C. 373, and among those since have been two recent cases, one from Wilmington and the other from Goldsboro (*Grantham v. Jinnette*, 177 N.C. 229), out of which the University became entitled under decisions of this Court to receive very considerable sums.

The University, therefore, is the proper, if not necessary, party to represent the public interest if there is a default of heirs and distributees, but the public administrator is not when he has not been appointed and qualified upon the estate in question. C.S. 6.

This contest turns upon the validity of the alleged will, a copy of which has been probated in common form in lieu of the alleged original will. The parties who are entitled to urge the caveat to set aside this probate are, as already stated, the alleged mother, the alleged wife and son, and the University of North Carolina.

The judgment dismissing the petition of the public administrator is

Affirmed.

STACY, J., concurs in result.

Cited: Brooks v. Clement Co., 201 N.C. 771; *University v. High Point,* 203 N.C. 563; *Carter v. Smith,* 209 N.C. 792; *In re Estate of Smith,* 210 N.C. 626.

(408)

MANUFACTURERS' FINANCE COMPANY ET AL., v. AMAZON COTTON MILLS COMPANY ET AL.

(Filed 9 November, 1921.)

1. Contracts — Deeds and Conveyances — Registration — Certificates — Forms—Statutes.

The certificate for registration of a contract of sale of personal property reserving title need not be in any particular form to meet the requirement for registration, and is sufficient if it conforms in its material parts. C.S. 3312.

2. Same—Venue—Parties—Acknowledgment.

Where the certificate for registration of a contract of sale of personal property thereon appears to have been "subscribed before" a notary public, with the seal attached showing the county, and has been certified to for registration by the clerk of the court of that county, and in the caption of the contract also appears the name of the county and state in which it had been registered, and by reference to the certificate and the paper to which it relates the names of the party sufficiently appears: *Held,* the contract is sufficient in form for the purposes of registration as to the venue, the name of the party, and as to its having been sufficiently acknowledged; and the fact that it was sworn to as well as subscribed is regarded as surplusage and immaterial. C.S. 3312.

APPEAL by plaintiffs from *Webb, J.,* August Term, 1921, of DAVIDSON.

This is an action to recover the balance due on sale of a motor truck, and for the possession of the truck, title to which was retained as security. The purchaser, who is insolvent, having sold the truck to his codefendant, the cotton mills, the only defense set up is by said cotton mills that the acknowledgment to the contract retaining title is insufficient. The court so held, and plaintiffs appealed.

Brooks, Hines & Smith for plaintiffs.
Raper & Raper, and H. R. Kyser for cotton mills.

CLARK, C.J. The sufficiency of the acknowledgment to the conditional sale retaining the title to the truck is the sole question. The instrument is full and in regular form in all respects, and was regis-

tered at the time the sale was made, as was required. C.S. 3312. Said contract begins with the heading "State of North Carolina, county of Davidson," and specifically stipulates "The title to said property is to remain in the vendor until the notes are fully paid." It is signed by the purchaser under seal, and has this acknowledgment:

"Signed, sealed and delivered in the presence of..... Subscribed and sworn to before me this 17 April, 1920. In witness whereof I have hereunto set my hand and seal this day and date above written. R. L. Pope, N. P." (Here follows the seal of the notary public, with the addition of the sentence, (409) "My commission expires 16 October, 1921"), and the following:

"North Carolina, Davidson County, in Superior Court. The foregoing certificate of R. L. Pope, N. P., of Davidson County, attested by his official seal, is adjudged to be in due form and according to law. Let the instrument and certificate be registered. Witness my hand this 24 April, 1920. S. J. Smith, C. S. C." The paper was filed for registration on that same day and duly recorded as certified by the register of deeds.

The defendants objected on the ground that said contract was improperly acknowledged and not entitled to registration. The court sustained the objection, to which the plaintiff excepted and submitted to a voluntary nonsuit, which ruling is assigned as error. The defendants contend that the acknowledgment is insufficient in that the venue is not stated; that the name of the grantor does not appear in the body of the acknowledgment, and the acknowledgment does not mention the instrument to which it relates; that the word "acknowledge" is not used; that the identical words used in the statute are not used in the acknowledgment, which is in the form of an affidavit.

The authorities are uniform that the certificate will be upheld if the place can be ascertained with reasonable certainty by an inspection of the whole instrument. 1 R.C.L. 283; 108 A.S.R. 543, note.

"It is a rule of universal application that a literal compliance with the statute is not to be required of a certificate of acknowledgment, and that, if it substantially conforms to the statutory provisions as to the material facts to be embodied therein, it is sufficient." 1 Cyc. 582.

The venue is stated in the beginning of the contract as North Carolina, Davidson County; the seal of the notary shows him to be a notary public of that county, and the clerk of the Superior Court certifies that he is such.

The failure to name the party in the certificate of acknowledg-

ment is not material when, as here, it appears on the same paper and refers to the instrument which is certified by the notary to be "subscribed before him." 1 R.C.L. 284; 72 S.A.R. 927. The use of the word "acknowledgment" is not essential if its equivalent is used. The officer certifies that this paper was subscribed in his presence, which is a sufficient acknowledgment, and the fact that it is sworn to in nowise detracts from the sufficiency. This was unnecessary and surplusage.

In this State we have cases exactly in point. In *Starke v. Etheridge,* 71 N.C. 240, where a deed was proven before the clerk of the court, who wrote opposite the witness' name the word "jurat," and the clerk testified that the witness did in fact acknowledge the deed, this was held sufficient. This case was cited and approved
(410) in *Quinnerly v. Quinnerly,* 114 N.C. 147, which held that the recital in the probate that the mortgagees "had procured the paper to be proven" was sufficient. In *Devereux v. McMahon,* 102 N.C. 287, where the certificate was simply that "the execution of the deed was this day proven," it was held sufficient, the Court saying that if the essential elements appear the certificate will be upheld regardless of mere form. In *Moore v. Quickle,* 159 N.C. 130, the Court approved the above authorities and held that a presumption arises from the registration of the deed that the probate was by the proper officer and was properly proven by him. The same authorities are cited and approved in *Power Corp. v. Power Corp.,* 168 N.C. 221.

The simple question, therefore, is whether the above certificate of the notary public, who was certified to be such by the clerk of the Superior Court (and which was on the instrument duly admitted to registration by the register of deeds, on the adjudication of the clerk) that the instrument had been "subscribed and sworn to" before him was equivalent to its being acknowledged. It certainly amounted to this, and even more, but like the young lawyer who swore to his demurrer, this did not invalidate it.

Sir John Barrington (Judge) in his "Irish Sketches" says that an affidavit before him for resisting an officer in serving a writ, in the wilds of Connemara, averred that "the defendant poked his gun at the affiant through a crack in the door, and with an oath said that if the affiant did not leave there immediately the defendant would send the affiant's soul to hell, which the affiant *very believes he would have done.*" The judge did not quash the warrant on account of the surplusage.

The paper being duly certified by the notary as "subscribed"

before him was a plenary acknowledgment, and the additional words "and sworn to" certainly could not make it invalid.

Reversed.

Cited: *Finance Co. v. Cotton Mills Co.*, 187 N.C. 234; *Finance Co. v. Cotton Mills Co.*, 188 N.C. 827; *McClure v. Crow*, 196 N.C. 660; *Hayes v. Ferguson*, 206 N.C. 415; *Freeman v. Morrison*, 214 N.C. 243.

M. H. PINNIX v. L. A. SMITHDEAL.

(Filed 9 November, 1921.)

1. Statute of Frauds—Contracts—Lands—Resales—Division of Profits.

A parol contract for the resale of lands for a division of the profits is not within the statute of frauds, and is enforceable.

2. Limitation of Actions—Contracts.

The statute of limitations does not begin to run against one claiming a right under a parol contract to share in the profits of land from a resale, until the time agreed upon as that upon which the division thereof shall be made; and he has his election to await therefor until the time specified.

3. Appeal and Error—Theory of Trials—Objections and Exceptions.

Where, in an action to recover a division of the profits upon a resale of land, there are issues submitted as to the validity of a parol contract, or whether the plaintiff was entitled to recover for his services under a *quantum meruit*, and the defendant, by his plea and all the testimony available to him, directed his defense exclusively to the definiteness of the evidence to stablish an express agreement, he is precluded from insisting on an appeal upon an exception entirely inconsistent with the position maintained by him on the trial as to the insufficiency of the evidence upon the second issue, as to the *quantum meruit*.

4. Limitation of Actions—Pleadings—Evidence—Burden of Proof.

The burden of pleading the statute of limitations is upon the defendant relying thereon, but when properly pleading the burden of proof is on the plaintiff to show that his cause of action comes within the statutory period, and it is reversible error for the judge in his charge to place this burden on the defendant.

5. Appeal and Error—New Trials—Issues.

Where an action for breach of contract for the resale of land and division of profits has been submitted to the jury upon one issue as to the damages and the other as to the statute of limitations set up and properly pleaded as a defense, and there is involved the question of plaintiff's

recovery upon a *quantum meruit* against which the statute has evidently run, but not as to the breach of contract alleged; and the court has erroneously placed the burden upon the defendant to show that the statute had run against the plaintiff's action, and the verdict of the jury is in exact accordance with the plaintiff's demand, without allowing deduction for defendant's expenses, a new trial will be granted on appeal, upon both issues, it not distinctly appearing that the error committed has not prejudiced the entire verdict. *Poindexter v. Call, ante,* 366, cited and distinguished.

APPEAL by defendant from *Finley, J.,* at the March (411) Term, 1921, of GUILFORD.

Civil action to recover one-half of profits accrued from a deal in real estate alleged by plaintiff to be due from defendant. There was denial of liability and plea of statute of limitations. On issues submitted the jury rendered the following verdict:

"1. What amount, if any, is plaintiff entitled to recover of defendant? Answer: '$2,218.24, with interest at 6 per cent from 6 March, 1921.'

"2. Is the plaintiff's claim or any part thereof barred by the statute of limitations? Answer: 'No.'"

Judgment for plaintiff, and defendant excepted and appealed.

Wilson & Frazier for plaintiff.

King, Sapp & King, Fentress & Jerome for defendant.

HOKE, J. There were allegations with evidence on the (412) part of plaintiff tending to show that in September, 1914, plaintiff, an agent who had made some successful deals in real estate, was approached by defendant with a request that if plaintiff found a desirable investment of that kind, defendant would advance the money, and on resale they would divide the profits equally; that soon thereafter plaintiff found a piece of property in Greensboro, known as the Hawkins place, and same was purchased by defendant pursuant to agreement. It being considered desirable that some improvements should be made on the property, plaintiff undertook to supervise this work, and about the time, or soon after it was completed, and the property rented, plaintiff, in December, 1914, suggested that the agreement between them be reduced to writing, the parties having met for that purpose, there was a dispute between them as to how much interest defendant should be allowed on the money he had advanced for the purchase and improvements.

The evidence showed that defendant had procured this money by a sale of some bank stock on which he was realizing 8 per cent, payable semi-annually, and he contended the agreement was that in

adjustment of this matter he was to be allowed the same per cent. Plaintiff denying this, no written or further agreement was made about it, defendant testifying in reference to this interview that when the disagreement arose, plaintiff said he would proceed to sell, and defendant replied, "No you won't sell my property. You haven't invested a cent in it."

The facts in evidence tended further to show that defendant retained control and possession of the property, renting it, etc., till 5 March, 1919, when he sold same at a profit, according to plaintiff's testimony, of $4,436.48, and one-half of same, $2,218.24, being plaintiff's share as per their agreement, defendant's evidence being to the effect that the entire profits were about $2,000, or a little more. And there were other facts in evidence which may have tended to render the alleged agreement indefinite. There was also evidence as to the character of plaintiff's service in supervising the improvements, and the time he gave to this work; that on sale being made, plaintiff had demanded the share of the profits alleged to be due him, and payment was refused. Upon this, a sufficient statement to a proper apprehension of the questions presented, the case was submitted to the jury in two aspects of liability, one under and by virtue of the express agreement to divide the profits, and another on a *quantum meruit* for services rendered, in case the first position should not be sufficiently proved. As to the express agreement, the contract, if so established, being for a division of profits on and after a sale of realty, is not within the statute of frauds. *Bourne v. Sherrill,* 143 N.C. 381; *Michael v. Foil,* 100 N.C. 178.

And under the express terms of the agreement, this division of the profits to take place after the sale, the statute of limitations would not begin to run until a sale was had, and defendant by his mere verbal effort to repudiate the agreement in (413) 1914, even if his words amounted to that, could not force the plaintiff to presently commence suit, but he was entitled at his election to await for division the time that the agreement specified, under principle approved in *Smith v. Allen,* 181 N.C. 56; *Helsabeck v. Daub., Admn.,* 167 N.C. 205; *Smith v. Lumber Co.,* 142 N.C. 26; *Markham v. Markham,* 110 N.C. 356. And as to the *quantum meruit,* while there seems to be very little evidence to justify a submission of that question, the objection is not open to defendant on the record, as he by plea and all the testimony available to him, was endeavoring to show that the pertinent facts were too indefinite to establish an express agreement, in which event the issue could have been properly submitted on a *quantum meruit.* On authority he should be precluded from insisting on an exception so entirely in-

consistent with the position maintained by him in the trial of the cause. *Smith v. Lipsitz,* 178 N.C. 100; *Brown v. Chemical Co.,* 165 N.C. 421; *R. R. v. McCarthy,* 96 U.S. 258.

On the second issue, that as to the statute of limitations, the court charged the jury that the burden of the issue was on the defendant, and the question was considered under that ruling. The law puts the burden of pleading the statute of limitations on a defendant, but when properly pleaded, the burden is then on the plaintiff to show that his cause of action comes within the statutory period. *Sprinkle v. Sprinkle,* 159 N.C. 81. The charge of his Honor, therefore, is clearly erroneous. And on the record we are of opinion that there should be a new trial as to both issues. As heretofore stated, the first issue was submitted in two aspects, on the express agreement, and on a *quantum meruit.* As to the first, the statute of limitations could in no event affect the question, as the suit was commenced within a few days after the sale. But on the second ground of imputed liability, the statute of limitations would bar the claim, the evidence showing that the services involved in such a position were rendered more than four years before suit brought, and although it would seem that the jury in determining the first issue have accepted plaintiff's version of the matter, both as to an express agreement and the amount due thereunder, we cannot be so assured of this as to say that the error in the statute of limitation may not in any way have affected the result. While we have found no error in the determination of the first issue, which is not covered by any exception, it is clear from a perusal of the evidence that the profits claimed on a resale have been estimated on an improper basis. Under an alleged express agreement for profits on a sale of the property, defendant has been charged with the full amount of the sale, all the rents collected, and has been allowed nothing either for in-
(414) terest on the investment or for taxes or any other expenses incident to the ownership and control of the property or the collection of the rents.

Considering the question briefly in a recent decision, *Samatt v. Klapp,* 181 N.C. 503, the Court said: "Profit implies without more, the gain resulting from the employment of capital, the excess of receipts over expenditures and so understood, the expenses must be deducted before the profits can be ascertained." Apart from this and in the absence of express agreement affecting the matter, in any fair estimate of profits when rents are considered as an item of charge, the interest on the capital invested must be allowed for by way of reduction. The court seems to have left this question of interest to the jury, but in a case of this character the adjustment of

profits growing out of a contract, the allowance of interest at the legal rate is of right and should not be left to a jury's discretion. *Bond v. Cotton Mills,* 166 N.C. 20.

In this aspect of the record we cannot say of a certainty that the jury may not have awarded recovery on the theory of a *quantum meruit,* and merely adopted plaintiff's estimate as a guide to the conclusion arrived at. We are not inadvertent to a decision at the present term to the effect that when an issue determinative of the controversy has been properly settled that an error committed in the determination of a second issue will not be allowed to affect the result. *Poindexter v. Call, ante,* 366. But this is where the two are on separate questions, and it is clear that the finding on one could in no way have injuriously affected the decision of the other. But not so here, where the finding of the issue on the statute of limitations under an erroneous ruling may have very real significance from the manner in which the first issue was presented and necessarily considered by the jury.

For the error indicated, plaintiff is entitled to a new trial on both issues, and it is so ordered.

New trial.

Cited: Fisher v. Lumber Co., 183 N.C. 491; *Barbee v. Edwards,* 238 N.C. 220; *Schmidt v. Bryant,* 251 N.C. 841.

BOARD OF COUNTY COMMISSIONERS OF STOKES COUNTY v. WALTER W. GEORGE.

(Filed 9 November, 1921.)

1. Constitutional Law—Trial by Jury—Courts—Jurisdiction—Investigations—Rights Safeguarded.

Article I, section 19, of our State Constitution, guaranteeing the right of trial by jury in "controversies at law respecting property," includes equitable and legal elements involved in the determination of the issues made by the pleadings, but it is not required that a trial by jury be had at each stage of the proceedings when this right has elsewhere therein been properly safeguarded by statute.

2. Same—Statutes—Dogs—Damages.

The ascertainment of damages by three disinterested freeholders, etc., caused by injury to person or property by any dog, upon satisfactory proof, etc., and the payment thereof by county commissioners from the dog taxes, with the right of the county to sue to recover the amount so

paid from the owner of the dog if known or discovered, C.S. 1681, reserves to such owner the right to a trial by jury in the action of the commissioners, and does not permit recovery in excess of the sum awarded for the damages caused as ascertained under the provisions of the statute.

3. Same—Trial—Procedure.

C.S. 1681, ascertaining in a certain manner damages caused by the dog of another, etc., is a police regulation not estopping the defendant in the county's action from establishing any defense available to him under the pleadings, nor does it change the method of procedure as to the burden of proof, or otherwise, except that it limits recovery of the injured person, electing to proceed under this statute, to a sum not exceeding the amount thereunder ascertained.

4. Same—Estoppel—Election—Waiver.

In an action by the county to recover damages to the person or property sustained by the dog of another, under C.S. 1681, the reasonable cost of the services of the persons chosen to make the assessment, and paid by the county, is a part of the money paid on account of the injury or destruction caused by the dog, and defendant's exception thereto will not be sustained. *Semble*, the question of the reasonableness of this amount is a question for the jury, when aptly and properly raised and presented.

5. Evidence—Nonexpert Witness—Sheep—Dogs—Statutes.

Where the time that has elapsed between the death and discovery of sheep is relevant to the inquiry in the county's action against the owner of the dog to recover damages it has paid, C.S. 1681, testimony of the judgment of a nonexpert witness upon the personal observation of the carcass of the sheep, as to the length of time it had been killed, is not erroneous as the expression of a theoretical or scientific opinion.

APPEAL by defendant from *Finley, J.*, at the Spring
(415) Term, 1921, of STOKES.

Civil action tried before Finley, Judge, and a jury on appeal from a justice of the peace.

Section 1681 of Consolidated Statutes is as follows:

"The money arising under the provisions of this article shall be applied to the school funds of the county in which said tax is collected: *Provided,* it shall be the duty of the county commissioners, upon complaint made to them of injury to person or injury to or destruction of property by any dog, upon satisfactory proof of such injury or destruction, to appoint three freeholders to ascertain the amount of damages done, including necessary treatment, if any, and all reasonable expenses incurred, and upon the coming in of the report of such jury of the damages as aforesaid, the said
(416) county commissioners shall order the same paid out of any moneys arising from the tax on dogs as provided for in this article. And in cases where the owner of such dog or dogs is known or can be ascertained, he shall reimburse the county to the

amount paid out for such injury or destruction. To enforce collection of this amount the county commissioners are hereby authorized and empowered to sue for the same."

C. H. Lunsford made complaint that certain of his sheep had been killed by dogs, and the board of commissioners appointed three freeholders to ascertain the amount of his damages. These freeholders made the following report:

To the Board of County Commissioners of Stokes County, North Carolina:

Jurors appointed by the board in the above-entitled matter to make inquiry into and assess the damages of C. H. Lunsford, most respectfully report to the board:

That in obedience to the order, and after due notice to the claimant, and also to Walter George, the alleged owner of the dogs, they met at Capella, in Stokes County, North Carolina, on 31 January, 1920, and proceeded to hear the evidence offered, and find the said claimant lost four sheep killed by dogs, and had one other sheep injured, and upon the evidence we find that Walter W. George's dogs were in the sheep pasture, but no evidence that they killed the sheep, and they assess the damages sustained by the claimant at $43.

Respectfully reported this 31 January, 1920.

R. B. TUTTLE.
D. F. TILLOTSON.
J. H. COVINGTON.

Fees for services:

J. H. Covington	$4.00
D. F. Tillotson	4.00
R. B. Tuttle	4.00

In May, 1920, the plaintiff brought suit against the defendant before a justice of the peace to reimburse the county to the amount paid out on account of the sheep killed and injured. On appeal the case was tried in the Superior Court, the issue and the answer being as follows:

"Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: '$55.' "

Judgment was entered, and the defendant, having noted exceptions, appealed to this Court.

N. O. Petree for plaintiff. (417)
McMichael & Johnson for defendant.

ADAMS, J. The defendant's counsel denounces the validity of the statute in question on the ground that it deprives his client of rights and privileges guaranteed by the organic law. His chief objection is based on the proposition that the statutory provision for the assessment of damages by three freeholders is an express denial of the right of trial by jury. We do not understand the defendant's counsel to contend that the provision is in conflict with the "due process clause" of the Federal Constitution, for the Supreme Court of the United States has held that the Seventh Amendment relates only to trials in the Federal courts, and that trial by jury in suits at common law in the State courts is not a privilege or immunity of national citizenship which the states are forbidden by the Fourteenth Amendment to abridge. *Walker v. Sauvinet,* 92 U.S. 90; *Montana Co. v. Mining Co.,* 152 U.S. 171; *Marvin v. Trout,* 199 U.S. 212. But he insists that the statute conflicts with Art. I, sec. 19, of the Constitution of North Carolina, which is as follows: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." The words "controversies at law" include all civil actions in which facts, involving either legal or equitable elements, are put in issue by the pleadings, but they do not include questions of fact, or proceedings which are purely equitable. *Porter v. Armstrong,* 134 N.C. 447; *Caldwell v. Wilson,* 121 N.C. 425; *Worthy v. Shields,* 90 N.C. 192. "Trial" refers to a dispute and issue of fact, and the expression "trial by jury," as used in the statute, does not necessarily signify that every legal controversy is to be determined by a jury. The section under consideration guarantees to the citizen the right to have submitted to and determined by a jury every issue of fact properly and legally raised by the pleadings in a civil action. If the statute before us were in conflict with such constitutional provision, it could not be sustained. But it does not purport to abridge the defendant's right. Conceding that the defendant, although duly notified, was not required to attend the hearing before the freeholders and therefore was not barred by their award, still, it does not necessarily follow that the provision for the assessment of damages is for this reason in conflict with the Constitution. The statute is a police regulation evidently designed as between the claimant and the county to fix a limitation upon the demand of the former and upon the liability of the latter. When the claimant invokes the aid of the statute and elects to abide by the method therein prescribed he cannot thereafter claim either from the county or from the owner of the animal any damages in excess of the amount awarded by the freeholders. But the amount

awarded the claimant is not an estoppel upon the owner (418)
of the dog. The latter's right of trial by jury is not denied,
but is amply protected by the provision which empowers the commissioners to bring suit. When such suit is brought the owner of the dog may submit to the jury any issues joined upon the pleadings, and by this means preserve his constitutional right. The sentence, "He shall reimburse the county to the amount paid out for such injury or destruction," imports, not that the defendant is bound by the freeholders' award, but that the commissioners shall not in any event recover more than the amount paid to the claimant.

Upon the trial it would be incumbent upon the commissioners to show by the preponderance of the evidence that the defendant was the owner of the dog, as well as the amount of the damage; and it would be open to the defendant to rely upon failure of the plaintiff's proof and, if necessary, upon evidence offered in rebuttal. This construction of the statute affords the owner of the dog the opportunity to present every defense he would be entitled to in case of suit brought by the owner of the injured or destroyed sheep.

The freeholders assessed the claimant's damages at $43; the fees of the freeholders were $12. His Honor instructed the jury that they might award damages "not exceeding the $43 and the $12 cost." The defendant excepted to this instruction on the ground that the statute provides for reimbursement to the extent of the amount paid by the county "for such injury or destruction," and not for cost. The expression "amount paid out for such injury or destruction," construed in connection with other provisions in the statute, imports the amount paid out on account of such injury or destruction. If the defendant had insisted on his right to have the jury find whether the cost was reasonable, we should have been inclined to sustain his exception; but his proposition is that the plaintiff as a matter of law cannot recover the cost which is properly incurred.

Testimony as to the length of time that had elapsed between the death and the discovery of the sheep was properly admitted. It was not hearsay evidence; it was an expression of the judgment or estimate of a nonexpert witness based upon personal observation of the carcass, and not an expression of a theoretical or scientific opinion, or a deduction from the testimony of others. *Ives v. Lumber Co.*, 147 N.C. 307; *Bennett v. Mfg. Co., ib.*, 621; *Britt v. R. R.*, 148 N.C. 37; *Murdock v. R. R.*, 159 N.C. 131; *Barnes v. R. R.*, 178 N.C. 268; *Hassell v. Daniels*, 180 N.C. 38.

We have examined and duly considered all the exceptions, and in the record we find no error.

No error.

Cited: *S. v. Kincaid,* 183 N.C. 714; *McInnish v. Bd. of Ed.,* 187 N.C. 496; *S. v. Hege,* 194 N.C. 529; *Hagler v. Hwy. Comm.,* 200 N.C. 734; *McAlister v. Yancey County,* 212 N.C. 210; *Utilities Com. v. Trucking Co.,* 223 N.C. 695; *Erickson v. Starling,* 235 N.C. 654; *Wells v. Clayton,* 236 N.C. 105; *Wescott v. Hwy. Com.,* 262 N.C. 527.

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L. S. FORD v. W. J. McANALLY.

(Filed 16 November, 1921.)

1. Evidence—Pleadings—Nonsuit.

The pleadings will be liberally construed and the evidence taken in the light most favorable to plaintiff, on defendant's motion for judgment thereon.

2. Malicious Prosecution—Evidence—Punitive Damages.

The requisites of maliciousness, wantonness, and recklessness, and want of probable cause, in order to recover punitive damages in an action for malicious prosecution, is sufficiently evidenced when the testimony tends to show that the defendant caused the plaintiff to be arrested, cursed him, had policemen to arrest and incarcerate him without a warrant, and appeared before the committing magistrate and participated in the prosecution, which resulted in acquittal, taxing the plaintiff, as prosecutor, with the cost.

3. Damages—Punitive Damages—Public Policy.

Punitive damages are allowed in proper cases on the ground of public policy for example's sake, and given to the plaintiff because it is awarded in his suit.

4. Same—Verdict—Discretion of Jury—Excessive or Arbitrary—Appeal and Error.

Where punitive damages are allowable, their award is in the sound discretion of the jury, and the amount so ascertained will not be disturbed on appeal, unless excessively disproportionate to the circumstances of contumely and indignity present in each particular case, and in the instant case the verdict therefor is not regarded as being arbitrarily or harshly rendered, upon the facts appearing of record.

APPEAL by defendant from *Finley, J.,* at April Term, 1921, of GUILFORD.

Civil action to recover damages for an alleged assault, false arrest and malicious prosecution.

Upon denial of liability, and issues joined, the jury returned the following verdict:

"1. Did the defendant assault the plaintiff as alleged in the complaint? Answer: 'Yes.'

"2. If so, what damage is the plaintiff entitled to recover of the defendant? Answer: '$25.'

"3. Did the defendant cause the arrest and prosecution of the plaintiff as alleged? Answer: 'Yes.'

"4. If so, was the arrest without probable cause? Answer: 'Yes.'

"5. If so, was the arrest malicious? Answer: 'Yes.'

"6. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: '$3,079.' "

There was a judgment entered on the verdict in favor (420) of the plaintiff, from which the defendant appealed.

J. Allen Austin and John A. Barringer for plaintiff.

W. P. Bynum, S. S. Alderman and C. C. Barnhart for defendant.

STACY, J. There is no exception or question presented on the initial cause of action arising out of the alleged assault. Defendant concedes that the plaintiff is entitled to judgment on the first two issues, but contends that the allegations of the complaint and the evidence adduced on the hearing were not sufficient to warrant the verdict on the remaining issues, or those relating to the second cause of action.

Giving the complaint a liberal construction, as we are required to do under C.S. 535, and considering the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, we think the verdict and judgment should be upheld.

There is evidence on the record tending to show that, after the assault and without any warrant or other legal process, the plaintiff was arrested at the instance of the defendant and taken by two policemen to the police station in the city of High Point. The defendant followed the officers and made application, at the police station, for a peace warrant and left instructions that the plaintiff be locked up, which was done, and he remained in jail from about 9 a.m. until approximately 7 p.m., or practically the entire day. The evidence also discloses that the defendant signed the warrant in blank, which was afterwards filled out by one of the officers, charging L. S. Ford, plaintiff herein, with an assault with a deadly weapon, to wit, a pistol. At the trial on the following morning in the recorder's court Ford was acquitted and the prosecuting witness, defendant herein, was taxed with the cost.

The defendant denied that the arrest was made at his instance, or that he gave any instructions to have the plaintiff committed to

jail under the warrant; but, during the course of his examination, he testified as follows:

"At the trial I asked the court to tax me with the costs. I did that because I was sorry for the man. The reason for my sympathy was just because I thought that he was feeble, hardly a responsible man. It was after I made the request that the court released him. I was the least bit angry, when I was down there at the gallery. Yes, sir, I will say I was angry. I was angry enough to fight, but I didn't propose to fight him."

It is further contended by the defendant that, under authority of *Oakley v. Tate,* 118 N.C. 361, he should not be held responsible for the prosecution because of the officer's error in filling out the blank warrant, charging the present plaintiff with an as-
(421) sault, when application had been made for a peace warrant only. But it appears unmistakably that the plaintiff was arrested without any warrant at all; that Dr. McAnally was present at the trial on the following morning, and the jury have found that he was there aiding in the prosecution. It could hardly be said that he was ignorant of what was going on. At any rate, there was no request to correct the error and change the warrant. Indeed, it would seem that by conduct, at least, the defendant adopted the warrant and ratified what the officer had done. The jury evidently took this view of the matter, as it was submitted to them by the court, and they have found, in answer to the third issue, that the defendant caused the arrest and prosecution of the plaintiff.

The defendant objected to the submission of the fifth and sixth issues and contended that there was no evidence in the case to justify an award of punitive damages, citing *Lewis v. Clegg,* 120 N.C. 292. But upon the attendant facts and surrounding circumstances, the jury have found that the defendant acted wrongfully and that he was actuated by malice. Indeed, he himself testified: "As to Mr. Ford's statement on the witness stand that I told the officers to arrest him, what was said was that I told them I wanted a peace warrant for him. I did, as he stated, ask the officers at the gallery and at the lockup to lock him up, that he was crazy. I believe I did say that the man was crazy. I think that today. I didn't curse him. I expressed an opinion. I said 'get out of the way, you damned fool.' That is the only thing I said, or any kind of profanity."

We think, upon the whole case, his Honor correctly submitted the issues to the jury.

Punitive damages, sometimes called smart money, are allowed in cases where the injury is inflicted in a malicious, wanton and

reckless manner. The defendant's conduct must have been actually malicious or wanton, displaying a spirit of mischief towards the plaintiff, or of reckless and criminal indifference to his rights. When these elements are present, damages commensurate with the injury may be allowed by way of punishment to the defendant. But these damages are awarded on the grounds of public policy, for example's sake, and not because the plaintiff has a right to the money, but it goes to him merely because it is assessed in his suit. Both the awarding of punitive damages and the amount to be allowed, if any, rest in the sound discretion of the jury. *Cobb v. R. R.*, 175 N.C. 132; *Fields v. Bynum*, 156 N.C. 413; *Hayes v. R. R.*, 141 N.C. 199; *Smithwick v. Ward*, 52 N.C. 64. However, the amount of punitive damages, while resting in the sound discretion of the jury, may not be excessively disproportionate to the circumstances of contumely and indignity present in each particular case. (422) *Gilreath v. Allen*, 32 N.C. 67; *Sloan v. Edwards*, 61 Md. 100; *Bernheimer v. Becker*, 3 L.R.A. (N.S.) 221.

In the case before us it would seem that the jury have been liberal in their award, but we cannot say the amount is disproportionately excessive. The defendant is a physician, and he admitted that he was angry and knew the plaintiff was a feeble man. In fact, he stated that he thought he was crazy. The jury evidently concluded that, under these circumstances, the defendant, with his superior advantages, should have been more charitable in his conduct toward the plaintiff, a man in an unequal and less fortunate condition. It is unbecoming in the strong to deal oppressively with the weak; and the jury evidently thought the present defendant should be taxed with a substantial sum in the form of punitive damages, or smart money. We cannot say they have acted arbitrarily or harshly. It does not so appear on the record.

The remaining exceptions are apparently without special merit; and, upon a careful consideration of the whole case, we have found no sufficient reason for disturbing the result of the trial.

No error.

Cited: Elmore v. R. R., 189 N.C. 674; *Swain v. Oakley*, 190 N.C. 115; *Tripp v. Tobacco Co.*, 193 N.C. 618; *Lay v. Publishing Co.*, 209 N.C. 139; *Petty v. Ins. Co.*, 210 N.C. 500; *Robinson v. McAlhaney*, 214 N.C. 184; *Bryant v. Reedy*, 214 N.C. 759; *Harris v. Coach Co.*, 220 N.C. 69; *Hairston v. Greyhound Corp.*, 220 N.C. 645; *Parris v. Fischer & Co.*, 221 N.C. 113.

STERN AND SWIFT v. HYMAN BROTHERS.

(Filed 16 November, 1921.)

Attorney and Client—Contracts—Fees—Contingencies—Evidence — Recovery—Questions for Jury—Trials.

The relationship of attorney and client is one wherein the parties do not stand upon an equal footing in making a new contract for the compensation of the attorney, *in medias res*, or after he has therein been employed and before the conclusion of the matter; and when, under such circumstances, the attorney has agreed with his client to be paid upon a contingent fee basis, this contract will be declared void, not upon the ground that actual fraud is necessary to be shown, but as a matter of sound public policy to exclude its possibility; and if no definite original contract of employment has been established, the measure of the attorney's recovery, is a reasonable compensation for the service rendered.

APPEAL by defendants from *Finley, J.*, at February Term, 1921 of GUILFORD.

This is an action by the plaintiffs, attorneys at law, to recover $5,050 as a fee for services claimed to have been rendered in adjusting the loss by fire on a stock of goods with certain fire insurance companies. The complaint alleges that the defendants employed the plaintiffs to adjust said losses with the insurance companies,
(423) and that afterwards pending the said adjustment the defendants agreed to pay the plaintiffs 20 per cent on the amount recovered, which the plaintiffs claim was $25,250, on which they seek to recover a fee of $5,050. The defendants deny the making of such contract and allege that the only contract ever made with the plaintiffs was to pay them $200 for their services in making proofs of loss and in assisting in adjusting the same, which was all the service the plaintiffs rendered. The defendants further allege that $25,250, the basis on which the plaintiffs demand $5,050 as 20 per cent fee, was never recovered; that in fact the insurance companies took over $15,000 of goods and $550 for fixtures and agreed to pay $9,700 in cash, loss by fires, of which $3,250 has not been paid, and allege not only that there was no contract for 20 per cent, but that, if there was it should be computed only on the cash actually recovered, and they contend further that if there were any contract for 20 per cent, it was made during the time the plaintiffs were acting in pursuance of their employment and was void, and the plaintiffs are entitled only to reasonable compensation for their services to be assessed by the jury.

Wilson & Frazier for plaintiffs.

W. P. Bynum and R. C. Strudwick for defendants.

CLARK, C.J. The record is voluminous and there are many exceptions, but we need not consider but one, which we think entitles the defendants to a new trial, for the others may not arise on another trial.

The defendants except and assign for error the refusal of his Honor to give the third instruction requested by the defendants, to wit: "It being admitted that at the time of the alleged contract between the plaintiff Stern and the defendants (as claimed by plaintiffs) the relation of attorney and client existed between them, the plaintiffs would not be entitled to recover from the defendants any sum for their sevrices which was not fair and reasonable under all the circumstances of the case, no matter what sum was mentioned in the said contract." This prayer should have been granted. It is, and should be, well settled that where the relation of attorney and client exists and the contract sued upon by the attorney is made during the existence of the relationship, and more especially when the contract is for a portion of the subject-matter contended for, as here, the attorney can recover no more than a reasonable compensation for his services, no matter what kind of a contract he made with his client or induced him to enter into. This rule is based upon the confidential relations existing between attorney and client, and is enforced, not upon the ground that there was fraud, but in order to prevent fraud and as a matter of sound public policy.

While the relationship exists an attorney cannot bind his client in any manner to make him greater compensation (424) for his services than he would have the right to demand if no contract had been made, during the existence of the relationship. Weeks on Attorneys (2 ed.), sec. 368; *Elmore v. Johnson* (149 Ill. 503), 21 L.R.A. 366. His Honor disregarded this principle as pointed out by exceptions 5, 7, 9, and 16 in the record.

In a contract of this kind, the burden is on the plaintiff to show that it was fair and reasonable and not upon the defendant to show to the contrary. *Lee v. Pearce*, 68 N.C. 81, 87; *McLeod v. Bullard*, 84 N.C. 516; *Pritchard v. Smith*, 160 N.C. 84; 2 R.C.L., p. 966, sec. 42, and p. 1038; *Shirk v. Neible*, 83 American State Rep., note on pages 161-162, and cases there cited.

According to the complaint and the testimony of the plaintiff Stern himself, the contract he sets up was entered into after the establishment of the relation of attorney and client between the parties and during the continuance of this relationship.

Under such circumstances the client would be at a serious disadvantage if the attorney should throw up the case after acquiring knowledge of his plaintiff's case, and while the conduct of the case

was *in medias res.* The parties did not stand upon an equal footing. 2 Thornton on Attorneys, secs. 428, 432.

This wholesome principle is that the parties to a contract must stand on an equal footing, and that, therefore, as a matter of law, "Certain known and definite fiduciary relations, as, for instance, that of trustee and *cestui que trust,* attorney and client, guardian and ward, and general agent, having the entire management of the business of the principal, are sufficient under our present judiciary system to raise a presumption of fraud as a matter of law to be laid down by the judge as decisive of the issue, unless rebutted. Other presumptions of fraud are matters of fact to be passed upon by a jury." *Lee v. Pearce,* 68 N.C. 81. The able opinion in this case by Chief Justice Pearson laid down the eternal principle of equity and fair dealings from which this Court has never deviated. On page 87 of that opinion the Court instances other fiduciary relations which do not amount to a presumption of fraud as a matter of law, but merely raise a presumption of fraud as a matter of fact to be passed upon by a jury.

That case has been cited and affirmed by this Court in a long line of cases cited in the Anno. Ed., and the principle is universally recognized. The fact of the existence of the relationship of attorney and client at the time the contract is alleged by the plaintiffs to have been made appears from the complaint and by the evidence of the plaintiff himself, Stern, and the judge should have held the alleged contract, if made, to have been void as a matter of law. And, unless the jury rejected, as it would seem that they did,
(425) the defendants' allegation that there was a contract made prior to entering into the relationship for $200, then the case should have been submitted to the jury upon the third prayer of the defendants as above set out, and the jury should have assessed the plaintiffs' recovery upon the basis of a reasonable compensation for the services rendered by the plaintiffs and the benefits received by the defendants. The verdict and judgment must be set aside and a new trial is granted for this

Error.

Cited: Mebane v. Broadnax. 183 N.C. 338; *Abernethy v. Godette,* 183 N.C. 675; *Ellis v. Poindexter,* 193 N.C. 565.

JAMES R. ALLEN v. JUNE T. GARDNER.

(Filed 16 November, 1921.)

1. Military—Civil Authority.

The civil authority is superior to that of the military, and the latter can act only by authority and in execution of the power of the former.

2. Same—Citizenship.

A soldier in the United States Army going, at the invitation of the officers of a military organization, to take part as a bugler in a local celebration, is to be regarded as a citizen while so doing.

3. Same—False Arrest—Evidence—Questions for Jury—Trials.

Evidence that the commanding officer of militia in a city under the orders of the Governor to quell a threatened riot, caused the plaintiff, in the action for false imprisonment, and a soldier in the regular Army, there at the request of the officers of the militia to take part as a bugler in certain festivities to be held there, to be arrested with curses, and incarcerated in the city jail, because, though perfectly respectful, he did not at once comply with his orders to go back to the barracks, when, not being prepared to stay there, he was on his way to a hotel to secure a room for sleeping, and while he was in his regular uniform, differing from that of the militia, is sufficient as to the arrest being willful, malicious, and arbitrary, and without probable cause, to be submitted to the jury on the issue of the defendant's guilt, there being no necessity shown for the order given to the plaintiff.

4. Appeal and Error—Instructions.

The appellant has no just grounds for an exception to an instruction of the court that is favorable to him, as appears of record in this action for false arrest.

5. Same—False Arrest—Personal Malice.

The evidence must be taken in the light most favorable to the plaintiff on defendant's motion as of nonsuit thereon, and a requested instruction in this action for false arrest, that the plaintiff could not recover unless the jury should find that the defendant was moved by personal ill will or malice towards the plaintiff, was properly refused, under the evidence.

APPEAL by defendant from *Finley, J.*, at the May Term, 1921, of DAVIDSON. (426)

This was an action for false imprisonment. The plaintiff alleges that he was wrongfully arrested and imprisoned in the city jail of Charlotte under the orders and directions of the defendant, in command of the 1st Regiment, N. C. National Guard. The defense was that the defendant was acting under the orders of the Governor to quell a threatened riot in that city, and arrested the plaintiff upon a reasonable apprehension that it was his duty to do so.

The pleadings raised the issue whether the conduct of the de-

fendant was in good faith or was arbitrary and unwarranted. The jury found all the issues against the defendant, who makes no exception except as to the refusal to nonsuit, and the refusal to give certain prayers for instruction, which, as the record shows, the court substantially gave. From the verdict and judgment the defendant appealed.

P. V. Critcher and J. R. McCrary for plaintiff.
Phillips & Bower and Attorney-General Manning for defendant.

CLARK, C.J. The evidence for the plaintiff, which alone is to be considered on a motion for nonsuit, was to the effect that the plaintiff was not a member of the defendant's command, "The 1st N. C. National Guard," but was a regular in the U. S. Army on furlough, whose uniform and hat distinguished him from the members of the National Guard. The evidence also shows that he was a man of good character and went to Charlotte at the invitation of the officers of the Lexington Company to act as a bugler at the 20th of May celebration the next day. He had taken no bedding or other equipment with him, and, therefore, not being prepared to sleep in the barracks of the National Guard on the night of the 19th, he was on his way to the hotel, all of which, he testifies, he explained fully and respectfully to the defendant when he was arrested, but avers that the defendant arbitrarily and unjustly, without reasonable cause and without any necessity to prevent a riot, and without authority, sent him to jail.

The testimony of plaintiff and his witnesses is that at the time of the plaintiff's arrest and imprisonment, and for some time previously, the streets had been cleared of both civilians and soldiers with the exception of the guard of soldiers, and at the time of the plaintiff's arrest there was no commotion or disturbance going on anywhere. When the plaintiff was halted by one of the sentinels he promptly obeyed the command, and when asked where he was going, replied that he was a member of the Regular Army, and did not belong to the National Guard, and was going to the hotel to get a bed to sleep on; that Colonel Gardner, the defendant, told the
(427) plaintiff that "he would have to go back to the barracks." The witnesses testify that the plaintiff, in a respectful manner, repeated to Colonel Gardner the above statement, and stated his object was to find a bed to sleep, whereupon the defendant told him that he would have to respect him, and the plaintiff, in a most respectful manner, did salute him, but the defendant replied that "He did not give a d— for his salutes," and in an angry manner told

the plaintiff that he "would give him a bed" and ordered the witnesses to take him under arrest and carry him to jail, which was done, and the plaintiff was thrown into the city prison with the humiliating circumstances of its filth and odors and disorderly inmates, where he was kept confined until the next morning when he was released, as the defendant claims, on his orders.

If the defendant deemed the plaintiff was a member of his command he should have been sent back to the barracks, and there is no evidence which justifies his being sent under guard to the city jail, which was a humiliation to a soldier, and which was especially unwarranted as to the plaintiff, who for the purposes of this occasion was a civilian, attending the celebration as the guest of the officers of the Lexington Company.

The evidence of all these witnesses, with slight contradiction from the defendant's witnesses, was that the manner and conduct of the plaintiff was calm, quiet, respectful, and inoffensive, and that the conduct of the defendant was angry, offensive, arbitrary, and without reason or necessity, and that the plaintiff disobeyed no order of the defendant, and that his arrest and imprisonment was unnecessary to preserve the peace and order of the city, in order to prevent any further trouble, if there had been any prior trouble worthy of mention, which the record does not disclose. The witnesses testify to seeing only one man apparently hurt, and the plaintiff when arrested knew nothing of any riot or disturbance having occurred.

On the motion to nonsuit, the evidence for plaintiff must be taken as true. The jury, upon the issues submitted, found that the arrest and imprisonment was without probable cause and was malicious.

With every allowance for the excitement and confusion, and the possible misunderstanding of the situation, there was evidence properly submitted to the jury upon which they found their verdict. The supremacy of the civil authorities over the military is at the very basis of our republican form of government, both State and Federal, and the military can act only by authority, and in execution of the civil power. "A member of the State militia, whether a private or an officer, in active service, is not relieved from civil liability for his acts while so engaged on the ground that he acted in obedience to orders received through the regular military channels." *Frank v. Smith,* 25 A. & E. 319, and notes.

A soldier is responsible for damages for wrongful acts done by him whether with or without orders or in excess of (428) his orders. His being a member of the military does not give him license to do those things which a civilian cannot do. A

military officer may legally arrest a person, in given instances, but no more force must be used than is necessary, and if the power is exercised for the purpose of oppression or any injury is wilfully done, he will be answerable. 18 R.C.L. 1082.

The requirement of reasonable good faith and probable cause and the evidence tending to show arbitrary and oppressive use of authority by the defendant are fully and correctly set out in the judge's charge, who instructed the jury that if the plaintiff refused to go to barracks when there was danger of the renewal of a riot, or if the defendant had reasonable ground to believe that the plaintiff going up the street in uniform might excite the negroes, or tend to bring on a renewal of the trouble, they should answer the second issue as to probable cause in favor of the defendant.

The court further charged the jury that under the circumstances the defendant's conduct should not be weighed in golden scales, and if he acted in good faith and under good reasons the jury should answer the issue in his favor.

The court further charged the jury that if the plaintiff went with the soldiers to Charlotte as their guest he was under obligations to abide the military rules and regulations and render obedience to the officers of the militia, and had no right to resist any lawful command of the defendant, who had a right to prevent the plaintiff from going up town if there was reason to apprehend that it might cause trouble between the whites and blacks. Indeed, the larger part of the charge was the statement of the contentions for the defendant and giving at length substantially the instructions asked by his attorneys. These were as favorable as he could expect, if not indeed in some respects too much so.

The court properly refused to give the prayer that the plaintiff could not recover unless the defendant was moved by personal ill will or malice towards the plaintiff. While the jury could consider the evidence that tended more favorably towards the defendant, as already stated, the Court, on appeal, is privileged to consider, on the motion to nonsuit, only the evidence in favor of the plaintiff, and with the most favorable inferences from it in his favor.

The facts have been found by the jury upon evidence that if believed justified their findings, and without any erroneous statement of the law prejudicial to the defendant.

No error.

(429)

O. V. WOOSLEY v. COMMISSIONERS OF DAVIDSON COUNTY.

(Filed 16 November, 1921.)

1. School Districts—Counties—Education—Statutes — Constitutional Law —High Schools—Divisions—Segregation of Pupils.

Our statutes providing that the county board of education shall divide the townships, or the entire county, etc., into convenient school districts, etc., C.S. 5469, and authorizing and empowering the board to redistrict the entire county and consolidate school districts, etc., C.S. 5473, was passed in pursuance of Article IX, section 3, of the State Constitution, and refers to the establishment, consolidation, etc., of districts in the sense of territorial or geographical regions, and not to the dividing or segregation of the pupils; and an attempt of the county board of education thereunder to form a high school district in a territory comprised of several public school districts, is without authority and invalid. As to whether this may be done under the Public Laws of 1921, ch. 179, is neither before the Court nor decided on this appeal.

2. School Districts—Bonds—Taxation— Counties — Statutes — Constitutional Law—Local Laws—Injunction.

An act which authorizes a high school district, sought to be established under an invalid resolution of the county commissioners, to issue bonds and levy taxes for school purposes, is itself invalid to confer such authority; and an act for the purpose of ratifying such ordinance, passed since the adoption of Const., Art. II, sec. 29, is a local, private, or special act thereby prohibited; and the issuance of such bonds and levy of such taxes, will be permanently enjoined.

APPEAL by defendant from *Webb, J.*, at chambers, 14 October, 1921, from DAVIDSON.

Controversy without action, heard upon an agreed statement of facts, the material and controlling parts of which are as follows:

"1. That the board of education of Davidson County in meeting duly assembled on 16 February, 1921, created or attempted to create a school district, to be known as the Lexington High School District, by adopting the following resolution by unanimous vote, all the commissioners present and voting:

" 'Be it resolved by the board of education of Davidson County, that it is in the opinion of the said board for the best interest and for the educational advantage of the residents of the following named school districts, to wit, Dacotah District, Fowler District, Hargrove District, Greenwood District, Pilgrim District, Nakomis District, Southside District, and Lexington District, that a high school district be created to comprise the said districts.

" 'Therefore, be it further resolved, that a high school district, to be known as the Lexington High School District, comprising the districts above set forth, be, and the same is hebery, created.'

"That prior to 16 February, 1921, no school district was
(430) in existence containing as a whole the territory now embraced in the alleged school district known as the Lexington High School District, and no other or further action than that set forth above has been taken by the county board of education in relation to the creation of said school district.

"2. That the General Assembly of North Carolina, at its regular session of 1921, passed an act (not yet published in book form) entitled, 'An act to authorize the Lexington High School District of Davidson County to issue bonds and to provide a tax levy for the payment thereof, and a tax levy for maintenance,' which act was ratified on 2 March, 1921.

"3. That the General Assembly of North Carolina, at its regular session of 1921, passed an act (not yet published in book form) entitled, 'An act incorporating the Lexington High School District,' which act was ratified on 7 March, 1921. That said act created a governing body for the proper and more efficient management of the Lexington High School District, which governing body was known and designated as the Lexington High School Commissioners, and was constituted a body politic and corporate with the power to exercise the rights and privileges incident to corporations, and the said act made other provisions for the conduct of the high school in said district.

"4. That pursuant to the first act above mentioned, ratified 2 March, 1921, and as provided therein, the board of education of Davidson County on 7 March, 1921, petitioned the board of county commissioners of Davidson County to call an election in the Lexington High School District for the purpose of submitting to the qualified voters of said district the question of the issuance of $225,000 of bonds, to be used in erecting and equipping a school building in said district, and the purchase of a site therefor, and the levy of an annual tax for the payment of principal and interest, and also for the purpose of submitting to the voters the question of the levy of an annual tax for the maintenance of the high school so erected.

"5. That pursuant to the said petition, and under the authority conferred upon them by the said special act, the board of commissioners of Davidson County, at their regular meeting on 7 March, 1921, granted the prayer of the board of education as set forth in said petition, and ordered a new registration of voters and ordered the said special election to be held in the Lexington High School District on 19 April, 1921, which said election was duly carried.

"6. That of the eight school districts mentioned and set forth in the resolution of the county board of education, passed 16 Febru-

ary, 1921, as the districts which are to be comprised in the Lexington High School District, six are school districts created by the county board of education under the general law, and without any vote of the electors for such creation, and no tax (431) is levied therein. In each of the said districts a school committee is in charge of the school properties therein. That one of said districts, to wit, Nakomis District, is a special-tax school district, and by vote of the electors thereof a local tax is levied for the maintenance of the school. That the Lexington District referred to in said resolution is not a school district in any sense save that the boundaries thereof are coterminous with the boundaries of the town of Lexington, the charter of which town vests the management of the schools therein in a special board of school trustees, and the town levies a tax therein for school purposes and for the payment of school bonds issued by the town for the school buildings.

"7. That the board of education of Davidson County, in the resolution adopted 16 February, 1921, did not attempt to consolidate the eight districts mentioned in the said resolution into one district and thereby wipe out and abolish the several then existing school districts, and no action has been taken by the county board of education or any other board to annul or repeal the creation of said constituent districts or to abolish the said committees having charge of the school property in said districts, and all of the same are continuing to function as if the Lexington High School District had not been created, and the school taxes have continued to be levied and collected in the said Nakomis District and in the town of Lexington, for the said county board of education attempted to create the Lexington High School District by overlapping or superimposing the said district on the eight districts comprised therein, and pursuant to the authority contained in the second act above mentioned, ratified 7 March, 1921, has elected a board of commissioners for the said Lexington High School District, the members of which having qualified.

. . . . . .

"9. That it is the declared intention of the board of education of Davidson County and the board of commissioners of Lexington High School District to erect a high school building and to maintain therein a high school for the attendance of pupils residing within the so-called Lexington High School District, who are being taught those subjects commonly called 'high school subjects' or studies, and pursuant to said declared purpose the board of commissioners of Davidson County, pursuant to the vote cast at said election, have authorized the issuance of the said $225,000 of bonds, and are pre-

paring to issue same, and are preparing to levy the tax for the payment of the principal and interest of said bonds, and are preparing to levy a tax for the maintenance of the said schools; and the said board of education of Davidson County, in accordance with the provisions of the said special act, are preparing to sell said bonds."

The plaintiff is a resident and taxpayer of Davidson
(432) County, living within and having property located in that section of the county which, for the purposes of this action, is designated as the Lexington High School District.

From a judgment continuing and making permanent the temporary restraining order, and holding that the board of education of Davidson County was without authority to create the Lexington High School District in the manner proposed, and that the issuance of the bonds in question was without warrant of law, the defendants appealed.

Raper & Raper for plaintiff.
J. L. Morehead for defendants.

STACY, J. It is conceded at the outset that the board of education and the commissioners of Davidson County have not proceeded under C.S. 5511, for the establishment of a central high school, or high schools in a *township,* as provided by said section. It should also be noted that the resolution of the board of education, purporting to create the Lexington High School District, and the two special acts of the Legislature relating thereto, were all passed prior to the enactment, on 8 March, 1921, of ch. 179, Public Laws 1921, amending the public school law of the State. Hence, the validity of the resolution and the special acts in question must be determined by the law as it existed at the time of their passage — there being no suggestion of a ratification by any subsequent legislation.

The sections of the school law chiefly relevant and bearing upon the questions now before us are:

C.S. 5469, which provides: "The county board of education shall divide the townships, or the entire county or any part of the county into convenient school districts, as compact in form as practicable. It shall consult the convenience and necessities of each race in settling the boundaries of the school district for each race."

And C.S. 5473, which is in terms as follows: "The county board of education is hereby authorized and empowered to redistrict the entire county or any part thereof and to consolidate school districts wherever and whenever in its judgment the redistricting of the con-

solidation of districts will better serve the educational interests of the township, or the county, or any part of the county."

It will be observed that these statutes, which were passed in obedience to Article IX, section 3, of the Constitution, confer upon the several county boards of education authority (1) to divide the townships, or the entire county, or any part thereof, into convenient school districts (not to exceed the limit fixed by C.S. 5472); and (2) to redistrict the entire county, or any part thereof, and to consolidate school districts whenever and wherever (433) such, in their judgment, will better serve the educational interest of the townships or of the county.

This grant of power from the Legislature, we apprehend, refers to the establishment, consolidation, etc., of districts in the sense of territorial divisions or geographical regions (*Howell v. Howell,* 151 N.C. 575; 18 C.J., 1292), and not in the sense of dividing or segregating pupils as distinguished from the land on which they live. "In its ordinary meaning the word district is commonly and properly used to designate any one of the various divisions or subdivisions into which the State is divided for political or other purposes, and may refer either to a congressional, judicial, senatorial, representative, school, or road district, depending always upon the connection in which it is used." *Oliver v. State,* 11 Neb. 1, 13; 7 N.W. 444.

Giving to the words of the statute their usual and customary meaning, we have found no authority for the establishment by the county board of education of such a district as the "Lexington High School District" (No. 7, agreed facts), which, to be more exact, might properly be termed a superdistrict in that it is sought to be created by superimposing the same upon the eight districts comprised therein. An arrangement of this kind may be very desirable and helpful in the building up of an educational system for the State; but, as now advised, we do not think the Legislature had so declared its purpose and policy at the time of the attempted establishment of the district in question. Nor do we wish to be understood, by what is said here, as suggesting that probably such a district might be created under ch. 179, Public Laws 1921. This latter question is not before us, and any expression presently made would be *obiter* and we make none.

Holding, as we do, that the resolution of the board of education of Davidson County, passed on 16 February, 1921, was insufficient to accomplish the desired purpose, and that the establishment of the proposed district was therefore ineffectual, it follows that the special acts of the Legislature, incorporating and authorizing said district to issue bonds, must be declared inoperative. *Ex nihilo nihil fit.*

There being no valid district in existence, the Legislature now is

without authority itself to pass any local, private, or special act establishing or changing the lines of school districts. Const., Art. II, sec. 29; *Sechrist v. Comrs.*, 181 N.C. 511; *Trustees v. Trust Co.*, 181 N.C. 306.

The judgment of his Honor permanently enjoining and perpetually restraining the defendant from issuing the bonds in question must be upheld upon the facts now appearing on the instant record.

Affirmed.

Cited: Paschal v. Johnson, 183 N.C. 133; *Perry v. Comrs.*, 183 N.C. 391; *Galloway v. Bd. of Ed.*, 184 N.C. 247; *Armstrong v. Comrs.*, 185 N.C. 407; *S. v. Kelly*, 186 N.C. 375; *Moore v. Bd. of Ed.*, 212 N.C. 502.

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(434)

J. N. ANDERSON v. TOWN OF ALBEMARLE.

(Filed 16 November, 1921.)

1. Instructions—Verdict Directing—Arguments—Jury—Courts — Appeal and Error.

A direction of the verdict upon the evidence renders immaterial an exception that the appellant had been deprived of the right to the last speech to the jury.

2. Cities and Towns—Municipal Corporations — Street Improvements — Assessments—Prima Facie Case—Instructions.

The assessment roll is *prima facie* evidence of the correctness of an assessment made in accordance with the provisions of statute by the governing board of a municipality as to the amount the owners of land upon an improved street shall pay for the special benefits they have received, and when there is no evidence to the contrary, it is not error for the court to direct a verdict upon this evidence.

3. Cities and Towns—Municipal Corporations — Street Improvements — Benefits—Government.

The question as to whether the owner of land abutting upon a street to be improved will be benefited thereby may be determined by the governing board of the municipality, under the provisions of our statute adopting the front foot rule as the method of assessment. The various methods of such assessments commented upon by CLARK, C.J.

4. Same—Pavements—Physical Contact of Improvements—Assessments.

The paving of the full width of a city street may be postponed until such time as the governing body of a municipality may adjudge that the traffic conditions thereon require it; and an objection by the owner of

land abutting on the street to an assessment by the front foot rule for special benefit, upon the ground that his property does not come in actual contact with the part of the street for which the city has paid as a general benefit, is untenable under our statutes, ch. 56, secs. 5, 13, Laws 1915.

APPEAL by plaintiff from *Bryson, J.*, at September (Special) Term, 1921, of STANLY.

The commissioners of Albemarle, under authority of ch. 56, Laws 1915, assessed against the plaintiff for improvements on the street in front of his lot on North Street the sum of $207.05. He filed exceptions and appealed. In the Superior Court the court instructed the jury if they believed the evidence to answer the issue $207.05, with interest, and the plaintiff appealed to this Court.

Raper & Raper and R. L. Brown for plaintiff.
R. L. Smith & Son and Manly, Hendren & Womble for defendant.

CLARK, C.J. The plaintiff excepted and assigned as error that the court refused to require the defendant to open the case, and thereby required him to take the burden of proof. Since at the close of all the evidence the court directed the verdict, it could make little difference upon whom the burden of proof was (435) placed. The assessment had been made by the commissioners under ch. 56, Laws 1915, and it had been reviewed and approved by them on exceptions filed by the plaintiff. The assessment roll is *prima facie* evidence of a valid assessment, and of the regularity and correctness of all prior proceedings. McQuillin Mun. Corp., sec. 2117, which he says is based upon the general maxim that public officers are presumed to have acted rightly until it is otherwise made to appear. In the absence of any showing to the contrary, assessments are presumed valid, and he who attacks their validity has the burden of establishing by competent evidence the contrary. *Justice v. Asheville*, 161 N.C. 62.

The second exception is to the refusal of the court to allow the plaintiff to testify that the work done on the street did not in any manner benefit his property, or enhance its value. It is not open to the property owner to say that the improvement is not a benefit to the property. Doubtless, if the owner's opinion on this point were to govern there would be few streets or sidewalks improved in their entire length. The question of benefit is one of fact, and the governing board of a municipality, under legislative authority, is vested with the power to determine what lands will be benefited by the improvements, and their determination is conclusive upon the owner of the ground charged with the costs of the improvements except in rare

cases. *Felmet v. Canton,* 177 N.C. 52; *Justice v. Asheville,* 161 N.C. 62; *Tarboro v. Staton,* 156 N.C. 504.

There are several methods of apportioning the costs of improvements, but there are two which are generally recognized, *i. e.,* apportionment according to benefits and apportionment according to frontage, but the liability of the land to assessment is determined by the municipality under the authority of the Legislature. The assessment to each owner when the apportionment is according to benefit is subject to review by appeal.

This matter is fully discussed, 25 R.C.L., at p. 138, and the general principles applicable on the question of assessment of benefits is discussed, 25 R.C.L., p. 160. The general principles of apportionment, when made, as in this case, according to frontage, are set forth 25 R.C.L., 144 *et seq.* The plaintiff excepted to the action of the court in directing the jury to answer the issue in favor of the town upon these grounds:

1. The petition does not sufficiently describe the local improvement to be undertaken. An examination of the record shows, in our judgment an entirely sufficient description of the improvements to be undertaken.

2. The second objection is that the order of the board prescribed that the street should be "improved by covering the same with sheet asphalt," whereas, only 30 feet in the middle was paved, leaving a space of 22½ feet between the plaintiff's property and the
(436) paved portion of the street, and the principal point of this appeal lies in the contention that the plaintiff's lot does not "abut on the improvement."

If there were force in this objection, then the town could not impose any part of the improvement of a street upon the adjacent landowners unless the street was paved to its entire width. In the good judgment of the board of the town of Albemarle this was not required, at the present time, by the needs of traffic in that town, and to have done this would have more than doubled the assessment upon the plaintiff's property, of which he already complains.

Section 13 of the statute authorizes the assessment to be made against "the property abutting upon said street or streets," and in another place says "abutting on the improvement." We take it that the intention of the statute which authorizes the apportionment of the charge mentioned in the statute and assessed by the board, according to frontage, is that the lots abutting on the street which is improved shall be assessed, and not that the town shall be required to improve the entire width of the street.

Section 5 of the act requires that the petition shall be signed by

a majority of the owners of the lots "abutting upon the street or streets or part of a street proposed to be improved," and section 6 says that the proportion of the costs is to be assessed "upon abutting property." Section 8 provides that one-half of the total cost "of a street or sidewalk improved . . . shall be specially assessed upon the lots and parcels of land abutting directly on the improvements according to their respective frontage thereon"; and section 13, as above stated, refers to the assessment being against "the property abutting upon said street or streets."

We think it clear that all these mean the same thing, and that the words "abutting on the improvement" means abutting on the street that is improved, and that this does not require that the pavement shall extend the entire width of the street when this would be an unnecessary cost, and would greatly enhance the burden of which the plaintiff in this case complains. By the term "abutting property" is meant that between which and the improvement there is no intervening land. *Millan v. Chariton,* 145 Iowa 648.

Land need not necessarily abut directly on the part of the street that has been improved to subject it to liability for its share of the cost of improvement. Indeed, premises separated from a street by a small stream, but having access to the street by means of bridges, are premises abutting on the street though the owner of the premises is not the owner of the bed of the stream, and he is liable to assessment provided he has the right of ingress and egress over the intervening land to the improvement. 25 R.C.L., p. 112, (437) and cases cited under notes 8, 9, 10, and 11.

If the plaintiff's contention that the property sought to be assessed must "abut" upon the improvements by coming in actual contact with the improvement could be maintained, then the common practice of paving the middle of a sidewalk, leaving a strip of unimproved sidewalk between the property line and the paved portion, and leaving another strip between the curb and the paved portion, must be abandoned since the property which abuts the sidewalk could not be assessed because it does not abut the improved part of the sidewalk.

The common-sense, practical meaning of the legislation is that lots abutting the street that is improved, either with respect to the roadway or the sidewalk, are benefited thereby and should be assessed for a proper proportion of the cost, over and above that portion of the cost paid by the city by reason of the general benefit. It cannot be said that the street or sidewalk is not improved because it is not paved the entire width.

In this case the street in front of the plaintiff's property is 75

feet in width, and the traffic over it at this time did not, in the judgment of those to whom the law has committed the making of the improvement, require the paving of the entire width of the street. In the course of time, the town of Albemarle will assuredly increase in population and wealth, so that the traffic will require the street to be paved the entire width, and then the plaintiff, or his successor in title, will be charged with the additional costs which he is now complaining that he is spared by the action of the authorities.

No error.

Cited: Gallimore v. Thomasville, 191 N.C. 651, 652; *R. R. v. Ahoskie,* 192 N.C. 262; *Lenoir v. R. R.,* 194 N.C. 711; *Greensboro v. Bishop,* 197 N.C. 752; *Winston-Salem v. Smith,* 216 N.C. 5; *Asheboro v. Miller,* 220 N.C. 301; *Salisbury v. Barnhardt,* 249 N.C. 556; *Harris v. Raleigh,* 251 N.C. 317.

PENN-ALLEN CEMENT COMPANY v. PHILLIPS AND SOUTHERLAND.

(Filed 16 November, 1921.)

1. **Appeal and Error—Fragmentary Appeals—Pleadings — Judgments — Dismissal.**

   Upon the joinder of three causes of action with counterclaims set up as to each, the defendant should preserve his exception to the action of the trial court in entering judgment on the pleadings in plaintiff's favor in two of them and reserving the other for trial, until a final judgment in the court below, and a present appeal by defendant is fragmentary, and will be dismissed.

2. **Same—Execution.**

   Where the defendant has improvidently appealed from judgment entered on the pleadings in two of the causes of action alleged in the complaint, reserving the third alleged cause for trial, execution under the judgments so entered cannot be issued until the disposition of the case by final judgment adverse to the defendant.

3. **Appeal and Error—Pleadings—Judgments—Admission.**

   Upon judgment entered upon the pleadings against the defendant, the matters set up in defense are admitted to be true for the purpose of appeal.

4. **Commerce—Discrimination—Federal Statutes—Pleadings— Void Contracts—Quantum Meruit.**

   Where a purchaser sued for the purchase price of goods in interstate commerce, sets up a counterclaim alleging an unlawful discrimination

against himself in favor of other like purchasers (U. S. Compiled Statutes, sec. 8835b), and has accepted the goods from the carrier, he may recover the unlawful overcharge upon a *quantum meruit*, but not upon the contract, which is void.

5. New Trials—Appeal and Error—Rights of the Parties.

Where the Supreme Court has set aside a judgment upon the pleadings entered in the court below, in the plaintiff's favor, on two of the causes of action alleged in his complaint, the third having been reserved for trial, a new trial will be ordered, leaving the matter open to both parties as *res nova*.

6. Appeal and Error—Judgments—Unadjudicated Matters.

Matters not passed upon and adjudicated by the Superior Court will not be considered on appeal.

7. Appeal and Error—Dismissal — New Trials — Discussion of Merits — Court's Discretion.

Where the dismissal of an appeal will have the effect of a new trial, the Supreme Court may in its discretion express its opinion upon the merits as a guide in the next trial.

APPEAL by defendants from *Ray, J.*, at June Term, 1921, of SCOTLAND. (438)

This is an action to recover the price of four carloads of cement. There are three causes of action stated in the complaint. On 17 September, 1920, the plaintiff shipped the defendants one carload, 231 barrels of cement, at $6.09 per barrel, less freight and war tax, making $1,039.03, which amount was paid to the plaintiff by the defendant. On 18 September, 1920, the defendants sent the plaintiff a telegram to ship them two more carloads of 231 barrels each, which were received by the defendants for which the plaintiff now seeks to recover $2,079.87 in his first cause of action. On 27 September, 1920, the plaintiff shipped another carload of cement, which contained 231 barrels, which at the same price amounted to the sum of $1,039.26, and is the plaintiff's second cause of action, and another carload of 289 barrels which the defendants refused to accept was the third cause of action. The defendants based their refusal upon the ground that the shipment of 289 barrels was in excess of the 231 barrels which they had ordered, and further, because they allege that they had ascertained that the plaintiff had discriminated in the price of said cement in that it had charged the defendants $1.10 per barrel more for said cement than it had charged other purchasers within the United States in violation of section 2, chapter 323, 38 U. S. Statutes, which was illegal, and (439) they set up and pleaded as a counterclaim a rebatement of $1.10 on each of the first four carloads, and that by reason of said

illegal price and the excessive quantity in the last shipment they had refused to receive the last carload and pleaded as a counterclaim the $460.09 as freight and war tax paid by them on said last carload.

The defendants also pleaded as a counterclaim threefold damages by reason of the overcharge of $1.10 per barrel on said four carloads, making a total of $2,142.57, and threefold the damages of $28.90 per month from 15 October for storage on the carload refused.

The court adjudged that the plaintiff recover of the defendant $2,079.87, with interest thereon from 17 October, 1920, on the first cause of action — 2 carloads, and the further sum of $1,039.26, with interest from 27 October, 1920, on the second cause of action and retained the cause for trial as to the third cause of action. Appeal by defendants.

Walter H. Neal for plaintiff.
Cox & Dunn for defendants.

CLARK, C.J. The court entered judgment upon the pleadings in favor of the plaintiff upon the first and second causes of action, and "retained the cause for trial as to the third cause of action stated in the complaint," and took no action as to the counterclaims pleaded by the defendants.

This Court has uniformly held that it will not entertain fragmentary appeals. "The Court will not entertain appeals brought up in a fragmentary manner. The whole case must come up on appeal." *Hines v. Hines,* 84 N.C. 122; *Comrs. v. Satchwell,* 88 N.C. 1; *White v. Utley,* 94 N.C. 511; *McGehee v. Tucker,* 122 N.C. 186. "An appeal from the ruling upon one of several issues will be dismissed. The trial and appeal must be upon the whole case." *Hines v. Hines,* 84 N.C. 122; *Arrington v. Arrington,* 91 N.C. 301.

"The trial of an action should embrace and determine all the matters at issue, so that a *final* judgment may be entered and any errors committed may be corrected upon one appeal. Fragmentary appeals will not be tolerated. Therefore, in an action to recover land, with damages for its detention, where the issue as to the title and right to possession was tried, but the issue as to damages was reserved to be afterwards tried if it should be adjudged that the plaintiff was entitled to recover, the Supreme Court would not entertain an appeal for reviewing alleged errors on the trial of the issue submitted. *Hicks v. Gooch,* 93 N.C. 112; *Rodman v. Calloway,* 117 N.C. 13.

"Fragmentary appeals will not be allowed when the

subject-matter could be afterwards considered and error (440) corrected without detriment to the appellant. But this rule does not apply to interlocutory orders, the granting or refusal of which may produce present injury or loss. *Davis v. Ely,* 100 N.C. 283; *Guilford v. Georgia Co.,* 109 N.C. 310."

The later decisions have all followed this rule, among them, *Shelby v. R. R.,* 147 N.C. 537; *Moore v. Lumber Co.,* 150 N.C. 261; *Smith v. Miller,* 155 N.C. 242; *Shields v. Freeman,* 158 N.C. 123; *Chadwick v. R. R.,* 161 N.C. 209; *Walker v. Reeves,* 165 N.C. 35; *Chambers v. R. R.,* 172 N.C. 555; *Joyner v. Reflector Co.,* 176 N.C. 277; *Headman v. Comrs.,* 177 N.C. 261, and many other cases besides those disposed of by *per curiam,* the ruling being so well settled.

In *Joyner v. Reflector Co.,* 176 N.C. 277, Allen, J., said: "This appeal is premature and must be dismissed, because the order appealed from disposes of only one question of many arising upon the record (*Hinton v. Ins. Co.,* 116 N.C. 22; *Richardson v. Express Co.,* 151 N.C. 61); but upon dismissal, the exceptions, duly taken, are reserved to be passed on upon appeal from the final judgment. *Gray v. James,* 147 N.C. 141."

The two latest cases probably are Hoke, J., in *Lipsitz v. Smith,* 178 N.C. 100, and *Thomas v. Carteret,* 180 N.C. 111, where Brown, J., says: "We are of opinion that this appeal is premature, and under the rules of the Court it must be dismissed *ex mero motu.* It is well settled by numerous decisions that this Court will not entertain premature or fragmentary appeals. *Cameron v. Bennett,* 110 N.C. 277; *Milling Co. v. Finlay, ib.,* 412."

The defendants should have noted their exceptions and have brought up the case when a final judgment was entered. Of course until final judgment was entered no execution could issue, for otherwise the plaintiff might have collected on its judgment while defendants' demand by way of counterclaim was left undetermined. The costs of the appeal will be divided between the parties.

Though the case must go back, the court may in its discretion, as it sometimes has done, express its opinion upon the merits so far as it may be a guide in the next trial. *Milling Co. v. Finlay,* 110 N.C. 412; *S. v. Wylde, ib.,* 503, and citations to those two cases in the Anno. Ed.

Judgment having been rendered upon the pleadings, all that is set up in the answer is, for the purposes of the appeal, admitted to be true. The U. S. Compiled Statutes, sec. 8835b (15 October, 1914, ch. 323, sec. 2), forbids "discrimination in price between purchasers of commodities where the effect may be to lessen competition or tend

to create a monopoly is unlawful," and provides: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in
(441) price between different purchasers of commodities," etc. This shipment was from Penn-Allen, Pa., to the defendants in Scotland County, and the judgment upon the pleadings admits the allegation in the answer for the purposes of this appeal that there was a discrimination and overcharge against the defendants of $1.10 per barrel. The contract was, therefore, unlawful and at most the plaintiff was entitled to recover the amount charged deducting $1.10 per barrel upon the two carloads set out in the first cause of action and on the carload in the second cause of action, for which they are liable, not upon the contract, which is unlawful, but upon a *quantum meruit,* having accepted the shipment. The judgment rendered upon the pleadings on the first and second causes of action is erroneous, and is set aside. This matter will be open to both parties as *res nova* on the new trial.

As to the third cause of action, the defendants claim that they are not liable both by reason of the carload, 289 barrels, being in excess of the usual carload, 231 barrels ordered, and by reason of the $1.10 per barrel excess in price. No judgment having been rendered as to this cause of action the allegations in the answer are not taken to be true, as in regard to the first and second causes of action, and we have nothing to review.

As to the counterclaim for threefold damages for the cost of the storage of the fifth and last carload and the threefold damages of $2,142.57 by reason of the overcharge of $1.10 per barrel on the other 4 carloads which the plaintiff claims under the provisions of the U. S. Compiled Statutes of 1916, sec. 8829, being sec. 7 of the Anti-Trust Act of 1890, the plaintiff contends that the defendants cannot recover the treble damages by counterclaim pleaded in an action to collect the purchase price, but must pay for the goods and bring an independent action in the Federal Court under Compiled Statutes, sec. 8835d (15 October, 1914, ch. 323, sec. 4). This matter also has not been passed upon by the court below, and there is nothing for us to consider.

The appeal must be dismissed, and upon trial of the whole action an appeal will lie from the final judgment upon the whole controversy.

Appeal dismissed.

Cited: Hussey v. R. R., 183 N.C. 9; *Corp. Com. v. Trust Co.,* 183 N.C. 171; *Goldsboro v. Holmes,* 183 N.C. 204; *Teal v. Liles,*

183 N.C. 679; *S. v. Yates,* 183 N.C. 756; *Grocery Co. v. Newman,* 184 N.C. 375; *Garland v. Improvement Co.,* 184 N.C. 552; *Corp. Com. v. Mfg. Co.,* 185 N.C. 23; *Newton v. Hwy. Com.,* 194 N.C. 305; *Nissen v. Nissen,* 198 N.C. 809; *Johnson v. Ins. Co.,* 215 N.C. 123; *Knight v. Little,* 217 N.C. 682; *Washington v. Bus, Inc.,* 219 N.C. 860; *Cole v. Trust Co.,* 221 N.C. 251; *Belks Dept. Store v. Guilford County,* 222 N.C. 450; *Veazey v. Durham,* 231 N.C. 362; *Perkins v. Sykes,* 231 N.C. 490; *Burgess v. Trevathan,* 236 N.C. 159.

(442)

BOARD OF DRAINAGE COMMISSIONERS OF MATTAMUSKEET DISTRICT v. JEFF CREDLE, TREASURER.

(Filed 9 November, 1921.)

1. Drainage Districts—Counties—Treasurer — Compensation — Commissions—Statutes.

Semble, C.S. 3910, cannot be construed to allow additional compensation to the county treasurer for receiving and disbursing money of a drainage district under sec. 36, ch. 442, Laws of 1909, the acts being unrelated: but, if otherwise, the county treasurer must bring himself within the provisions of sec. 3910 by showing the amount claimed was allowed to him in the discretion of the county commissioners, within the limit fixed by the statute, and that the regular procedure followed as to the drawing of the warrants by the drainage commission upon funds on hand derived from collections for the benefit of the drainage district alone, etc.

2. Same—Expressio Unius, Est Exclusio Alterius.

Sec. 13, ch. 67, Laws 1911, dealing with the compensation to be allowed the county treasurer for disbursing the revenue obtained from the sale of bonds of a drainage district, provides but one compensation for all services, *i. e.,* 2 per cent of the revenue derived from the sale of the drainage bonds, and expressly denies compensation for certain other services mentioned, and if not, then under the doctrine of *expressio unius est exclusio alterius* the treasurer is not entitled to compensation by way of commissions on the moneys derived from assessments for maintenance.

APPEAL by plaintiff from *Bond, J.,* at chambers, 20 July, 1921, from HYDE.

This action was brought to ascertain and declare by our judgment the commissions which the defendant, as treasurer of the county, is entitled to receive for collecting and disbursing what are known in the drainage law of the district (Laws 1909, ch. 442; Laws 1911, ch. 67; Laws 1917, ch. 152), as assessments for maintenance, etc. The claims of the respective parties are set out in the case agreed,

this being a controversy submitted without action, the plaintiff's contention being: (1) that the treasurer is not authorized to receive or disburse any of the funds of the said district, and he assumed this charged upon his own responsibility; and (2) if he is entitled to receive and disburse said funds by virtue of his office as treasurer of Hyde County, he is entitled to receive only such commissions as are specifically provided for by the general and special drainage laws; while the defendant contends that the treasurer (defendant in this case) is entitled to one-half of one per cent for receiving the funds raised by the taxes or assessments levied for the payment of construction bonds of said district, and to one-half of one per cent for receiving taxes or assessments levied for maintenance purposes, and two and one-half per cent for disbursing taxes or assessments levied in the district, and to one-half of one per cent for disbursing any money that may have been borrowed by the said district
(443) and repaid out of funds provided for maintenance purposes by the collection of maintenance taxes or assessments, or to the same commission provided by law for receiving and disbursing other public or general taxes that come into his hands by virtue or color of his office.

The court was of the opinion, and so adjudged, upon the case agreed, "that the defendant treasurer of Hyde County is entitled to one-half of one per cent for his services in receiving the funds raised by the taxes levied and collected for payment of construction bonds of said district, and to one-half of one per cent for receiving and two and one-half per cent for disbursing the maintenance taxes or assessments levied and collected for said district, or the same commissions provided by law for receiving or disbursing other public or general taxes that came into his hands by virtue or color of his office as treasurer of Hyde County."

It will be necessary to a full understanding of the matter to set out the terms of two statutes supposed to be applicable to the case. The first is the act of 1909, ch. 577, secs. 1 and 2, which amended Revisal of 1905, sec. 2778, and which, as thus amended, is C.S. 3910. We will state it in the terms of the latter section, as follows: "The county treasurer shall receive as compensation in full for all services required of him such a sum, not exceeding one-half of one per cent on moneys received and not exceeding two and a half per cent on moneys disbursed by him, as the board of commissioners of the county may allow. . . . In counties where the treasurer's total compensation cannot exceed two hundred and fifty dollars per annum the treasurer may be allowed, in the discretion of the board of county commissioners, and of the board of education as to the school

fund, a sum not exceeding two and one-half per cent on his receipts and not exceeding two and one-half per cent on his disbursements of all funds handled by him; but the compensation allowed by virtue of the provisions of this last proviso shall not be operative to give a total compensation in excess of two hundred and fifty dollars per annum to such treasurers." The other statute is sec. 13, ch. 67, Public Laws of 1911, which is really the only provision in the drainage laws dealing with the treasurer's compensation, and is as follows: "That the fee allowed the sheriff or other county tax collector for collecting the drainage tax (or assessments), as prescribed in section thirty-four of chapter four hundred and forty-two of the Public Laws of one thousand nine hundred and nine (the same being for construction of drainage canals, etc.) shall be two per cent of the amount collected, and the fee allowed the county treasurer for disbursing the revenue obtained from the sale of the drainage bonds shall be one per cent of the amount disbursed: *Provided,* no fee shall be allowed the sheriff or other county tax collector or county treasurer for collecting or receiving the revenue obtained from the sale of the bonds provided for in section (444) thirty-four of chapter four hundred and forty-two of the Public Laws of one thousand nine hundred and nine, nor for disbursing the revenue raised for paying off the said bonds: *Provided further,* that in those counties where the sheriff or tax collector and treasurer are on a salary basis, no fees whatever shall be allowed for collecting or disbursing the funds of the drainage district."

Plaintiff excepted and appealed.

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

Mann & Mann and Manning, Bickett & Ferguson for defendant.

WALKER, J., after stating the case: It is well to notice, and clearly understand, in the beginning the defendant's contention. His first proposition is this, that under the act of 1909, ch. 442, sec. 36, after fixing, in that section, the compensation of the engineer and the various rodmen, axemen, chainmen, and other laborers, it is provided as follows: "All other fees and costs incurred under the provisions of this act shall be the same as provided by law for like services in other cases. Said costs and expenses shall be paid by the order of the court, out of the drainage fund provided for that purpose, and the board of drainage commissioners shall issue warrants therefor when funds shall be in the hands of the treasurer." That section (36), it is admitted, was repealed by the act of 1917, ch. 152,

sec. 2. It is deduced from the provisions of sec. 36, ch. 442, Laws 1909, that the defendant, so far, at least, as services already rendered by him before the repeal of that section are concerned, is entitled to compensation for such services as provided by Rev. 2778, as amended by Laws 1909, ch. 577, it being C.S. 3910, all of which is recited fully in the statement of the case. But we find ourselves unable to agree with this view of the matter. The precise contention is that as sec. 36, ch. 442, Laws 1909 (the drainage act), provides for compensation as for like services where no special provision is made in the drainage act for the particular service, it necessarily refers to the kind of services the compensation of which is provided for in C.S. 3910 (which we will hereafter refer to, for the sake of brevity and convenience, by the number of the section only). But that section (3910) is placed under the title of "Salaries and Fees" where the compensation of county treasurers for their ordinary services is fixed, and not for any special service rendered under the drainage act, which was something apart from their ordinary duties and stood in a class to themselves, as contended by the plaintiff, and we are strongly inclined to accept this interpretation of the statutes when considered together, though we do not decide the ques-
(445) tion, as it is not essential that we should do so, for even if C.S. 3910, applies, and should receive the construction advanced by the defendant, we yet are of the opinion that he has not brought his case within the provision of that section, or the laws from which it was compiled, for the reason that it provides that the amount of the compensation to be allowed shall be "in the discretion of the county commissions," or "as said county commissioners may allow" (the maximum only being fixed), and the language, therefore, being thus substantially the same. There is no admission in the case, or even allegation by the defendant, that the board of county commissioners, even if they had the power, had declared what the compensation should be. Besides, the language quoted above from C.S. 3910, shows, we think, clearly that sec. 36, Laws 1909, did not refer to services provided for in section 3910, as the county commissioners have no power or authority in the premises given by the drainage act, and the compensation, under section 36, is payable "out of the drainage fund provided for that purpose by order of the court, and the board of drainage commissioners shall issue warrants therefor when funds shall be in the hands of the treasurer." It appears to be manifest from this language that the provision in section 36 does not refer to C.S. 3910. So that it comes to this, that the special ground upon which the defendant relies is not at all tenable, even if he be entitled to any compensation for the

special services he claims to have rendered, as stated in his cause of action, and we conclude that he is not, upon a careful consideration of Laws 1911, ch. 67, sec. 13, which is copied in our statement. That section provides but one compensation for all services and expressly denies compensation for certain services therein enumerated.

The defendant's counsel inquire as to why the Legislature mentioned only two instances where compensation is denied and not all of them, the answer being that no express provision is made for compensation in any other case where the treasurer handles drainage funds, and we are not at liberty to supply the omission. The general rule is that *expressio unius, est exclusio alterius*, and when the Legislature explicitly provides that only one "fee" shall be paid we have no right to say or to imply, that is, infer, that more was intended than what is expressly given.

The case of *Koonce v. Comrs.*, 106 N.C. 192, has no application to this case, but referred to a different class of services rendered by the treasurer, and was decided long before this drainage act was passed. It is true, as said in *Koonce's* case, that the policy of this State has been to compensate its officers fairly and justly for their services, and it may be well inferred that the Legislature thought it had done so in this instance, by allowing one per cent on the amount realized from the sale of the drainage bonds, and it is to be noted in this connection that section 3910, on which defendant relies, sets a limit to his compensation for such services ren- (446) dered by him as are described in that section. The fact, if it be true, that the county treasurer may also be *ex officio* treasurer of the drainage district is not at all important in the discussion, as we have assumed for the sake of argument that he is, and *Carter v. Comrs.*, 156 N.C. 183, and *Comrs. v. Lewis*, 174 N.C. 528, are, therefore, irrelevant. Plaintiff contends that the State Treasurer is treasurer of this district. But we need not decide how this is, as it is immaterial in our view.

Even though it should be true that the maximum prescribed by the act has in fact been allowed by the commissioners of Hyde County as compensation to the treasurer (which does not appear and is not admitted), yet this would not give the defendant a right to commissions for handling drainage district funds.

This case is not like *Comrs. v. Davis, ante*, 140, upon a somewhat similar question. We held there that the sheriff was entitled to commissions of two per cent on collections of assessments for maintenance purposes, because such an inference as to the intention of the Legislature to that effect was clearly to be drawn from the drainage act of 1909 itself, for the reasons stated in the opinion of

the court which are not applicable here. There we hold the sheriff to be entitled to commissions of two per cent on collections for maintenance of the district, because there was some ambiguity in the laws, and there was a legislative construction of them which extends the right to commissions, beyond collections for organization, etc., to such collections for maintenance, and there seemed to be no disposition of the Legislature to limit this compensation, as in the case of the treasurer, by C.S. 3910, because, as we presume, the sheriff's duties are more onerous. He must collect and pay out to the treasurer, while the latter merely receives the money and pays it out, taking receipts for the same, and making proper entries on his books — a much less difficult and responsible service. There were some other considerations which moved us there which are not present in this case.

It may be that the defendant should have more compensation, and if so, the Legislature will hear him, as he has a strong equity upon which to base his appeal to it for relief. But such relief we cannot grant, as we have no power of legislation.

The judgment below will be reversed, as defendant is not entitled to recover anything upon the case agreed, and it will be so certified.

Reversed.

Cited: *Hill v. Stansburg*, 223 N.C. 195.

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(447)

DRAINAGE COMMISSIONERS v. CHARLES BRINN, TREASURER, ET AL.

(Filed 9 November, 1921.)

Drainage Districts—County Treasurer—Commissions—Bonds.

The claim of the treasurer of the county for commissions derived from assessments in Mattamuskeet Drainage District is not allowed on this appeal, under the decision of *Comrs. v. Credle*, *ante*, 442, which also covers the question as to commissions on the receipt and disbursement of canal tolls by him.

APPEAL by plaintiff from *Bond, J.*, at chambers, 2 July, 1921, from BEAUFORT.

This is a controversy between the board of drainage commissioners of Mattamuskeet District in Hyde County and Charles Brinn, treasurer of Hyde County prior to the first Monday in De-

cember, 1916, and S. S. Mann, receiver; submitted without action upon agreed facts.

It is admitted that plaintiff is a duly constituted drainage corporation, created under the general drainage law, ch. 442, Public Laws of North Carolina, Session of 1909, and that prior to the first Monday in December, 1916, defendant Brinn was treasurer of Hyde County.

The only questions for the Court's consideration are:

1. Was defendant, as treasurer of Hyde County, entitled to commissions of one-half of one per cent for receiving $84,970.03, derived from assessments levied in Mattamuskeet Drainage District for payment of bonds issued for construction work?

2. Was defendant, as treasurer of Hyde County, entitled to commissions of one-half of one per cent for receiving $14,997.14, derived from assessments levied in said district for maintenance, and commissions of two and one-half per cent for disbursing $8,666.84 of such maintenance assessments?

3. Was defendant, as treasurer of Hyde County, entitled to commissions of one-half of one per cent for receiving and commissions of two and one-half per cent for disbursing $305.43 of canal tolls collected, in said district.

The plaintiff board of drainage commissioners contends that the defendant treasurer was not entitled to such commissions. The defendant treasurer contends that he was thereto entitled.

The court below held with defendant, and plaintiff appealed.

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

Mann & Mann and Daniel & Carter for defendant.

WALKER, J., after stating the facts: It will be perceived on a perusal of this case that it is not substantially unlike *Drainage Com. v. Credle, ante,* 442. The questions involved are the same, except as to the canal tolls, and that one is fully (448) covered by what is said in the opinion filed in *Credle's* case. This being so, it is unnecessary to discuss the matter further, as it would be a mere repetition of what has already been said in that case.

It would serve no useful purpose to go over in detail the excellent briefs filed by the counsel in these cases, as what we have said in the opinions filed by us at this term in the above case and *Comrs. v. Davis, ante,* 140, covers fully the entire ground of inquiry and investigation.

The judgment is therefore reversed, as the defendant is not entitled to the commissions or compensation he claims, and it will be so certified.

Reversed.

CAUBLE v. SOUTHERN EXPRESS COMPANY AND WALKER D. HINES, DIRECTOR GENERAL OF AMERICAN RAILWAYS EXPRESS COMPANY.

(Filed 9 November, 1921.)

1. Appeal and Error—Harmless Error—New Trials.

A new trial will not be granted on appeal for mere technical error committed on the trial, which will not subserve the real ends of substantial justice in correcting some ruling that so tends to the prejudice of the appellant that a new trial may rectify it.

2. Same—Government—Express Companies—Railroads — Negligence — Measure of Damages.

Where in an action against a common carrier to recover damages for its negligence in rendering practically valueless the goods delivered to it for transportation, the measure of plaintiff's damages is the difference between the market value of the goods just preceding the injury and their value immediately thereafter; and though, in this case, the court erroneously charged the jury that the damage to the goods would be the difference between their market value immediately preceding the injury and such value at the time of the trial, a year or more thereafter, it was harmless, it appearing that such value was the same in both instances.

3. Appeal and Error—Motions — Pleadings — Process — Amendments—Parties—Express Companies—Railroads—Director General—Government.

In an action to recover damages for the destruction of goods by express, when express companies, as a war measure, were under the management and control of the Director General of Railroads, the plaintiff's motion in the Supreme Court, on appeal, to amend process and complaint, to show the injury was not caused by the express company, but by the Director General, was allowed, which had the effect of eliminating defendant's contention that only the express company had been sued.

4. Parties—Express Companies—Director General—Government—Pleadings—Process—Appeal and Error—Record.

It appearing of record on appeal in this case that the name of the Director General of Railroads, having charge of express companies, was named in the summons, accordingly served on the local agent, and that his name as well as that of the express company was set out in the pleadings alleging negligence, etc., and that the jury considered the evidence upon the separate issues accordingly: *Held* as untenable, the exception that only the express company and not the Director General was a party

to the action, and that a verdict as to the latter was invalid, both the Director General and the express company being substantially parties.

5. Express Companies — Director General — Government — Railroads — Measure of Damages—Evidence—Diminution of Damages.

In an action against the Director General of Railroads while in control of express companies, as a war measure, for the complete destruction, by negligence, of a shipment by express, the defendant may show, if he can, that there remained value in the damaged shipment, in diminution of the amount of recovery, but not having attempted to do so in this case, he must be satisfied with the damaged shipment, which is left with him for whatever benefit he may derive therefrom.

APPEAL by defendant from *Finley, J.*, at the February Term, 1921, of GUILFORD. (449)

This action was brought to recover damages for the injury to or destruction of a cash register, sold by the plaintiff (who lived and carried on his business at High Point, N. C.) to the Bank of Hickory Grove, at a town by that name in the State of South Carolina, the machine having been shipped via the American Railway Express Company to the consignee at that place. It is alleged that when shipped it was in perfect condition, but when it arrived at its destination it was found to be in a very ruinous state, and the manufacturer could not repair it, even at great cost, because its number had been lost, so it was left in the possession of the American Railways Express Company. The jury assessed the damages at $300, and defendant appealed from the judgment on the verdict.

Wilson & Frazier for plaintiff.
John A. Barringer for defendant.

WALKER, J., after stating the case: (1) The defendant's first exception and assignment of error set forth in the case on appeal is to the charge of the court as to the rule of damages by which the jury was to be guided in assessing the amount which the plaintiff was entitled to recover. It appears the judge charged the jury that the rule of damages was the difference between the market value of the cash register before the injury complained of and the market value of the cash register at the time of the trial which was more than a year afterwards. The defendant contends that (450) this is not the correct rule, which is the difference between the market value of the property just before the injury and the said value immediately after the injury, and not the value of the property a year or more after the negligence complained of.

Allen, J., lays down the rule in the following language in the

case of *Farrall v. Garage Co.,* 179 N.C. 393: "The correct and safe rule is the difference between the value of the machine before and after its injury." But plaintiff, in making this objection to the measure of damages, overlooks, or rather leaves out, the fact that although the charge measured the damages by the difference in the value of the cash register before the injury to it, and one year after the injury, it appears that the injury to the machine was the same just after it was done as it was one year afterwards, and there was no decrease in its value between the two dates, so that there was practically, and even theoretically, no harm done. When the aid of this Court is invoked to grant a new trial, the motion for the same will be carefully weighed by us, and will be denied unless the merits are made clearly to appear. Courts do not lightly grant reversals, or set aside verdicts, upon grounds which show the alleged error to be harmless or where the appellant could have sustained no injury from it. There should be, at least, something like a practical treatment of the motion to reverse, and it should not be granted except to subserve the real ends of substantial justice. The motion should be meritorious and not based upon merely trivial errors committed, manifestly without prejudice. Reasons for attaching great importance to small and innocuous deviations from correct principles have long ceased to have that effect and have become obsolete. The law will not now do a vain and useless thing. The foundation of the application for a new trial is the allegation of injustice, and the motion is for relief. Unless, therefore, some wrong has been suffered there is nothing to be relieved against. The injury must be positive and tangible, not theoretical merely. For instance, the simple fact of defeat is in one sense injurious, for it wounds the feelings. But this alone is not sufficient ground for a new trial. It does not necessarily involve loss of any kind, and without loss or the probability of loss there can be no new trial. The complaining party asks for redress, for the restoration of rights which have first been infringed and then taken away. There must be, then, a probability of repairing the injury, otherwise the interference of the Court would be but nugatory. There must be a reasonable prospect of placing the party who asks for a new trial in a better position than the one which he occupies by the verdict. If he obtains a new trial he must incur additional expense, and if there is no corresponding benefit he is still the sufferer. Besides, courts are instituted to enforce right
(451) and restrain and punish wrong. Their time is too valuable for them to interpose their remedial power idly and to no purpose. They will only interfere, therefore, where there is a prospect of ultimate benefit. *Brewer v. Ring and Valk,* 177 N.C. 476, at

pp. 484-485, citing many authorities, and among them, Hilliard on New Trials (2 ed.), secs. 1 to 7; *S. v. Smith,* 164 N.C. 476; *Schas v. Assurance Society,* 170 N.C. 420, 424; 3 Graham and Waterman on New Trials, 1235; *Hulse v. Brantley,* 110 N.C. 134; *Alexander v. Savings Bank,* 155 N.C. 124; *McKeel v. Holloman,* 163 N.C. 132. See, also, *Grice v. Ricks,* 14 N.C. 62; *Gray v. R. R.,* 167 N.C 433; *Blalock v. Clark,* 133 N.C. 309; *Reynolds v. R. R.,* 136 N.C. 345; Pell's Revisal, vol. 1, p. 237, sec. 507.

Surely when this rule, which is both sensible and just, is applied to the facts in hand, there is nothing to be gained by granting a new trial for the reason stated by the defendant, and it would, practically considered, be unwise to do so, as the motion, so far as it relates to this ground upon which it is based, is without any genuine merit. If defendant (Director General) had shown that the debris of this machine was of any real value, he would have been entitled to a deduction from the recovery, to the amount of it, as found by the jury, but he did not do so. But it will appear hereafter that this is really immaterial, as we will direct that the machine be kept by the defendant, who can dispose of it in his discretion and in that way get the benefit of its value, if it has any. This was defendant's principal exception on the merits.

Plaintiff moved in this Court to amend process and complaint so as to show more clearly that the injury to the cash register was not caused by the Southern Express Company, but by the defendant Director General of Railroads, having charge of the American Railways Express Company during the period of Federal control as a war measure, and we allowed the amendment. This disposes of the defendant's contention that the Southern Express Company was the only one sued in this action, and that the Director General (in charge of the American Railways Express Company) was not sued, nor was the last named express company. While we have sufficiently answered the last contention by reference to the amendment of process and pleadings, or complaint, we are of the opinion the amendment was not necessary, but was, perhaps, resorted to as a cautionary measure. The record plainly shows that the summons was addressed to "Walker D. Hines, Director General of the American Railways Express Company," and was served, according to the sheriff's return thereon, "On J. R. Parks, agent of Walker D. Hines, Director General of American Railways Express Company," and also on the agent of the Southern Express Company on 9 January, 1920. The bond for costs was made payable to the American Railways Express Company. The case was entitled on the record below, *"Cauble v. Walker D. Hines, Director General,"* and some- (452)

times as *"Cauble v. American Railways Express Company,"* and was, in all of these names, submitted to the jury. This would seem to be most ample to show, and show conclusively, that the Director General and both express companies were served with process, and the complaint is drawn accordingly, expressly naming both express companies and the Director General.

The other exceptions are either merely formal or entirely without merit.

The trial of this case was errorless, and it is remanded with instructions to dismiss the action, with costs to be taxed, as to the Southern Express Company, which it appears had no connection with the transaction (*McAlister v. Express Co.*, 179 N.C. 556), and, as to the Director General of the American Railways Express Company we affirm the judgment.

The cash register, as above indicated by us, will remain in the possession of the defendant Director General having charge of the American Railways Express Company as his property, so that he may get the benefit of its value, if it has any.

Judgment affirmed as modified.

Cited: *S. v. Beam*, 184 N.C. 744; *Construction Co. v. R. R.*, 185 N.C. 46; *Booth v. Hairston*, 193 N.C. 281; *Carstarphen v. Carstarphen*, 193 N.C. 549; *In re Will of Efird*, 195 N.C. 92; *Lowder v. Smith*, 201 N.C. 648; *Avery v. Guy*, 202 N.C. 155; *Justice v. Mitchell*, 238 N.C. 366; *Dobias v. White*, 240 N.C. 688.

YORK & FENDERSON v. JEFFREYS & SONS.

(Filed 16 November, 1921.)

Vendor and Purchaser — Contracts — Railroads — War — Stipulations Against Damages for Delayed Shipments.

Where there was a stipulation in a written contract of sale of seed potatoes made during governmental control of railroads as a war measure, that the vendor would not be "liable, or responsible" for delays in the delivery of the shipment for causes beyond his control, and it appears that the shipment was delivered beyond the time agreed upon and to a different line of carriage, but solely caused by war conditions, and the necessities of the Government in the prosecution of the war, the purchaser in the vendor's action to recover the purchase price may not avoid liability therefor by having refused to accept the shipment, the provision of the contract in plaintiff's favor being reasonable, nor can he successfully con-

tend that the shipment having been made by the plaintiff under "an order notify" bill of lading attached to draft, even though as a matter of law it reserved the title in him, made the carrier liable to the plaintiff, and not the defendant.

APPEAL by defendant from *Lyon, J.*, at the January Term, 1921, of WAYNE.

During the month of January, 1918, Messrs. Maley & Carolin, brokers, of New York, negotiated a contract be- (453) tween the plaintiff and defendant as follows:

"Agreement between York & Fenderson of Mars Hill, Me., and Jeffries & Sons, Goldsboro, N. C., as to one car of potatoes, as follows: 150 10-peck sacks Red Bliss seed potatoes, balance of car consisting of about 150 sacks seed Cobblers at the following prices: three dollars and fifty cents per cwt. for the Red Bliss and three dollars and ten cents per cwt. for the Cobblers, shipment to be made about the first of February and delivered Goldsboro, N. C., at above mentioned prices. The said Jeffries & Sons agree to pay $3.50 per cwt. for the Red Bliss and $3.10 per cwt. for the Cobblers in the following manner: Amount draft and bill lading attached.

"It is further agreed that the said York & Fenderson will load and ship the potatoes, using all possible means available to get them out on time, but will not be held liable or responsible for delays occasioned by the railroads being unable to furnish cars for the transportation of said potatoes or for other delays over which said York & Fenderson have no control.

"In witness whereof, the parties hereto have hereunto subscribed their names the day and year above written.

"YORK & FENDERSON,
JEFFREYS & SONS."

The above contract is dated 23 January, 1918, but was not forwarded to the defendant until 31 January, 1918, as will appear by letter. The contract was thereupon returned to Maley & Carolin, brokers, by the defendant, and on 4 February, 1918, mailed to this plaintiff by said Maley & Carolin. While it is true that the contract provides for shipment about 1 February, it is admitted by the defendant Z. M. L. Jeffreys that he did not actually sign the contract until 1 February, at which time he attached thereto an additional order for 200 bags of Cobblers to be shipped in the same car. He knew at the time that the contract was to be mailed from Goldsboro, N. C., to Maley & Carolin, New York City, thence by Maley & Carolin to these plaintiffs at Mars Hill, Maine, and the defendant Z. M. L. Jeffreys further admitted that plaintiff could not possibly

have shipped any potatoes under this contract, even if there had been no embargoes, before 6 or 7 February.

Immediately upon receipt of the contract, plaintiff wrote to the defendants that their favor of the 30th to Maley & Carolin had been forwarded to them for attention, and, in reply, they begged to advise that just at that time there was an embargo on the M. & M. T. Company from Boston to Norfolk, and as this was the route that their shipment had to take, they were unable to move it just
(454) then, besides the weather was extremely cold and plaintiff did not believe that defendant would want them moved under such conditions. That plaintiff had the matter before them and would move defendant's car just as soon as conditions would permit, which they trusted would be satisfactory, and that the potatoes would reach defendant in plenty of time for their requirements. To the above letter the defendant made no reply.

On 15 February, the plaintiff, in accordance with said contract, shipped to the defendant one carload of potatoes and advised the defendant by letter of same date, in substance as follows:

"We hand you herewith the invoice for your first car of potatoes, and are pleased to advise, as you will see, that we were able to get a large car and have given you the 200 bags of Cobblers which you asked for. We used the freight rate as given us by the transportation people, but if there is any difference from what we have allowed, if you will send paid freight bill we will send you check to cover. We trust that the stock will arrive in good season and be satisfactory, as we feel sure it will."

It appears by the undisputed testimony that plaintiff made application for car immediately upon receipt of the contract, and shipped the potatoes in the first available car, and that the potatoes were U. S. grade No. 1. There was delay in transit, and the potatoes did not arrive in Goldsboro until about 23 March, 1918. On 9 March, 1918, and before the potatoes arrived, the defendants wrote the plaintiffs that they had asked the Atlantic Coast Line Railway to trace the car of potatoes (M. C. E., 65030), and had been informed that the car left Boston on Clyde Line via Charleston, S. C., on 4 March. "Why did you ship this car via Clyde Line? It seems to us that we are entitled to damages. Planting season is virtually over with us, and no probability of getting potatoes in some time. We had sold these potatoes before we gave orders for same. All our orders have been canceled. Am satisfied charges will be much more than you deducted."

Again, on 19 March, defendant wrote the plaintiff that should the car of potatoes arrive they would notify plaintiff by wire. That

Mr. D. H. Dixon, broker, was a good man to turn them over to. He had handled fifty cars that season. That defendant was turning car down upon the ground that planting season was over and the people they had sold to had bought elsewhere. That defendant had lost their profit, and plaintiff could look to transportation company. And on 23 March, when the potatoes arrived the defendants wired the plaintiff as follows: "We are not going to accept potatoes."

It appears from the evidence that the normal time for delivery of potatoes from Mars Hill, Maine, to Goldsboro, N. C., is fourteen days, and if the delivery had been made within the usual time the potatoes would have reached Goldsboro in ample (455) time for the planting season. The plaintiffs contend that at the time this contract was entered into both parties knew that the World War was being waged, and both knew that embargoes were frequent, and that delays were the rule rather than the exception, and, under such conditions, it was but natural and prudent that every shipper could safeguard himself against delays by railroads that were engaged primarily and preferentially in the transportation of soldiers. The defendant testified that the potatoes lay on the docks in Boston for three weeks, and that if the potatoes had arrived three weeks earlier they would have been in time for planting season. Examination of the record will disclose that the potatoes were refused because they did not arrive in time for the planting season, and it will appear, and it does appear, that if the potatoes had been transported within the usual time that they would have arrived in ample time for the planting season in eastern North Carolina.

The judge charged the jury as follows: "If you find from this evidence, the burden being on the plaintiff so to satisfy you, that the plaintiff shipped the potatoes according to its contract, that there was no unreasonable delay in the shipment, and that they shipped by the route that at that time was open and available, and that the delay in the arrival at Goldsboro was no fault on the part of the plaintiffs, why then it would be your duty to answer this issue whatever you may find the amount to be according to the contract. Plaintiffs contend that the amount is $1,508.84." Defendants excepted.

Verdict for plaintiff, assessing damages at $1,508.83. Judgment thereon, and appeal by defendant.

Langston, Allen & Taylor for plaintiff.
Teague & Dees for defendants.

WALKER, J., after stating the material facts: This is a case of great apparent hardship, as will appear from our recital of the facts,

but it is a misfortune which has come to the defendants through no legal fault of the plaintiffs, and therefore must be borne with patience and patriotic resignation, as it was caused by the pressing needs of our Government for immediate and rapid transportation in the movement of men and materials for war purposes. This alone would not exonerate the plaintiffs, but defendants entered into a contract with them which appears in the statement, by which they agreed that the plaintiffs should not be held "liable, *or responsible,*" for any delay, over which they had no control, and occasioned by the railroads being unable to furnish cars, because of prior Government demands upon them to supply transportation for war purposes.

(456) The defendants asked for two instructions (which were practically identical), to the effect that as the potatoes were shipped, not by open bill of lading, which would have vested the title to them in the defendants, and thereby imposed the risk of delay upon them, but by bill of lading "to their own order, notify Jeffreys & Sons," the risk of any delay was assumed by the plaintiffs, because they retained the title to the potatoes during the course of transportation and until delivery to the defendants upon payment of the draft, which was drawn to order with bill of lading attached. But this view leaves out of consideration the important and very essential fact that this shipment moved under special contract, excluding the ordinary liability of a shipper by a carrier, and containing a clause therein which protects them from delay in transportation in certain circumstances, which have already been stated. It appears, first, that the defendants agreed that the shipment should be made as it was, that is, "Amount draft and bill of lading attached," and specially stipulated, that the plaintiffs should not be considered in fault, when any delay was caused by conditions and circumstances beyond their control, such as the preferential right of the Government to all means and methods of transportation. The ordinary rules of law do not prevail in such instances, for *inter arma leges silent.* Where the preservation of the Government is at stake, all private rights must give way and be subordinate to it. This is not only the law of war, but the call of patriotism. Ordinarily, the maxim is that "private good yields to public," and the interest of an individual should give place to the public good (*privatum commodum publica cudit*), Jenk. Cent., p. 223, case 80; and the other version of it is that private inconvenience is made up or compensated for by public benefit (*privatum incommodum publico bono pensatur.*) But on another, which is somewhat related to those we have stated, the safety of the people is the supreme law, and as such

entitled to the first consideration, and it is the inexorable law that regard be had to the public welfare, and, in times of war and peril, to the public safety, for in such instances an interference with private rights is obviously dictated and justified by the immediate urgency of the occasion and the highest necessity. Broom's Legal Maxims (8 ed.), pp. 2 to 5. The rights and supreme power of the Government in times of war, which may be exercised for its own safety and the protection of its people, must be conceded, and among those rights is the one which permitted it to commandeer the existing means of transportation for its own purposes in prosecuting the war which it had declared against the Central Empires, and to the extent of seizing the railroads or subjecting them to its use and control for war purposes, and the exercise of this power was the reason for inserting the special clause in this contract, exempting the plaintiff from liability or responsibility for delays in transportation beyond its control. It was a valid stipulation, and must be enforced, and if any losses have been sustained by the de- (457) fendant because the goods could not be shipped with the usual and customary expedition, by reason of such delays, the defendant must submit to them, for there is no measure of redress, as they came within the class of losses where there is no technical injury, and within the designation of the contract of shipment, that is, "delays beyond plaintiffs' control." If there had been no such provision in the contract, the plaintiff might not have been protected against recovery of damages by the defendant, and perhaps could not have themselves recovered for the price of the potatoes. But the Government, under its war power and the "National Defense Act" of the Congress, had the right to take over all transportation facilities and thereby prevent or obstruct the regular and usual course of carriage by rail and water. If the plaintiff had exempted itself from "liability" only, the result might have been different, but it was relieved from "responsibility" as well, and the parties meant, by the use of this word, something more than mere "liability," or exposure to a suit, or counterclaim for damages. They intended to relieve the plaintiffs of all fault whatever, when the shipment was delayed by an embargo on transportation caused by the necessities of the Government in the exercise of its war powers as authorized by Congress.

This subject is fully discussed in *Roxford Knitting Co. v. Moore and Tierney*, 265 Fed. Rep. (C.C.A.) 177; *Kneeland-Bigelow Co. v. Michigan C. R. Co.*, 207 Mich. 546; *Primos Chemical Co. v. Fulton Steel Corp.*, 266 Fed. Rep. 945; *Bernhardt L. Co. v. Metzloff*, 184 N.Y. Suppl. 289; *Prescott & Co. v. Powles & Co.*, 193 Pac. Rep.

(Wash.) 680. The question is also considered in an elaborate note to *Roxford Knitting Mill v. Moore and Tierney, supra,* as reported in 2 Am. L. Rep., Anno., at p. 1429, to which we refer. It was held in *Chemical Co. v. Steel Corp., supra,* that a vendor of a crane, to be manufactured under a contract calling for delivery at a specified time, and providing that the vendor did not assume liability for loss from any cause beyond its control, was held not entitled to recover for the crane, which was not delivered at the time agreed, although the delay might have been due to orders before contracted for, as to which priority certificates had been issued by the Government. The Court recognized, however, that such a cause would constitute a defense to an action by the vendee for damage due to the delay. And in *Prescott & Co. v. Powles & Co., supra,* the Court stated that had the vendor been sued for damages for failure to ship the full order, the Government's act might have afforded a defense, but that, having sued on the contract, it was essential to a recovery that a full performance be shown, and that no excuse not provided for in the contract would justify a recovery where the per-
(458) formance was partial only, save an act of the vendee rendering performance impossible, or a waiver by it.

I forbear to further pursue this part of the discussion, as in this case there is a clause in the contract which, in our opinion, exempts and exonerates the plaintiffs from all blame and required the defendant to pay for the potatoes. They cannot object that the plaintiff retained the title to the potatoes under the terms of the draft and bill of lading annexed, for they deliberately consented to this form of shipment, and their real promise, therefore, was to pay the draft when the potatoes arrived, take up the bill of lading, and receive the potatoes, and even if they had not so promised, the clause of exemption in the contract would require them to do so, as by its terms, and the finding of the jury as to the embargo preventing an earlier delivery, the plaintiffs were in no fault, having delivered the potatoes as soon as they could do so, and the contract exempted them not only from liability, but also from "responsibility," for not delivering before the end of the planting season.

The jury's verdict has disposed of all other questions concerning defendant's liability for the price of the goods, as, for one example, the shipment by the Clyde Line to Charleston, S. C., it appearing that the Merchants and Miners Transportation Line, the usual one, had been closed by the Government to private transportation.

There is no contention, as we understand the case, that the potatoes were of inferior quality when they were delivered to the car-

rier for shipment, and there does not appear to be any ground upon which to hold the plaintiffs "responsible" for dilatory conduct on their part. There seems to be no negligence legally imputable to them. *Waddell v. Reddick,* 24 N.C. 424.

Whether the defendants have any right over against the carriers, or any one of them, is a question not now pertinent. As to their rights under the contract of purchase and the other facts, not now necessary for us to consider, see *Richardson v. Woodruff,* 178 N.C. 46; *Gwyn v. R. R.,* 85 N.C. 429, where there is a general discussion of the matter.

The other exceptions are either merely formal or devoid of any genuine merit. Upon the whole, we conclude that the case was correctly tried below and the result is in accordance with the relevant and controlling principles of law.

No error.

Cited: R. R. v. Lumber Co., 185 N.C. 234.

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HIGH POINT CASKET COMPANY v. R. A. WHEELER, STRUDWICK, AND BARRINGER, INTERVENERS.

(Filed 16 November, 1921.)

1. Attorney and Client—Fees—Contingencies—Contracts—Assignments—Judgments.

Where the plaintiff's attorneys have intervened and filed a petition claiming an assignment of a part of the recovery for services rendered the plaintiff in the pending action upon a contingent fee basis, the defendant is not required to see the application of the funds to be paid under the judgment rendered against him, and he has no interest in the interpleader that he can litigate. The judgment in favor of the interveners will conclude all the parties when they have had due notice of the interpleader and have failed to answer the petition in the time allowed by law.

2. Same—Reasonable Fee.

An agreement between the attorney and client that the former should receive a certain part of the recovery in an action as a fee upon the contingency of success, is an assignment that may be enforced upon a judgment rendered in the plaintiff's favor, when reasonable in amount, and *held* in this case that a fee of one-third of the recovery in the case was not unreasonable under the facts and circumstances appearing therein. Contract between attorney and client for the former's compensation upon a contingent fee basis, and its reasonableness, discussed by WALKER, J.

3. Same—Intervener—Procedure.

Where the plaintiff endeavors to avoid paying a contingent fee agreed upon for compensating his attorneys for successfully prosecuting the action, it is proper procedure for the attorney to intervene and show his interest in the judgment rendered in plaintiff's favor, and have their rights therein secured.

4. Attorney and Client—Amount of Fee—Fees—Contingencies—Evidence.

Where an attorney takes a matter to be litigated upon a contingent fee, it is not to be considered unreasonably large because larger than it would have been had it not been upon such basis, and in this case, *held*, a fee of one-third of the recovery was not unreasonable, considering the services rendered and all the other facts and circumstances.

5. Same—Confidential Relationship—Fraud—Undue Influence.

While the contract entered into by an attorney with his client for a fee for services upon contingency of recovery must be free from fraud or undue influence or oppression to be valid and enforceable, the mere fact that it was in a larger amount than would be reasonable upon a straight fee basis, does not make it void as being within the confidential relationship of attorney and client, and it is enforceable when it appears that the contract was fairly entered into without oppression or wrong, and that the fee was reasonable under the circumstances.

6. Attorney and Client—Fees—Contingencies—Contracts — Assignments —Law—Equity—Statutes.

The common-law rule that the rights and benefits of a contract, with certain exceptions, could not be transferred by assignment, was afterwards modified in common-law courts, and more extensively in courts of equity, and extended by legislation, so that now, as a general rule, unless expressly prohibited by statute or in contravention of public policy, all ordinary business contracts are assignable, and actions for their breach may be maintained by the assignee in his own name; and *held*, where an attorney has contracted to receive as compensation from his client a fee contingent upon recovery in the action, it follows that upon the happening of the contingency he may enforce his right against his client in his own name, whether the assignment is regarded as a legal or equitable one.

7. Attorney and Client—Fees—Contingencies—Judgments—Liens.

Where the interveners have established their right to compensation for their professional services as attorneys upon a fee contingent on recovery, the lien of the judgment attaches, *pro tanto*, under our statute, to the defendant's land, in favor of the interveners, from the time of docketing the judgment, that is, to the extent that there is a definite appropriation of a special part of the judgment or recovery to their use and benefit.

APPEAL by defendant from *Finley, J.*, at the May Term,
(460) 1921, of GUILFORD.

This action was originally brought by the plaintiff against R. A. Wheeler individually. He was never sued as secretary and treasurer of plaintiff corporation. The complaint alleged that R. A. Wheeler was indebted to the plaintiff in a large sum of

money, both on account of unpaid subscription to capital stock and money of the company, which he had as former secretary and treasurer received and not properly accounted for. It is alleged that prior to the beginning of the action, to wit, on 2 September, 1915, Wheeler had been suspended as secretary and treasurer by action of the stock holders and the board of directors, who had elected B. H. Bradener to that office, in place of the defendant. The cause was referred to S. Clay Williams, Esq., who tried the same as referee, and reported that the defendant was indebted to the plaintiff in the sum of $1,687.06, and the further sum of $550, making $2,237.06, which the plaintiff was entitled to recover of the defendant.

Messrs. R. C. Strudwick and John A. Barringer appeared as attorneys for the plaintiff in the action, and until the judgment was rendered on the referee's report, intervened in this action to establish their right to compensation as attorneys. They were duly retained as such by the Casket Company, and were paid a retainer of fifty dollars, the company further agreeing that they should have as compensation for their services "one-third of any recovery that might be effected in the action against the defendant." The said terms of employment were accepted by the attorneys, and they represented the plaintiff and prosecuted the action throughout the litigation for their client, and recovered judgment in the sum above indicated in the referee's report. The controversy was long continued and hotly contested, and there seems to be no reason to dispute the reasonableness of the compensation promised to the at- (461)
torneys. The latter intervened in the principal action for the purpose of enforcing the allotment to them of one-third of the judgment recovered by the plaintiff with their professional assistance according to the contract, contending that they were entitled to the relief and to the lien on the defendant's land, which, under our statute, goes with the judgment. The petition of intervention was duly served, with a copy thereof, on the plaintiff, but not answered.

The defendant filed one exception to the report, and pending the confirmation of the same took action, as described in the petition, with a view of depriving interveners of their compensation by acquiring control of the plaintiff corporation. The defendant, in open court, withdrew his exception to the report of the referee, which was confirmed.

The interveners then filed their petition of intervention, and the court rendered judgment as follows:

"It is further ordered, adjudged and decreed by the court that the plaintiff do have and recover of the defendant in accordance with said report the sum of $1,687.06, and the further sum of $550, with interest on $550 from 8 January, 1917, until paid. It further ap-

pears to the court that John A. Barringer and R. C. Strudwick, attorneys at law, by leave of the court, have filed in this cause a verified intervening petition whereby they claim to be equitable assignees of one-third of said judgment, and that they are entitled to be paid one-third thereof; that the said petition has been duly served upon the defendant and upon C. C. Prince, now president of the High Point Casket Company, and that no answer thereto has been filed, the court doth find that all allegations of said petition are true. The court doth find, and thereupon order and decree, that by virtue of the agreement made by the plaintiff, said John A. Barringer and R. C. Strudwick, attorneys, are entitled to receive one-third of the amount recovered against the defendant, and that by virtue of the terms of their employment as aforesaid, they are the equitable assignees of one-third of said judgment against the defendant.

"It is further ordered and adjudged by the court that John A. Barringer and R. C. Strudwick, attorneys, be paid one-third of the amount of said judgment, and judgment is hereby rendered as to the one-third of the amount thereof in favor of said John A. Barringer and R. C. Strudwick against the defendant R. A. Wheeler.

"It is further ordered and adjudged by the court that the defendant pay the costs of this action to be taxed by the clerk, including an allowance of two hundred and fifty dollars to S. Clay Williams, Esq., referee."

Defendant appealed.

(462) *John A. Barringer and R. C. Strudwick for intervener.*
R. R. King for defendant.

WALKER, J. What real interest the defendant has in this controversy we are unable to see. He has to pay the judgment, in any event, and whether to the plaintiff, or one-third of it to the interveners, Messrs. Barringer and Strudwick, the attorneys of the plaintiff, can make no difference to him. A case directly in point is *Newsom v. Russell*, 77 N.C. 277, where the plaintiff was the assignee of the note on which the action was brought, and defendant alleged that it was assigned in fraud of the assignor's creditors, the Court held this to be no defense, as the assignor was bound by his assignment, though made in fraud of his creditors, and then the Court inquired, "It is not the duty of the maker of the note to see to the application of the money, and it is even less his duty to fight the battles of the bankrupt's creditors. What interest is it to him (defendant) if he is absolved from further liability by payment of his

debt upon a judgment regularly obtained against him?" Here the parties are all before the court and will be concluded by its judgment. The petition of intervention was filed in the case and copies of it duly served on the plaintiff and the defendant, who failed to answer it or otherwise plead to it, and the court gave judgment by default against them. This fully protects defendant in any payment he makes under the judgment of the court. And *Brown v. Harding*, 170 N.C. 253, 262 (*S. c.*, 171 N.C. 689), is to the same effect as *Newsom v. Russell, supra*. But see, also, *Wiggin v. Sweet*, 6 Metcalf (Mass.) 194 (*S. c.*, 39 Am. Dec. Extra Anno. 716); *Black v. Kirgan*, 28 Am. Dec., Extra Anno. 394; 6 Cyc. 631. The party of record who can complain of a judgment of a court, and appeal therefrom, is one who is aggrieved thereby, in the sense that his pecuniary interest is affected by it; one whose right of property, or interest, may be established or divested by the decree, as was said substantially by Chief Justice Shaw in *Wiggin v. Sweet, supra*, citing *Smith v. Bradstreet*, 16 Pick. (Mass.) 264; *Bryant v. Allen*, 6 N.H. 116. But however this may be, we are of opinion that the judgment of the court was right in itself.

There can be no question as to the definite terms of this contract for compensation of the attorneys, nor as to how it should be ascertained and secured, nor can it be reasonably doubted that the parties intended that they should receive a certain or fixed portion of the judgment recovered. The contract therefore constituted, at least, an equitable assignment of the judgment *pro tanto*. It was held in *Costigan v. Stewart*, 91 Pac. Rep. (Kansas) 83 (*S. c.*, 11 L.R.A., N.S. 630), that an attorney, who is retained to conduct or to assist in conducting the prosecution of a proceeding under a contract by which he is to receive compensation out of the fund recovered, is entitled to a lien upon such fund for his fees. And (463) so in *Svea Assurance Co. v. Packham*, 92 Md. 464, at 477 and 478, the Court said that there was no evidence to show that the amount defendant agreed to allow the attorneys was unreasonable or excessive. Cases of that character are generally defended by all the means the law affords. They often result in several trials and usually the receipt of the compensation is greatly delayed, when taken on a contingency. If the case is settled before it has taken its usual course, the attorney is undoubtedly benefited thereby, but the client is saved the necessity, and oftentimes hardship, of paying out cash, and has no personal liability for fees in the event of failure. Under such circumstances he must expect to, and usually does, give larger compensation, if successful, than he would if he agreed to pay a fixed fee, whether successful or not. When Mr.

Packham made the arrangement for fees the insurers had not paid the insurance money, and when they did, they knew what he had agreed to allow. Yet they stood by without objecting to it, and permitted the attorneys thus employed by Mr. Packham to proceed, knowing the terms of their employment. The case of *Davis et al. v. Gemmell et al.*, 73 Md. 530, is a conclusive answer to such objection by them now. There the attorneys were employed upon a contingent fee by Mr. Brydon, who had sued in his own name and recovered a judgment which was determined to belong to the North Branch Coal Company. Some of the stockholders objected to the allowance of the fee, but this Court said they "stood by and saw the work done — they neither interfered nor objected — and they cannot now be heard in a court of equity to except to that work being paid for out of the fund realized by the labor of these gentlemen, especially when they themselves (the exceptants) are seeking to reap the benefit of that very work and labor. Without citing other authorities on that subject, we are of the opinion that it would be inequitable to deprive the attorneys of the fees agreed to be allowed. See, also, note to the *Costigan* case, *supra.* It is said in 4 Cyc. 989, 990, and notes: While the law will scrutinize such transactions closely, an agreement is not necessarily invalid because the payment of the fee is made contingent upon the success of the suit or upon the happening of some other event, and such an agreement is not objectionable for want of mutuality. So, a contingent agreement to convey a portion of the land recovered by suit to the attorney for his fee will be specifically enforced, even though the land has greatly increased in value. Where the claim is assignable, the wording of the agreement for a contingent fee must in every case be examined to determine whether the parties intended an equitable assignment in favor of the attorney. *Fitzpatrick v. Lincoln Sav., etc., Co.*, 194 Pa. St. 544; *Howard v. Throckmorton*, 48 Cal. 482; *Martin v. Platt*, 5 N.Y. St. 284; *Chester v. Jumel*, 125 N.Y. 237, 25 N.Y. St. 4, 2 Silv. Sup.
(464) (N.Y.) 159; 5 N.Y. Suppl. 809. If the property has been converted into a fund, the attorney is entitled to his due share of the increased amount. *Hand v. Savannah, etc., R. Co.*, 21 S.C. 162. Where the client repudiates his contract, the attorney may compel him to deliver so much of the proceeds recovered as will compensate him or may have a personal judgment for his damages sustained by reason of the client's failure to carry out his contract. *Hazeltine v. Brockway*, 26 Col. 291. Similar agreements were held to constitute equitable assignments in favor of the attorneys in the following cases: *Hoffman v. Vallejo*, 45 Cal. 564; *Sammis v. L'Engle*, 19 Fla. 800; *Fairbanks v. Sargent*, 104 N.Y. 108; *Hagemann's Es-*

tate, 5 Pa. Co. Ct. 576; *The Alice Strong,* 57 Fed. 249 (distinguishing *Kendall v. U. S.,* 7 Wall (U.S.) 113, 19 L. Ed 85). A right of action is assignable in this State, but by assigning an aliquot part of the fund recovered, or the recovery, or judgment, as it may be denominated, the assignee gets no vested right in the cause of action, unless it is so stated or clearly to be implied. In this case the assignment is confined to the recovery or judgment itself. In 6 Corpus Juris, pp. 742, 743, it is stated that there are many cases which hold that an agreement with an attorney that he shall have as compensation a specific sum, or a stipulated percentage, to be paid out of the judgment recovered will, on the recovery of judgment, operate as an equitable assignment *pro tanto;* and this has been so held even where the action in which the judgment was obtained was on a cause of action for a tort in itself unassignable. But, in order that an agreement for a contingent fee may operate as an equitable assignment, there must be in effect a constructive appropriation of so much of the amount to be recovered as will confer upon the attorney a complete and present right to receive the same without the further intervention of the client. In some jurisdictions there must be an actual appropriation of some designated proportion or per cent of the judgment. In others it is not indispensable that the portion or amount of the fund sought to be assigned should be precisely ascertained and stated in the assignment. It is enough that the transaction affords evidence as to the part of the fund on which the assignment was intended to operate. Whether in a given case the agreement constitutes an equitable assignment is dependent upon the intent of the parties, as evidenced by the terms of the agreement, in the light of all the surrounding circumstances. See, also, *Bennett v. Donovan,* 82 N.Y. Suppl. 506 (83 App. Div. 95); *Flannery v. Geiger,* 92 N.Y. Suppl. 785; *Mays v. Sanders,* 90 Texas 132. It was held in *Martinez v. Succession of Adolphe Vives,* 32 La. Ann. 305, that the contract of an attorney with his client to receive a contingent fee of ten per cent on the amount recovered is a valid contract. An attorney who is entitled to a certain commission on the amount recovered by him, which amount is evidenced by and embraced in a judgment, has a sufficient interest in the judg- (465)
ment to sue for its full revival. Construing a contract between attorney and client similarly worded to this one, the Court held in *Hoffman v. Vallejo,* 45 Cal. 564, that it constituted the attorney the equitable owner of the undivided one-half of whatever shall result from the prosecution or compromise of the suit instituted by him to recover the land. If an attorney contracts with a party who claims land to commence a suit to recover the land and to pay

the expenses, and receive for his services and expenses one undivided half of what may be recovered, and the undivided one-half of the result of a settlement or compromise of the matter, and the party compromises by having money paid to a third person, who, in consideration of the money, deeds to a fourth person land in trust for the party, such fourth person holds an undivided one-half of the land in trust for the attorney. Considering a claim of like character in *Fairbanks v. Sargent,* 104 N.Y. 108 (*S. c.,* 58 Am. Rep. 490) (opinion by Chief Justice Ruger), the Court held that an assignee of such a claim from the owner must necessarily acquire the same interest in it that any other assignee does, and that is, in the absence of other controlling equities, an interest subject to the rule that he who is prior in point of time is prior in right. Such a claim is at common law nonassignable, and its assignee takes, by virtue of an assignment thereof, an equitable interest only, which must be governed by equitable rules for its protection and enforcement. See, also, *Schubert v. Heizberg,* 65 Mo. App. 578; *Williams v. Ingersol,* 89 N.Y. 508, and *Patten v. Wilson,* 34 Pa. 299, in which last case it was held that an agreement by parol between an attorney and client that the former should have one hundred dollars for his services "out of the verdict," in an action for unliquidated damages arising from a personal tort, operated as an equitable assignment of the judgment entered upon the verdict, and was good against an attaching creditor of the client. The Court thus answers the objection that, as the claim was for unliquidated damages in an action sounding in tort, it was not capable of assignment before judgment; strictly that is true. But it is true only in respect to the rights of third parties. As between Wolf and Geyer (client and lawyer) an assignment or agreement to assign the whole or part of a future verdict, would be binding, and, being founded on sufficient consideration, would be enforced. "Such agreements between counsel and client . . . bind the parties, and the attaching creditor of one of the parties succeeds to no higher rights than he possessed." *Bell v. Lake County,* 26 Col. 192. And in *Canty v. Latterner,* 31 Minn. 239, the Court was of opinion that upon its face the contract is to be construed as an equitable assignment of the amount there referred to as due the respondent from the railroad company. It is expressed

(466) not merely as an obligation to pay upon the contingency named, nor merely to pay out of the money to be collected by the respondent, but that the plaintiff should receive this money from the railroad company out of the amount owing by it to the respondent. It was in effect a constructive appropriation in favor of the plaintiff of so much of the money payable to the respond-

ent, subject only to the condition named, and was hence operative as an assignment, although not an assignment in form. There are very many cases collected in 6 Corpus Juris, at p. 741 and note 7, to the same effect as those we have cited, but they are too numerous to be inserted here. The annotator of the text says that in each of them there was a contract for a contingent fee, ranging in amount from one-tenth to one-half of the sum recovered; and the Court, finding upon examination that the contract was fair and the fee not excessive, gave effect to it and allowed the attorney to recover. It was held in the case of "The Alice Strong" (*S. c., Greenhalgh v. Same,* 57 Fed. Rep. 249), that an assignment by the libelant in an admiralty case (who has reasonable assurance that he is entitled to recover a certain amount), of a definite sum to his proctor for professional services, to be paid out of any recovery that might be had, is sufficiently certain, and on sufficient consideration, to support a lien on the proceeds. The lien of such an assignment has priority over the claim of a judgment creditor in a state court, who subsequently files his intervening petition in admiralty, after the court has decided that libelant is entitled to recover some amount on his libel.

One reason for the rule thus formulated by the courts is based on the ground that otherwise a party, without the means to employ an attorney and pay his fee certain, and having a meritorious cause of action or defense, would find himself powerless to protect his rights. *Newman v. Freitas,* 129 Cal. 283; *Andirac v. Richardson,* 125 La. 883.

This brings us to consider the validity of such a contract in another respect. The defendant attacks the same (in which, by the way, we have shown that he has no legal or moral interest or right), upon the ground that the relation of attorney and client is a fiduciary one, which raises a legal but rebuttable presumption of fraud, or of undue influence which is a species of fraud, and for this position he cites *Lee v. Pearce,* 68 N.C. 76, and we may add *McLeod v. Bullard,* 84 N.C. 515, 532, but if that principle be conceded to be the law, and we are not casting any doubt upon it, the evidence in this case establishes beyond cavil, that the attorneys, who were the interveners, acted in perfect good faith when the contract was made, and without fraud or the exercise of any undue influence, and that they took no advantage of the plaintiff in the transaction, and further that the compensation (one-third of the recovery) was just and reasonable. Besides, the allegations of the interveners, in their petition, are to the effect that there was no fraud or undue influence, and no bad faith, or unfair advantage taken by (467)

them of the plaintiff when the contract was made, but that, in all respects, the latter was fair and just, and the amount of compensation allowed was reasonable when the nature of the litigation and of the services to be rendered by them are considered, and these allegations were not denied, although the plaintiff and the defendant were duly served with copies of the petition and had full opportunity to be heard if they had any defense to it. It is neither a violation of law nor against good morals that a lawyer, if he believes a client or would-be client has been wronged, and is unable to employ counsel, to bring suit for the redress thereof, and to undertake the business without any hope or promise of reward, or upon a promise of reward contingent upon the result. Indeed, it is rather to be commended. *Stevens v. Sheriff*, 76 Kan. 124 (*S. c.*, 11 L.R.A., N.S.), 1153. A contract for a contingent fee must be made in good faith, without suppression or reserve of fact or of apprehended difficulties, and without undue influence of any sort or degree; and the compensation bargained for must be absolutely just and fair, so that the transaction may be characterized throughout by all good faith to the client. If the contract is shown to have been obtained by fraud, mistake, or undue influence; or if it is so excessive in proportion to the services to be rendered as to be in fact oppressive or extortionate, it will not be upheld. Such a contract cannot be condemned solely because of the proportion of the claim to be retained by the attorney was very large, if it was deliberately entered into, was free from fraud, and showed no purpose to obtain undue advantage. Thus the mere fact that the attorney is to receive one-half of the recovery does not render the agreement unconscionable, in the absence of proof that it was induced by fraud, or that the compensation provided for is so excessive as to evince a purpose to obtain an improper or undue advantage, although there is said to be a presumption against the propriety of such a transaction. One very properly may demand a larger compensation if it is to be contingent, or not certain. A contingent fee is permitted to attorneys only as a reward for skill and diligence exercised in the prosecution of doubtful and litigated claims, and it is not allowed for the rendition of merely minor services which any layman or inexperienced attorney might perform. 6 Corpus Juris, Sec. 316 (pp. 740-741), and notes. The word "unjust or unconscionable," as applied to attorneys' contracts for contingent fees, means nothing more than that the amount of the fee contracted for, standing alone and unexplained, would be sufficient to show that an unfair advantage had been taken of the client, or that a legal fraud had been perpetrated upon him. *McCoy v. Gas Engine Co.*, 135 App. Div. 771 (119 N.Y.S. 864).

There is nothing in this case which even suggests that the contract was either unfair, improper, or excessive, or (468) that the interveners did anything, in their professional characters as attorneys, that was not fit for them to do under the facts and circumstances.

We need not discuss the question as to whether intervention is the proper method for the attorneys to prosecute their right to the compensation and obtain judgment therefor as they have done. That it is, is too plain for argument, and it will be found that it is the one which was adopted in the cases we have cited and many others. Under our Code, it is one of its cardinal rules, and of its most commendable provisions, that all controversies relating to the same matters should be settled in one action, and the intervention was the most convenient and appropriate method in this case, as one of its objects was to arrest any disposition of the fund to be collected under the judgment which would jeopardize or defeat the interveners' rights, which were about to be greatly prejudiced by the defendant's wrongful conduct, which is particularized and denounced in the petition as an attempt to subject the judgment to defendant's control, so that he might oust the interveners of their just and equitable rights. Whether the contract was, in effect, an assignment at law or in equity, need not be considered. It was not good at common law, as under it choses in action were not assignable, but even then it was valid in equity. Under our law choses in action are assignable, while at common law the rights and benefits of a contract, except in the case of the law merchant and in cases where the crown has an interest, could not be transferred by assignment, a doctrine which Lord Coke attributes to the "wisdom and policy of the founders of our law in discouraging maintenance and litigation, but which Sir Frederick Pollock tells us is better explained as a logical consequence of the archaic view of a contract as creating a strictly personal obligation between the debtor and creditor," the rule in its strictness was soon modified in practical application by the common-law courts themselves and more extensively by the decisions of the courts of equity; and the principles established by these cases have been sanctioned and extended by legislation until now it may be stated as a general rule that, unless expressly prohibited by statute or in contravention of some principle of public policy, all ordinary business contracts are assignable, and that actions for breach of the same can be maintained by the assignee in his own name. *R. R. v. R. R.*, 147 N.C. 368-374. But it makes no difference whether we call the assignment legal or equitable, as in either case the result will be the same.

As we have held that by the term of the contract, the interveners acquire an interest of one-third in the judgment, which is what we call "the recovery," the lien of the judgment, under our statute (C.S. 614), attached *pro tanto* to the defendant's land from
(469) the time the judgment was docketed. This is not, therefore, a simple common-law action to recover for services the amount stipulated to be paid, but is the definite appropriation of a special part of the judgment, or "recovery," with its attendant lien, as compensation to the attorneys under the contract. This seems to be a case of first impression in our courts, but we deem the law concerning it to be well-settled.

The question is treated at large in Weeks on Attorneys (Ed. of 1878), secs. 346, 350, and 352.

There may be some conflict in the authorities, but our view is well supported by a large majority of the later decisions in courts of the highest repute.

This case bears no resemblance to *Mordecai v. Devereux,* 74 N.C. 673, and *Roe v. Journigan,* 181 N.C. 180, as there was no contract between attorney and client in those cases, and the Court was asked to allow compensation regardless of that fact.

Upon the whole case, when considered in any proper or admissible view, our conclusion is that there was no error in the judgment of the court below, as delivered by Judge Finley upon the report of the referee, and we therefore affirm the same.

Affirmed.

Cited: Abernethy v. Godette, 183 N.C. 675; *Trust Co. v. Williams,* 201 N.C. 466; *Horne-Wilson Co. v. Wiggins Bros.,* 203 N.C. 88; *In re Estate of Bost,* 211 N.C. 443; *In re Wallace,* 212 N.C. 493; *Crutchfield v. Foster,* 214 N.C. 553; *Cadillac-Pontiac Co. v. Norburn,* 230 N.C. 28.

ALEX. SASSER v. ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

(Filed 28 September, 1921.)

Negligence—Evidence—Nonsuit—Trials—Railroads.

Where the plaintiff's driver stopped his team of mules at a garage across a 50-foot street from the defendant's railroad track, and while he was in the garage, the mules, without apparent fright or other cause, suddenly turned and ran across the track in front of the defendant's running train, and thereby a mule was killed and the wagon injured the sole,

efficient, and proximate cause of the alleged injury was the negligence of the plaintiff's servant, and he cannot recover in his action for damages.

APPEAL by plaintiff from *Lyon, J.*, at the April Term, 1921, of WAYNE.

E. A. Simkins and Hood & Hood for plaintiff.
E. M. Land and O. H. Guion for defendant.

WALKER, J. This action was brought to recover damages for injuries to a mule and wagon. The plaintiff's servant had driven the team, consisting of two mules and a wagon, to a place in front of a garage in Mount Olive, and left them there unhitched and unattended and went into the garage for a minute or so. While he was in there, the mules, without any apparent cause, such as fright, turned around and went across the railroad track, and as the mules stopped they were stricken by a passing train. One of the mules was killed and the wagon was broken. (470)

A witness for the plaintiff testified that if the engineer or fireman had seen the action of the mules as they turned with the wagon, and stopped the train as quickly as they could do so, it would not have prevented the collision, "as they could not have stopped the train from the time the mules turned around and the train hit them." The mules were only fifty feet from the track, that being the width of the street on the west side. The driver did not stay in the garage more than a minute, and when he came out it had all happened. The evidence, which was all introduced by the plaintiff, tended to show that the train could not have been stopped in time to have prevented the accident. The judge, on motion of defendant, nonsuited the plaintiff and dismissed the action under the statute, and plaintiff appealed.

After careful consideration of the evidence and the argument of counsel, we conclude that there was no evidence upon which the plaintiff could have asked for a verdict, and, therefore, that the judgment of nonsuit was proper. The sole, efficient, and proximate cause of the alleged injury was the negligence of the plaintiff's servant in leaving the mules unhitched, and their turning around and crossing the railroad so suddenly. *Needham v. R. R.*, 171 N.C. 763. The plaintiff is wholly to blame for his own misfortune, and must, therefore, bear the loss.

Affirmed.

CHRISTINA STULTZ v. C. M. THOMAS ET AL.

(Filed 23 November, 1921.)

1. Municipal Corporations—Cities and Towns — Streets and Sidewalks — Negligence—Ordinances—Evidence—Questions for Jury—Trials.

In an action to recover damages for a personal injury alleged to have been negligently caused by the defendant contractor at night, in failing to properly safeguard concrete work on a sidewalk of a city, having in force an ordinance specifying the kind of guard rails, post lights, etc., that were to be used at such places dangerous to pedestrians, the requirements of the statute prevail in these respects, as the test of defendant's responsibility, and evidence offered in defendant's behalf as to what other such contractors were in the habit of doing there under like conditions, is irrelevant, and properly excluded.

2. Same—Nonsuit.

It is a question for the jury to determine whether or not a concrete contractor left at night a dangerous part of a sidewalk safe for pedestrians according to the requirements of an existing valid ordinance, in an action to recover damages for an alleged negligent injury therein caused the plaintiff, and upon this motion to nonsuit, construing the evidence in the light most favorable to the plaintiff, it is held the issue was properly submitted to the jury.

3. Same—Negligence Per Se—Proximate Cause.

Where a valid ordinance imposes a specific duty upon contractors as to the protection of pedestrians of a city from injuries from dangerous places on the sidewalks where paving has been done by them, their failure to discharge this affirmative duty is negligence *per se*, leaving for the determination of the jury the question of whether or not such negligence is the proximate cause of the injury.

APPEAL by defendants from *Webb, J.*, at March Term,
(471) 1921, of FORSYTH.

Civil action to recover damages for an alleged negligent injury to plaintiff by falling over a rope barricade which the defendants had erected around a newly laid concrete sidewalk in the city of Winston-Salem.

The defendants were engaged, under a contract with the city, in replacing an old sidewalk with a new concrete one in front of the premises occupied by the plaintiff's sister. The plaintiff, a woman of about fifty years of age, a seamstress by occupation, had rooms on the opposite side of the street, and took her meals at her sister's home.

The defendants' servants, at about six o'clock in the evening of 19 November, 1919, had completed the laying of the new concrete sidewalk in front of the residence of the plaintiff's sister, and erected barricades and placed red lanterns in the vicinity immediately before stopping work. They placed a plank, about 12 inches wide,

from the gate to the curb across the new concrete for the protection of the new concrete in case persons should desire to enter or leave the premises. They erected a number of posts, three or four feet high, along the curb between the street and sidewalk, and tied a rope to the top of these posts to act as a barrier for the protection of the new concrete. A post was placed at each side of the plank at the curb so close together as only to leave room for a person to pass between, and the rope, according to the contentions of defendants, was permitted to hang down alongside the post, to pass under the plank, and ascend alongside the other post to its top, the rope hanging loosely under the plank, and the plank projecting several inches beyond the rope and the edge of the curb. According to the plaintiff's contentions, the rope was placed above the plank and was carelessly permitted to sag down to within a few inches of the plank, thus rendering it dangerous for pedestrians to pass over.

About 6 or 6:15 p.m., the plaintiff came to supper from the opposite side of the street and went into her sister's (472) home, walking along this plank to do so. Twenty-five or thirty minutes later, the plaintiff, returning to her room, came out of the gate, walked across the plank and tripped against some obstacle — she did not know what at the time — which, on arising, she discovered to be the rope.

Upon the issues submitted, the jury returned the following verdict:

"1. Were the defendants independent contractors in doing the work referred to in the complaint, as alleged in the complaint? Answer: 'Yes.'

"2. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint? Answer: 'Yes.'

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

"4. What damage, if any, is the plaintiff entitled to recover? Answer: '$1,500.' "

From the judgment rendered on the verdict in favor of plaintiff the defendants appealed.

O. O. Efird, Swink & Hutchins, and N. O. Petree for plaintiff.
Fred M. Parrish, Linney Deal, and Moser Shapiro for defendants.

STACY, J. Considering the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, we think his Honor was correct in submitting the case to the jury.

Upon trial in the Superior Court, the defendants proposed to show, by several witnesses, the custom prevailing in Winston among

other contractors with respect to the precautions used by them in doing work of the same character in which the defendants were engaged. This evidence was excluded, upon objection by plaintiff, and defendants assign such ruling as error. The purpose in offering this evidence, as stated by counsel, was as follows:

"We propose to show by the witness that the custom and approved method of placing warnings and guards around newly laid sidewalks is to place ropes next to the streets and place the same under the plank that leads from the street to the abutting landowners, and place red lights at each end of the work, beginning and ending of the work on the streets, and it is further the custom to put the rope from a post under the plank as testified by these witnesses was done in this case, that that method was approved and in general use."

Section 108 of the ordinances of the city of Winston-Salem provides: "It shall be unlawful for any person, firm, or corporation to make any excavation or do any work which may create or cause a dangerous condition in or on or near any street, alley, sidewalk, or public place of the city, without placing and maintaining proper guard rails and signal lights or other warnings, at, in, or around the same, sufficient to warn the public of such excavation or work, and to protect all persons using reasonable care from injuries on account of same."

(473)

A failure to discharge an affirmative duty imposed by law has been held by us in a number of cases to constitute an act of negligence *per se* (*Taylor v. Stewart*, 172 N.C. 203); and, where such conduct on the part of the defendant has been shown or established, it is a question for the jury to say whether or not such negligence is the proximate cause of the plaintiff's injury. *Ridge v. High Point*, 176 N.C. 421; *Paul v. R. R.*, 170 N.C. 231; *Fox v. Texas Co.*, 180 N.C. 543; *Stone v. Texas Co.*, 180 N.C. 546, and cases there cited.

We do not think that an established use or custom among men engaged in the same line of work can avail as against the positive requirements of the ordinance, or statute. In fact, a breach of a legal duty, or a duty imposed by law, comes within the very definition of negligence; and, if such be the proximate cause of an injury, it constitutes actionable negligence. *Drum v. Miller*, 135 N.C. 215; *Larson v. Ring*, 43 Minn. 88; *Mallory v. Walker*, 77 Mich. 448; 6 L.R.A. 695.

In the *Mallory* case, just cited, the Michigan statute imposed a penalty upon municipalities for failing to make their highways safe for travel. The defendant neglected to provide proper and safe barriers at a dangerous place. The Court held that a general usage or

custom as to placing rails or barriers along a highway embankment is of no importance in determining the liability of the municipality for failing to provide such barriers at a dangerous place. This is in perfect analogy with the case at bar.

We have found no sufficient reason for disturbing the verdict and judgment.

No error.

Cited: Cherry v. R. R., 186 N.C. 265; *Hinnant v. Power Co.*, 187 N.C. 296; *Davis v. Long*, 189 N.C. 134; *Campbell v. Laundry*, 190 N.C. 654; *Goss v. Williams*, 196 N.C. 220; *Dickey v. R. R.*, 196 N.C. 728; *Godfrey v. Coach Co.*, 201 N.C. 267; *Wadsworth v. Trucking Co.*, 203 N.C. 732; *Norfleet v. Hall*, 204 N.C. 577; *Lincoln v. R. R.*, 207 N.C. 789; *Conley v. Pearce-Young-Angel Co.*, 224 N.C. 215; *Hunt v. High Point*, 226 N.C. 77; *Price v. Gray*, 245 N.C. 168.

R. L. BALLOU v. ROAD COMMISSION OF ASHE COUNTY.

(Filed 23 November, 1921.)

Statutes—Bond Issues—Road Districts—Requirements of Statutes—Void Bonds—Municipal Boards.

Where there are provisions in the statute authorizing an issue of bonds by the road commissioners of a county, making it the duty of the commissioners either to begin the retirement of the bonds within five years or create a sinking fund for their retirement at maturity, and that interest on the bonds be paid annually, the commissioners issuing the bonds may not by contract or otherwise render ineffectual the power of future such boards to exercise the discretion imposed on them by statute within the stated period; or in contradiction of the express provision of the statute, require the semiannual payment of the interest; and these statutory requirements reaching to the vitality of the bonds, their issuance otherwise will be declared invalid.

CLARK, C.J., concurring.

APPEAL by plaintiff from *Long, J.*, at chambers, 9 November, 1921, from ASHE. (474)

Civil action, submitted on an agreed statement of facts, to determine the regularity of certain highway bonds of Ashe County.

The following facts, taken from the case agreed, will suffice for our present decision:

"1. That on 3 November, 1921, the defendant board passed a resolution authorizing the issuance of $365,000 highway bonds of Ashe County, under the authority of chapter 467, Public-Local Laws 1919, as amended 3 February, 1921, bearing interest at 6 per cent per annum, payable semiannually, with fixed serial maturities, providing in said resolution for a sinking fund for the payment of said bonds and determining that no bonds should be redeemed at the option of the county or any officer or board thereof before the date of such serial maturities, respectively, and directing the board's secretary, defendant herein, to advertise said bonds for sale upon sealed bids to be received 3 December, 1921, further providing that not only the bonds themselves but the advertisement of sale should specifically recite that said bonds would not be redeemable before said serial maturities.

"2. That all acts, conditions, and things required by the Constitution and laws of North Carolina in connection with the issuance of said bonds, up to and including the said authorizing resolution and direction to advertise, have happened, exist and have been performed except that the plaintiff and defendants are not agreed upon any one of these three questions, the defendants contending that said questions should be answered in the affirmative, and the plaintiff contending that they should be answered in the negative:

"(a) Whether said bonds will be within the debt limit?

"(b) Whether the county may irrevocably waive any right to redeem the bonds before their fixed maturities?

"(c) Whether the interest payments may be made semiannually?"

His Honor, being of opinion that all three of these questions should be answered in the affirmative, as contended by the defendants, entered judgment accordingly, and plaintiff appealed.

Parke & Johnston for plaintiff.

W. R. Bauguess for defendants.

STACY, J. We will omit any consideration of the first question, as we understand a negative answer to either the second or third inquiry will render it impracticable for the defendants to proceed further with a sale of the present bonds. (475)

Chapter 467, Public-Local Laws 1919, under authority of which the bonds in question are to be issued, contains the following provision with respect to their payment: "It shall be the duty of said board of road commissioners, . . . not later than five years after the issue of said bonds, to begin, in the discretion of the board of road commissioners, the payment of said bonds or the creation of a

sinking fund for the payment of the principal of said bonds at their maturities."

In the case of *Comrs. v. Bank,* 181 N.C. 347, speaking of this identical provision, it was said: "The present board cannot estop the option which, under the statute, they or their successors may exercise." To hold otherwise would be to allow the board of road commissioners to amend the statute and to issue bonds of a different kind and tenor than those contemplated by the Legislature. The authority to issue the proposed bonds is derived from the statute, and its limitations and conditions are equally as effective and curbing as its enabling provisions are life-giving. *Proctor v. Comrs., ante,* 56. Under these decisions we think the second question must, therefore, be answered in the negative, rather than in the affirmative.

Again, section 11 of the act under consideration provides that the interest coupons attached to said bonds shall be "payable annually"; and further, in section 12, "it shall be the duty of said board of road commissioners to pay the annual coupons on said bonds, at the time and place thereon fixed." Hence, under the express terms of the statute, we think the bonds should be issued with "annual" rather than "semiannual" interest coupons attached.

From the foregoing it follows that the second and third questions propounded must be answered in the negative, or in accordance with the plaintiff's contention; and this will be certified to the Superior Court.

Error.

CLARK, C.J., concurs entirely in all that is said in the opinion of the Court. But to "exclude a conclusion," thinks proper, as the statute is before us for construction, to call attention to the fact that so much of this statute as authorizes the levy of any tax on the poll for the payment of bonds issued "for the construction and maintenance of roads" is invalid, because in violation of an explicit provision in the State Constitution, which, as adopted in 1868, provides (Art. V, sec. 2): "The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than 25 per cent thereof be appropriated to the latter purpose." This pro- (476) vision of the Constitution remains unaltered.

When there has been a levy authorized for general purposes the validity of the poll tax is not necessarily brought in question because when collected presumably the proceeds of the poll tax will be applied to the constitutional purposes to which it is restricted, *i. e.*, "education and the poor." But the act before us is restricted to the specific purpose therein stressed, that the whole of the tax levied

is to be applied solely in the construction and maintenance of the roads. So much of the act as levies a poll tax for that purpose is therefore unconstitutional and invalid. This, however, can be struck from the act without impairing the validity of the property tax as has been held in several cases.

As we now have a declared legislative policy of incurring an indebtedness of $50,000,000 for the construction and maintenance of roads, it is well to note that however laudable such purpose may be, the Legislature is explicitly forbidden by the Constitution to derive any funds for that purpose from the collection of a poll tax.

There were formerly conflicting decisions, owing to the requirement of an "equation of taxation" between the poll and property tax, whether when the tax exceeded 66⅔ cents on the $100 property valuation the poll tax could be collected to an amount in excess of $2, and whether such excess could then be applied to other purposes than "education and the support of the poor." These conflicting decisions have now ceased to have any bearing because under the Constitution as now amended the "equation of taxation" between the poll and property has been stricken out and the Constitution (Art. V, sec. 1) now reads: "The General Assembly may levy a capitation tax on every male inhabitant of the State over 21 and under 50 years of age, which said tax shall not exceed $2 and cities and towns may levy a capitation tax which shall not exceed $1. *No other capitation tax shall be levied.*"

Section 2 of that article of the Constitution, which provides that "The proceeds of the State and county capitation tax shall be applied to the purposes of education and the support of the poor," remains unaltered, and there can be no possible misunderstanding of the language of the Constitution which, as above quoted, says: "No other capitation tax shall be levied." It is also clear from this language that no capitation tax can be levied upon women, or upon men except from 21 to 50 years of age, and that so much of this or any statute as provides for the levy of any capitation tax for the maintenance and construction of roads is invalid and must be disregarded.

Cited: Burney v. Comrs., 184 N.C. 277.

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IN RE WILL OF MAGGIE A. ROSS.

(Filed 23 November, 1921.)

1. **Wills—Mental Capacity—Evidence—Time of Execution.**

The evidence of the mental capacity of a testator to make a will must, upon the trial, when at issue, be relevant to the time of its execution and attestation, and while ordinarily a few days difference will not be regarded as vitally important, it is otherwise if his mental and physical condition and old age makes it material.

2. **Same—Appeal and Error—Reversible Error.**

Where there is evidence that the testatrix was sixty-eight years of age, in bad physical health, and subject to spells of weeping and melancholy despondency, and that she and her sister were in consultation with a lawyer for the purpose of his drafting her will, and it appears that she executed as her will the draft he had mailed to her, more than five days thereafter, an instruction to the jury that made the issue as to mental capacity rest alone upon the evidence thereof at the time of the consultation, is reversible error.

3. **Same—Acts and Conduct of Testator.**

Where the sufficient mental capacity of a testatrix to make a valid will is in question upon the trial, her acts and conduct may be competent only when they have a proper hearing upon her mental condition at the time of the execution of the paper-writing propounded as her will.

4. **Wills—Legal Execution—Burden of Proof—Instructions—Appeal and Error—Reversible Error.**

The burden of showing legal execution of the paper-writing purporting to be a valid will is upon the propounders, and an instruction that relieves them of this burden is error prejudicial to the caveators.

5. **Wills—Mental Capacity—Evidence—Aid and Suggestions—Instructions—Appeal and Error—Reversible Error.**

The sufficiency of the testator's mental capacity to make a valid will depends upon whether his mind at the time of its execution was sufficiently clear to know the character of his property, those whom he wished to benefit and to the extent thereof, and an instruction that goes further and makes this to depend upon aid or suggestions given by a relative for the drafting of the instrument caveated, constitutes reversible error to the prejudice of the caveator.

6. **Appeal and Error—Presumptions—Burden on Appellant.**

The appellant must affirmatively show the errors he complains of in the lower court against a presumption on appeal that the trial was free from prejudicial or reversible error.

7. **Appeal and Error—New Trials—Substantive Error—Technical Error.**

To entitle the appellant to a new trial for errors committed in the lower court, he must show that such errors were so substantially prejudicial to him that a new trial may result to his benefit in the reversal of the verdict on the issue, and not merely technical or unsubstantial error.

WALKER, J., concurring in result.

IN RE ROSS.

APPEAL by caveators from *Ray, J.*, at March Term, (478) 1921, of UNION.

Issue of *devisavit vel non* raised by a caveat to the will of Maggie A. Ross. Alleged mental incapacity, undue influence and want of due execution are the grounds upon which the caveat is based.

The jury returned the following verdict:

"Is the paper-writing propounded, and every part thereof, and the codicil attached thereto, the last will and testament of Maggie Ross, deceased? Answer: 'Yes.'"

From the judgment rendered the caveators appealed.

Walter Clark, Jr., and Stack, Parker & Craig for caveators.

Cansler & Cansler, Vann & Milliken, Frank Armfield, John C. Sikes, W. O. Lemmond, and W. B. Love for propounders.

STACY, J. The trial of this cause in the Superior Court was a long-drawn-out and vigorous contest. It required fifteen days to try the case. Nearly one hundred witnesses were examined; the record is voluminous, and we would not be disposed to grant a new trial for any technical or formal error. In fact, it is now the settled rule of appellate courts that verdicts and judgments will not be set aside for harmless error, or for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling complained of was erroneous, but that it was material and prejudicial, amounting to a denial of some substantial right. Our system of appeals, providing for a review of the trial court on questions of law, is founded upon sound public policy, and appellate courts will not encourage litigation by reversing judgments for slight error, or for stated objections, which could not have prejudiced the rights of appellant in any material way. *Burris v. Litaker*, 181 N.C. 376; *In re Edens' Will, ante*, 398, and cases there cited. Again, error will not be presumed; it must be affirmatively established. The appellant is required to show error, and he must make it appear plainly, as the presumption is against him. *In re Smith's Will*, 163 N.C. 464; *Lumber Co. v. Buhmann*, 160 N.C. 385; *Albertson v. Terry*, 108 N.C. 75. See, also, 1 Michie Digest 695, and cases there cited under title, "Burden of Showing Error."

After carefully examining the record, with a full appreciation and observation of the above rules of procedure, we are unable to sustain the following portion of his Honor's charge, which was given at the request of the propounders, and to which the caveators have specifically excepted:

"Though the jury should find from the evidence that Miss Maggie Ross was feeble-minded, and that alone and (479) unassisted she could not have furnished her attorney, H. B. Adams, details concerning her property, nor the persons or institutions to whom she wished to will same, nor directions as to the disposition of said property, but should further find that Maggie Ross and Sallie Ross conferred together with their attorney concerning the execution of their wills; that Sallie Ross gave to said attorneys such details concerning the property of Maggie Ross and the persons or institutions to whom same was to be willed, and directions as to the dispositions of said property, Maggie Ross being present hearing such details and directions given, and by words or acts assenting to said details, directions and dispositions, and should further find that Maggie Ross's attorney, H. B. Adams, deceased, faithfully embodied the information, directions and details so given him concerning said property, persons and institutions to whom it should be willed and said disposition of said property, then the court charges you that said paper-writing would be the last will and testament of Maggie Ross, and that said paper-writing offered here for probate was formally executed by her according to the rules given you by the court."

There are several objections to this charge. In the first place, it fails to observe the difference in time between the giving of the instructions to the attorney and the execution of the will. It does not appear upon what date the Misses Ross conferred together with their attorney concerning the execution of their wills; but, in a letter written by said attorney on 15 November, 1907, he uses the following sentence: "It has required a little longer time to write your wills than I anticipated; however, I enclose them to you this evening by registered mail, so as to insure their safe delivery." The wills were executed five days later, on 20 November, 1907. It evidently required some time for their preparation, as the two are rather lengthy and bear evidence of careful drawing, with each containing more than forty separate items.

Ordinarily, the question of a few days might not be capitally important, but this would depend entirely upon the circumstances of the given case. It appears from the instant record that the testatrix was 68 years of age at the time of the execution of her will; she was feeble-minded, in ill health, given to fits of weeping or crying, and was subject to spells of melancholia. Mrs. Harriet Taylor, one of her neighbors, testified: "She would have these melancholy spells sometimes as often as three times a week; sometimes once a week; sometimes once every two or three weeks, and sometimes twice a week. She would sit for hours and not speak a word. . . .

These spells would last a day or two sometimes. She would sit and twirl her thumbs, stroke her chin and stare out of the window into space. . . . Her memory was not very good. . . . She
(480) could not carry on a connected conversation." There was further evidence tending to show that the testatrix was crying at the time she signed the will. One of the subscribing witnesses gave the following testimony: "I do not remember anything that Miss Maggie Ross said while we were there outside of her kind of boohoo that I positively recollect. She never said anything about the papers, nor asked me to witness them to my recollection. At the time Miss Sallie said these are our wills, and we want you to witness them, Miss Maggie was in the room, but I can't be positive as to just what position, but I know we were all in there together. I can't say I know what she heard."

The competency of the testatrix to make the will in question is to be determined as of the date of its execution, or of its republication, as by a codicil (*In re Journeay,* 162 N.Y. 511), and not when instructions for its preparation were given. *Memorial Home v. Haeg,* 204 Ill. 422; *Mitchell v. Corpening,* 124 N.C. 472; 40 Cyc. 998; *Kerr v. Lunsford,* 31 W. Va. 659. Of course, the conduct of the testatrix at the time of this conference is competent and relevant, as bearing upon the question of her testamentary capacity; but, notwithstanding her mental condition at that time, this would not necessarily establish her competency to execute the will at the subsequent date. 28 R.C.L. 93. The above special instruction, however, takes no note of this difference in time, and really makes her capacity at the time of the conference, and not at the date of signing, the test of her ability to execute the will. This is not in keeping with the law as heretofore declared. *Claffey v. Ledwith,* 56 N.J. Eq. 333.

Again, the giving of this special prayer was erroneous because it takes from the jury the question as to the due execution of the will. This was one of the grounds of the caveat, and the burden was on the propounders to establish the formal execution of the paper-writing alleged to be the last will and testament of the said Maggie A. Ross. *Mayo v. Jones,* 78 N.C. 402.

But the overshadowing objection to this instruction is to the substance of the charge bearing upon the quantum of mind, or mental capacity, necessary to the making of a valid will. It will be observed that the basis of this prayer is not only that the testatrix could not alone and unassisted give her attorney details concerning her property, but that she could not inform him of the persons or institutions to whom she wished to will the same. The practical effect of this instruction was to say that although Maggie Ross was incapable of making a will, yet, if she assented to what her sister did,

such conduct on her part would meet the requirements of the law and amount to a valid testamentary disposition of her property. We do not think she could understandingly and competently assent to her sister's act when, at the time, she was wanting in the requisite mental capacity to act for herself. We are not ad- (481) vertent to any authority holding that one person may make a will for another, when the person for whom the will is to be made is wanting in testamentary capacity. In fact, the very statement of the proposition would seem to refute itself.

If the word *assent,* appearing in its present context, is to be construed as giving such assent as the law requires, with sufficient capacity so to do, then the charge is self-contradictory, because the instruction starts with the assumption that the testatrix is without sufficient testamentary capacity. If she be without the necessary capacity of mind, then she could not legally assent to the act of another in disposing of her property by will. But in all events the instruction was prejudicial to the rights of caveators, and we must hold it for reversible error.

If a woman who is so feeble-minded that, alone and unassisted, she cannot furnish her attorney "details concerning her property, nor the persons or institutions to whom she wished to will same, nor directions as to the disposition of said property," then it can hardly be said that she is capable of making a will, disposing of a large estate, under the test as laid down in this and other jurisdictions. *Bond v. Mfg. Co.,* 140 N.C. 381; *Sprinkle v. Wellborn,* 140 N.C. 181; *Cameron v. Power Co.,* 138 N.C. 365; *Bost v. Bost,* 87 N.C. 477; *Slaughter v. Heath,* 27 L.R.A. (N.S.) 1, and note.

In *Barnhardt v. Smith,* 86 N.C. 473, Smith, C.J., gives the following terse and plain statement of the law, which has been cited with approval in many subsequent decisions: "The rule laid down by Lord Coke, 'that the person must be able to understand what he is about,' approved in *Moffit v. Witherspoon,* 32 N.C. 185; *Horne v. Horne,* 31 N.C. 99, and more recently in *Paine v. Roberts,* 82 N.C. 451, as a general and practical rule for the guidance of juries, approximates as accurate statement of the law as to the degree of mental capacity required to make a valid disposition of property as the subject will admit." See, also, *Lawrence v. Steel,* 66 N.C. 584, and *In re Broach's Will,* 172 N.C. 520, and cases there cited.

Finally, in the recent case of *In re Craven's Will,* 169 N.C. 561, Mr. Justice Walker, speaking for a unanimous Court, clearly states the law, with citation of authorities, bearing upon the question of testamentary capacity, and the following quotations from the well-considered opinion delivered in that case, would seem to be decisive of the question now before us:

"It follows that one who is incapable at the moment of comprehending the nature and extent of his property, the disposition to be made of it by testament, and the persons who are or should be provided for, is not of a sound, disposing mind. And if this mental condition be really shown to exist, the will must fail, even
(482) though he may have a glimmering knowledge that he is endeavoring to make a testamentary disposition of his property. It is here to be observed that some of the earlier cases have laid down the rule of testamentary capacity with much more subservience to and consideration for the purported expression of one's last wishes. They seem to have assumed that there must be a total want of understanding in order to render one intestable; that a court ought to refrain from measuring the capacity of a testator, if he have any at all; and that unless totally deprived of reason and *non compos mentis,* he is the lawful disposer of his own property, so that his will stands as a reason for his actions, harsh as may be its provisions. This ascribes altogether too great sanctity to the testamentary act of an individual as opposed to the law's own will set forth by the statutes and founded in common sense; and it is well that the best considered of our latest cases recede from so extreme and false a standard. Notwithstanding the modern rule to be favored, we should still, however, bear in mind that incapacity is more than weak capacity; and, as already intimated, mere feebleness of mind does not suffice to invalidate a will, if the testator acted freely and had sufficient mind to comprehend intelligently the nature and effect of the act he was performing, the estate he was undertaking to dispose of, and the relations he held to the various persons who might naturally expect to become the objects of his bounty.

"While it is true that it is not the duty of the Court to strain after probate, nor in any case to grant it where grave doubts remain unremoved and great difficulties oppose themselves to so doing, neither is it the duty of the court to lean against probate, and impeach the will merely because it is made in old age or upon the sick bed, after the mind has lost a portion of its former vigor and has become weakened by age or disease. Weakness of memory, vacillation of purpose, credulity, vagueness of thought, may all consist with adequate testamentary capacity, under favorable circumstances. And a comprehensive grasp of all the requisites of testamentary knowledge in one review appears unnecessary, provided the enfeebled testator understands in detail all that he is about, and chooses rationally between one disposition and another. Schouler on Wills, 2 Ed., 68 to 72, and notes. In the important case of *Delafield v. Parish,* 25 N.Y. 9, the Court, after announcing the fairer rule of

testamentary capacity above set forth, spoke of the testator's mind as acting without external pressure wherever it acted properly. 'The testator must,' said the Court, 'have sufficient active memory to collect in his mind, without (insidious) prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in regard to them,' and we may add, long enough to have been able to dictate or write out his wishes, and to execute the (483) will with all due formalities."

There are other exceptions appearing on the record, worthy of consideration; but, as they are not likely to arise again, we deem it unnecessary to consider them now.

New trial.

WALKER, J., concurring in the result: We have a well established rule in appellate courts that in reviewing a charge of the court we should read it as one connected whole, and not distributively, allowing one part to correct any seeming error in another part of it, provided the two are not in deadly conflict. If we follow this rule, not more clearly stated than in *S. v. Exum,* 138 N.C. 599, where human life was the issue, and examine the extract from the charge in this case in the light of other portions of it, we will find most assuredly that the law as to the mental capacity required to make a will was fully and accurately stated by the learned presiding judge, and the jury were especially instructed to consider the other parts of the charge to which we have referred in connection with what was to follow, and told that if, within the definition and explanation given to them by the court, the testator did not have sufficient mental capacity at the time she executed the script they should find against its validity. It is my opinion that there was no error in the selected instruction when properly construed, but surely there was none if we read it in connection with those that preceded it. But even if there was any error in the instruction of the presiding judge selected by the Court as the ground for a new trial, there was a codicil to the will which, in law, amounted to a republication of it (*Watson v. Hinson,* 162 N.C. 72; *Gulland v. Gulland,* 94 S.E. 943; *Lawrence v. Burnett,* 96 S.E. 416), and there was no such objection to the charge as to the execution and validity of the codicil. For all that appears, she executed the same without any help or suggestion from others, and this cured any error in regard to the will, if there was any.

But I think there was an error otherwise in the charge, which was prejudicial to the caveators, that is, if we are to follow a de-

cision of this Court of recent date, on competency of evidence as to mental capacity, and especially with reference to declarations and conduct of the testator. While I question the correctness of that decision, and of others which may have followed it, it has the weight of authority and precedent until it is reversed or modified, and should have been heeded by the court below.

Therefore, I concur in the result, but dissent from the opinion so long as the new trial is based upon the error alleged in it.

Cited: *Blevins v. R. R.*, 184 N.C. 325; *Newsome v. Cothrane*, 185 N.C. 162; *Wilson v. Lumber Co.*, 186 N.C. 57; *Power Co. v. Haywood*, 186 N.C. 313; *S. v. Hart*, 186 N.C. 604; *S. v. Love*, 189 N.C. 774; *In re Creecy*, 190 N.C. 304; *Simpson v. Tobacco Growers*, 190 N.C. 605; *Lumber Co. v. Sturgill*, 190 N.C. 779; *Hood v. Bottling Co.*, 192 N.C. 827; *Mason v. Anderson*, 193 N.C. 855; *Power Co. v. Taylor*, 194 N.C. 233; *In re Will of Efird*, 195 N.C. 89; *Jones v. Candler*, 196 N.C. 383; *Forester v. Vyne*, 196 N.C. 478; *Dulin v. Dulin*, 197 N.C. 219; *Bailey v. McKay*, 198 N.C. 640; *Morris v. Y & B Corp.*, 198 N.C. 722; *S. v. Beal*, 199 N.C. 303; *S. v. Caudle*, 201 N.C. 86; *S. v. Lea*, 203 N.C. 30; *Shelly v. Grainger*, 204 N.C. 493; *In re Will of Wilder*, 205 N.C. 432; *In re Will of Hargrave*, 206 N.C. 309; *S. v. Walls*, 211 N.C. 498; *Collins v. Lamb*, 215 N.C. 720; *Switzerland v. Hwy. Com.*, 216 N.C. 455; *Parrott v. Kantor*, 216 N.C. 592; *Caldwell v. R. R.*, 218 N.C. 86; *Gold v. Kiker*, 218 N.C. 208; *Ryals v. Contracting Co.*, 219 N.C. 477; *Bailey v. Hayman*, 220 N.C. 406; *Carland v. Allison*, 221 N.C. 123; *S. v. Isley*, 221 N.C. 215; *Rea v. Simowitz*, 226 N.C. 383; *In re Will of Kestler*, 228 N.C. 217; *In re Will of McDowell*, 230 N.C. 261; *In re Will of Johnson*, 233 N.C. 575; *S. v. Poolos*, 241 N.C. 383.

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ALICE V. SPRINGS v. JOHN L. SPRINGS ET AL.

(Filed 23 November, 1921.)

1. Wills—Letters—Devises—Fee—Trusts.

Where a holograph will, unnecessarily witnessed and bearing a seal after the testator's signature, in positive terms gives all of the testator's real property to his sister, to be held by a designated person in trust for her until her twenty-third birthday, and the testator has written a letter to her (without attestation or seal, but on the same sheet of paper) expressing a wish that when she should become aware of the contents of his will, she would make one, leaving "all your property" to a certain

nephew, so that in the event of her dying without children the nephew should have it, and in case of her marriage she could destroy her will: *Held*, the words in the letter were precatory and not mandatory; and should it be considered a part of the will, which is at least doubtful, and the clerk has admitted the whole to probate, the words employed in the letter are insufficient to evidence the intent of the testator to impose a trust thereby upon the unqualified gift in the writing he declared to be his will.

2. Same—Precatory Words—Statutes.

For precatory words used in a will to be regarded as mandatory to create a trust in lands devised, the intention of the testator to that effect must clearly appear by interpretation of the instrument, for otherwise these words must be given the ordinary significance of those of that character, both under our modern decisions and C.S. 4162, providing that a devise of lands shall be construed to be in fee, unless the terms of the will clearly shows the testator's intent to pass an estate of less dignity.

APPEAL by plaintiff from *Harding, J.*, May Term, 1921, of MECKLENBURG.

This is an action to remove a cloud upon title submitted upon the pleadings and agreed statement of facts. Richard A. Springs, of Charlotte, died in 1879. On 28 June, 1870, he wrote and signed the following paper-writings, which were admitted to probate in Mecklenburg Superior Court on 5 July, 1879, the whole of said writings being in testator's own handwriting, except the signature of John F. Orr as a witness, to wit:

CHARLOTTE, N. C., 28 June, 1870.

To whom it may concern:

Knowing the uncertainty of life, and wishing to have my worldly goods disposed of according to my wishes, I make my last will and testament.

I will first that all my debts be paid. Secondly, I will, devise, give and bequeath all my real and personal estate and valuables of every kind to my sister, Alice V. Springs, and I wish Gen. Robert D. Johnston to act as trustee for her until her twenty-third birthday.

Given under my hand and seal this 28 June, 1870.

R. A. SPRINGS. [SEAL.]

Witness: JOHN F. ORR.

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To my Sister Alice:

When you are made acquainted with the contents of this will, it is my wish that you make a will immediately and leave all of your property to our nephew, John M. Springs. Should you marry after-

ward you can then tear up the will. My object is to have my property given to you first, but should you die without children, I wish you to leave your property to Johnny Springs.

Very affectionately, your brother,

R. A. SPRINGS.

The testator had never married, and left him surviving five sisters, one of whom is the plaintiff, the other four being then married; one brother, and the children of a deceased brother, who had left a widow and five minor children, the defendant, John L. Springs, being next to the youngest of them, and the only boy. The testator left an estate, real and personal, including a half interest in fee simple in a lot in Charlotte described in the complaint, the whole valued at that time at about $13,300. At the date of the paper-writing, and at the death of the testator, the plaintiff had property estimated to be worth $2,000, or $2,500, inherited from her father.

The only question involved in this appeal is whether under the will of Richard A. Springs the plaintiff was seized of an absolute fee simple title to the property in question to the exclusion of the defendants. The court below so held, and the defendants appealed.

Cansler & Cansler, Clarkson, Taliaferro & Clarkson for plaintiff.

Cochran & Beam, W. B. Council, and John M. Robinson for defendants.

CLARK, C.J. The defendants contend that the will and the lower script having been probated in common form, the lower script has been adjudicated to be a part of the will. We do not deem it essential to discuss this point, for taking it to be true that it has been so adjudicated, we think that the words in the script are simply precatory and not mandatory. It would seem that the appended letter was not intended to operate as a part of the will, but as merely a private letter of recommendation; but passing that by and taking it to have been proven as a part of the will, still it seems to us that the effect is not at all different.

The will itself, excluding the script, is a devise absolute in terms, and it will not be impressed with a trust by reason of words of "request" or "desire" contained in the subsequent and independent clause. The words used in the will proper are unequivocal and clearly vested a fee simple absolute in the plaintiff, and did not create a trust. The words of the script, taken as a part of the will,
(486) should be taken as having been used in their usual and

commonly accepted sense, and in the absence of clear indication of a contrary intent, expressions of "wish," "hope," etc., are not to be construed as creating a trust.

The will was complete in itself, and disposed of all his property absolutely in his sister, the plaintiff. It is given under his hand and seal, and is witnessed. While the seal was not necessary, it indicates an intention of making it his solemn act, and as such he had it duly witnessed, and it is directed to the public generally. The script appended on the same sheet is evidently an intimate letter addressed "To my sister Alice," and has no seal nor witness. The first line of this script states to his sister that when she is made acquainted "with the contents of this *will*," it is his wish that she would make a will leaving "all *your* property" to their nephew, John M. Springs. These words embrace the property which he knew the plaintiff had already inherited from her father, as well as that which she would take by virtue of this will. This indicates that it was a mere wish, for he had no power to require her to devise "all" *her* property to the nephew. He further states in this note to his sister that if she should marry after making such will she could tear it up, notwithstanding the request that he had made, and he further states that his object is to give his property to her first, but that if she should die without children, he wished her to leave "*your* property to Johnnie Springs," and he signs this script "very affectionately, your brother."

The broad and comprehensive terms of the devise to the plaintiff made her the sole beneficiary. No logical reason has been assigned why if the testator desired to make the contents of his affectionate note to his sister a limitation on his absolute devise to her he did not incorporate it in the will as signed, sealed and witnessed at the same time. The fact that he did not do so is conclusive evidence that he did not intend the letter to operate as an imperative testamentary command imposed as a charge upon his devise of all his property to her. Indeed, he suggests in his note not only that she should devise all her property, which would include that which she already had, as well as that which he had given her, but he adds that if she should marry she could tear up the will, thus indicating that her compliance with his request was not absolute or imperative.

Had the testator desired and intended to place an obligatory burden upon the devise to his sister whereby in the event of her death without children his property should go to their nephew he would certainly have written, "But should you die without children my property (or the property herein devised) shall go to John Springs." And, furthermore, he would have included a provision of

such importance in the will proper which he had signed,
(487) sealed and caused to be witnessed, whereas there was no witness or seal to the script. It is significant that his request to his sister is one which he knew could not be obligatory, for it is the expression of a wish that she should devise all "her" property to the nephew, which he knew was not binding upon her, for he was aware that she already had independent property of her own and points out that if she desired she could afterwards tear up the will if so made.

It is true that under the old English decisions, which were followed by a few of the early cases in this country, the expression of a wish by the testator, like that of a sovereign, was construed as a command, but all the later cases, both in England and in this country, repudiate the doctrine, and hold that in the absence of a clear indication of a contrary intent, expressions of "wish," "desire," etc., are to be taken as used in their commonly accepted sense, and are not to be artificially construed by the courts as a trust. In this State to this effect, *Alston v. Lea*, 59 N.C. 27; *Batchelor v. Macon*, 69 N.C. 545; *Young v. Young*, 68 N.C. 309; *St. James v. Bagley*, 138 N.C. 348; *Hayes v. Franklin*, 141 N.C. 599; *Fellowes v. Durfey*, 163 N.C. 305; *Carter v. Strickland*, 165 N.C. 69; *Hardy v. Hardy*, 174 N.C. 505; *Laws v. Christmas*, 178 N.C. 359; *Waldroop v. Waldroop*, 179 N.C. 674.

The decisions are to the same effect elsewhere, and are summed up, 37 L.N.S. 646, notes; Ann. Cases, 1915D, 416, note; 2 Underhill on Wills, 1151 *et seq.;* 1 Perry on Trusts 147.

The subject is nowhere better stated than in a review of the cases in this and other states by Mr. Justice Hoke in *Carter v. Strickland*, 165 N.C. 69, as follows: "Some of the earlier English cases, and they have been followed by decisions in this country, are to the effect that a trust will be engrafted or imposed upon an estate, absolute in terms, or upon its holder, by reason of precatory words in a will whenever the objects of the precatory language are certain and the subject of the recommendation or wish is also certain — a position supposed to best effectuate the intent of the testator. A consideration of the later cases, however, will show that, in the decisions referred to, the principle has been too broadly stated, and it is now the prevailing doctrine, certainly so in this jurisdiction, that such words will be given their ordinary significance, and will not have the effect above stated, unless from the terms and dispositions of the will and the circumstances relevant to its proper construction it clearly appears that they are to be considered as imperative and that the testator intended to create a trust."

That case has been cited with approval in the subsequent cases on the subject, and is almost exactly on all fours with this case. In 2 Underhill on Wills, 1156, it is said: "The current of the decisions, both in England and the United States, indubitably shows that precatory trusts are not to be favored, nor is their ex- (488) tension to be encouraged by the courts."

Indeed, C.S. 4162, has made this ruling statutory. "When real estate shall be devised to any person the same shall be held and construed to be a devise in fee simple, unless such devise shall in plain and express words show, or it shall be plainly intended by the will or some part thereof, that the testator intended to convey an estate of less dignity."

The rule is well settled that in a will no words are necessary to enlarge an estate devised or bequeathed into an absolute fee. On the contrary, restraining expressions must be used to confine the gift to the life of devisee or legatee. *Holt v. Holt,* 114 N.C. 241; *Jones v. Richmond,* 161 N.C. 553.

In *Griffin v. Commander,* 163 N.C. 230, where the testator devised to his wife "all the remainder of my estate, real and personal, with power to give and devise the same after her death to her beloved children and grandchildren," it was held that she took in fee simple.

In *Fellowes v. Durfey,* 163 N.C. 305, where, after giving the property to the testator's widow in subsequent clauses the will goes into elaborate details and directions as to advancements, and in other respects authorizing her to make provision for their children, the Court held that the widow took an estate in fee simple absolute.

The judgment of the court below is

Affirmed.

WALKER, J., concurring in result: I concur in the decision of this case, but not altogether in the reason assigned in the Court's opinion therefor. The letter of Mr. Springs to his sister, which was written at the same time as the will, was not intended to be a part of the same, but merely a collateral request to his sister, which should only suggest his wishes as to the subsequent disposition of his property by her, but which should not be imperative upon her, but strictly discretionary or optional, that is, a thing she might do or not as she pleased. This is shown by his not incorporating it within his will as a part thereof, but expressing his wish in the form of a letter to her, without being witnessed by Mr. John F. Orr. As the letter was probated with the will as a part thereof (which should not have been done, as it was clearly not intended to be any part

of the will), I must recognize the principle of law applicable to such a case, that the probate cannot be attacked except directly, for the usual rule with regard to judgments rendered by a court of competent jurisdiction applies to the decrees of a competent court admitting a will to probate and to the extent that the same can be attacked only by a proceeding immediately directed to that end, and they cannot be assailed collaterally. Gardner on Wills (1903), p. 337; 40 Cyc. 1370-1377, especially the latter page; *Hampton v.* (489) *Hardin*, 88 N.C. 592; *London v. R. R., ib.*, 584; *Edwards v. White*, 180 N.C. 55; *In re Beauchamp's Will*, 146 N.C. 254; *Starnes v. Thompson*, 173 N.C. 466; *In re Thompson's Will*, 178 N.C. 540. But, admitting this to be the inflexible rule of the law, it is nevertheless proper to consider the nature, or character, of the two documents, and the fact that they were prepared and signed at the same time, in passing upon the meaning of the testator, and upon an examination of them in the light of the facts and surrounding circumstances, my opinion is that it was clearly not the intention of Mr. Springs that his language should be considered as imperative, but merely precatory, that is, the expression of a mere wish, without intending to bind his sister at all to its observance. She might comply with it or not as she deemed best. The fact that her entire will was revocable by her upon her marriage favors this construction. If it were otherwise, and the letter had been made formally a part of his will, that is, embodied in it, I would be compelled to hold that the words he used were not merely precatory, and the making of her will purely discretionary, but that they would be imperative or mandatory upon her, and I have written this opinion to exclude the conclusion that I assented to the statement in the opinion that the words, considered by themselves, are precatory, and not imperative in character.

My opinion is that Miss Alice V. Springs is not compelled to comply with the request contained in the letter, but may do so or not as she may choose, and with perfect freedom to act in that way.

HOKE, J., concurs in the opinion of WALKER, J.

Cited: *Weaver v. Kirby*, 186 N.C. 391; *Hass v. Hass*, 195 N.C. 741; *Brown v. Lewis*, 197 N.C. 706; *Williams v. Thompson*, 216 N.C. 294; *Andrews v. Hughes*, 243 N.C. 618; *Humphrey v. Faison*, 246 N.C. 134; *Rouse v. Kennedy*, 260 N.C. 157.

JOHN L. RHYNE v. FLINT MANUFACTURING COMPANY.

(Filed 23 November, 1921.)

1. Injunction—Surface Water—Division of Stream.

An injunction will lie against an upper proprietor of lands diverting the natural flow of water thereon to the damage of the lower proprietor.

2. Same—Pollution of Stream—Property.

Where a cotton mill and settlement has diverted the natural flow of water on its lands containing sewage and filth from its mill upon the lands of the adjoining lower proprietor so as to pollute his springs and cause him to cease to use it for his cattle and his land for pasture, a permanent injunction will lie.

3. Same—Health—State Board of Health—Sewage—Treatment—Injunction—Damages.

Where a cotton mill and settlement has polluted a stream upon its own land and diverted its flow upon the lands of a lower proprietor, which caused him to abandon his spring for watering his cattle and his pasture, the fact that the mill company had constructed a septic plant in accordance with plans furnished by the State Board of Health, C.S. 7179 *et seq.*, will not exonerate the defendant from injunction or liability for damages.

4. Same—Private Corporations—Eminent Domain—Property—Constitutional Law—Due Process.

The action of the State Board of Health in directing the establishment of a septic tank by a cotton mill and settlement for the treatment of sewage of a stream which the mill company diverted to the land of the lower proprietor, the compliance by the company cannot have the effect of concluding the right of the lower proprietor for injunctive relief and damages caused thereby to his lands, as that would be to permit a private corporation, without the right of eminent domain, to take the property of another without his consent or giving him a day in court.

5. Same—Actions and Defenses—Offer to Purchase—Inconvenience.

A cotton mill corporation which has unlawfully diverted its polluted stream upon the lands of a lower proprietor, amounting to the taking of property and menace to health, may not successfully defend a suit for injunction and damages by offering to buy a part of the plaintiff's lands, or on the ground that a permanent injunction would work an inconvenience in the operation of its mill.

APPEAL from a continuance of a restraining order to the hearing by *Ray, J.*, at chambers in Charlotte, 10 October, (490) 1921, from GASTON.

The defendant company owns a tract of land on which is situated a cotton manufacturing plant of 23,040 spindles and a village of 70 tenement houses occupied by its employees. The plaintiff owns a contiguous tract of land of 252 acres, and the defendant has constructed and operates a septic tank and filter through which the sewage flows from said plant and tenement houses, and then through

an open ditch located near a branch which runs through a part of plaintiff's lands.

This is an appeal in a proceeding for a perpetual injunction in which the restraining order was continued to the hearing. The plaintiff alleges and files numerous affidavits that the defendant, since February, 1921, has discharged the sewage and filth from its mill and tenement houses through a sewerage system constructed by it, without properly purifying the same, into a dry ditch near plaintiff's land, from which point it naturally flows upon his land and into a small branch running through his pasture and by his spring whereby the branch and spring have been grossly polluted and rendered unsafe and unfit for use by persons or cattle, and thereby caused the abandonment of the spring and forced the plaintiff to aban-
(491) don his pasture lands and to move his cattle, used for the purposes of a public dairy, therefrom.

The injunction was continued to the hearing, and the defendant appealed. Subsequently, the court granted a stay of the restraining order till 2 November, 1921, so as to give the defendant an opportunity to make such changes as may be necessary to protect the plaintiff.

B. Capps, Tillett & Guthrie, and A. L. Quickel for plaintiff.

Mason & Mason, S. J. Durham, and Mangum & Denny for defendant.

CLARK, C.J. The defendant seeks to assert the rights of a dominant tenant to flow the surface water and debris from its premises across the plaintiff's land. The evidence is uncontradicted that the water that falls on defendant's land would, if not diverted by the defendant, naturally flow in another direction (with a slight exception), and that the water used to flush defendant's sewerage system is diverted from its natural flow. Upon these facts, aside from all question of pollution creating a nuisance, the defendant is a trespasser and plaintiff would be entitled to an injunction. The settled law is that while the dominant proprietor can accelerate the flow he cannot divert the water from his premises to that of another upon which it would not naturally flow. *Roberts v. Baldwin*, 151 N.C. 407, and cases there cited. The defendant is a private corporation, and does not possess the right of eminent domain by which he might acquire such right in a proper case upon assessment of damages. *Jenkins v. R. R.*, 110 N.C. 438, and citations in 2 Anno. Ed.

Upon the affidavits of the plaintiff and admissions of the defendant the restraining order was properly continued to the hearing.

The defendant seems to rely largely upon the fact that it has constructed a septic tank in accordance with plans furnished by the State Board of Health. C.S. 7129 to 7144, which gives the State Board of Health authority to require sewerage or sanitary privies. We do not think, however, that this will exonerate the defendant from injunction, or liability in damages to the plaintiff who had no day in court or hearing as to the sufficiency of the septic tank either as prescribed or as built. Besides, the Board of Health had no authority to pass upon this matter as against the plaintiff. To allow such a defense to protect the defendant against the nuisance which it has created would be to permit the defendant, a private corporation, to take the property of the plaintiff without his consent, and even without opportunity to be heard. *Donnell v. Greensboro,* 164 N.C. 330.

There are cases in which the Court has denied a restraining order and injunction. But that line of cases has been reviewed by Justice Hoke in *Cherry v. Williams,* 147 N.C. 452, where he observes that the cases which had denied the restraining order on the ground that the injury was only apprehended, or contin- (492) gent, obtained generally where the injury was threatened by reason of some industrial enterprise which gave promise of benefits to the community, affecting rather the comfort and convenience than the health of adjacent proprietors and giving indication that adequate redress might, in most instances, be afforded by an award of damages, as in *Simpson v. Justice,* 43 N.C. 115; *Hyatt v. Myers,* 71 N.C. 271; *Hickory v. R. R.,* 143 N.C. 451, saying: "But so far as we have examined, whenever this principle has been apparently applied with us in cases which threatened serious injury to health and injunctive relief was denied to claimant, it will be found either that there was some defect in the proof offered by plaintiff, or such proof was successfully controverted by defendant, or there were other conditions present which required the application of some other principle than that which the defendant here invokes for his protection." That case is cited and approved in *Berger v. Smith,* 160 N.C. 205. But in this case:

1. The plaintiff has diverted the flow of the water which he has used in operating his sewerage plant in a direction in which it does not naturally flow, and hence the plaintiff was entitled to his injunction, irrespective of the allegations of nuisance.

2. Upon the affidavits and admissions, the defendant is committing a serious nuisance upon the plaintiff's land, and is jeopardizing the health of the community by the injury to the spring, and otherwise, and to the cattle used in the plaintiff's dairy.

3. The septic tank may or may not have been constructed ac-

cording to the regulations of the State Board of Health, and the defendant admits that it has not always operated efficiently.

4. While defendant alleges that it has offered to purchase that part of the plaintiff's land affected by the nuisance, this would amount to a practical grant or license to the defendant to perpetually maintain this nuisance alongside of the plaintiff's remaining land. This the defendant cannot compel the plaintiff to accept. The defendant has no power of eminent domain, and to allow such defense would enable powerful individuals or corporations to force out undesired neighbors, by maintaining a nuisance, and would enable them to repeat the Biblical instances of Naboth's vineyard (1 Kings, ch. 21), and Nathan's ewe lamb (2 Sam., ch. 12).

The defendant contends strenuously that a permanent injunction would work an inconvenience to it in the operation of its mill. It has been operated for many years without being a nuisance to the plaintiff, and has only become such since February last, when it installed its new and unsatisfactory sewerage plant, and in any event it has no right to force the plaintiff to abandon the use of his own
(493) land for pasture for his dairy cattle and to abandon the use of his spring in order that the defendant may experiment with a disposal of sewage in a manner that is a nuisance to the plaintiff, however satisfactory or convenient such method may be to the defendant.

In *Lumber Co. v. Cedar Works*, 158 N.C. 164, Brown, J., says: "It would be a most extraordinary destruction of the rights of property if a private corporation, possessing no right of eminent domain, could seize the lands of another, to which it has no semblance of title, and appropriate them to its own use simply because it was able to respond in damages. This contention of the defendant's is, in our opinion, without support in reason or authority," and he quotes (at p. 169) from Connor, J., in *Cozard v. Hardwood Co.*, 139 N.C. 284, as follows: "While, as found by his Honor, it is reasonable and even necessary to the successful operation of defendant's enterprise that they carry their timber over the plaintiff's land to reach the markets, and while there may be no injustice to him in permitting them to do so, and while his opposition may be either sentimental or selfish, yet the courts may not violate or weaken a fundamental principle upon the strict observance and enforcement of which the security of all private property, so necessary to the safety of the citizen, is dependent. The guarantees upon which the security of private property is dependent are closely allied, and always associated with those securing life and liberty. Where one is invaded, the security of the other is weakened."

The defendant must attain its ends, advance its interests, or serve its convenience, by some method, whether in improving its sewerage system or otherwise, which shall be in accordance with the age-old maxim that a man must use his own property in such a way as not to injure the rights of others — *"sic utere tuo, ut alienum non laedas."*

The judgment continuing the restraining order is

Affirmed.

Cited: Finger v. Spinning Co., 190 N.C. 77; *Cook v. Mebane*, 191 N.C. 4; *Lineberger v. Cotton Mills*, 196 N.C. 507; *Nance v. Fertilizer Co.*, 200 N.C. 706; *Little v. Furniture Co.*, 200 N.C. 732; *Lightner v. Raleigh*, 206 N.C. 503.

J. T. PILLEY v. J. D. SULLIVAN.

(Filed 23 November, 1921.)

1. Wills—Restraint on Alienation—Public Policy—Void Clauses.

A devise of land to testator's daughter and her husband for life, then to their daughter, who takes a defeasible fee upon contingency that she die leaving heirs, with provision that the devisees shall not sell or convey the "said land or any part thereof to any individual or incorporated company," and for a division among the testator's children should the daughter die without leaving heirs, is void as an attempted restraint on alienation and in contravention of public policy.

2. Wills—Interpretation—Intent—Repugnancy—Words—Clauses.

The entire will should be construed to give effect to the testator's intent, reconciling clauses apparently repugnant, and effectuating whenever possible every clause and word.

3. Same—"Or"—Words and Phrases.

Where the disjunctive meaning of the word "or," used in a will, is contrary to the testator's intent under a proper construction of the instrument, it will be construed as "and" when such appears to have been the testator's intention; and where there is a contingent limitation of an estate over should the beneficiary "die without heirs or intestate," this construction of the word "or" will apply when the testator evidently intended the limitation over to take effect upon the happening of both events, and not one of them.

4. Wills—Restraint on Alienation—Next of Kin—Explanatory Clauses.

A devise of lands for life and then in remainder, and upon the contingency that the lands be divided between the testator's children, should the remainderman die without heirs and intestate, and after attempting to impose a restraint upon alienation the testator adds "but the same

shall descend to her next of kin," these words will be interpreted as indicating the testator's reason for the attempted restraint, and not so much as directing the course of descent.

5. Wills—Estates—Tenants for Life—Limitations—Contingencies—Heirs—Remaindermen.

A devise of land to the testator's daughter and her husband for life, remainder to their daughter, "and if either or both of them should die intestate without heirs," then to be equally divided between all of the testator's children: *Held*, the meaning of the words "either or both" could not reasonably apply to the life tenants, whose interest would in either event terminate at their death, vesting the remainder in their child specifically mentioned in the will.

6. Wills—Estates—Limitations — Contingencies — Defeasible Fee — Fee Simple.

An estate for life to testator's daughter and her husband, with remainder to their daughter, but in the event either or both should die without heirs or intestate, then it shall be equally divided among all of the testator's children, share and share alike: *Held*, the word "heirs" should be construed as "children," and the grandchild of the testator took a remainder in fee, defeasible in the event of her dying intestate and without children, and not an absolute fee-simple estate.

APPEAL from a judgment of *Horton, J.*, at the October
(494) Term, 1921, of BEAUFORT.

Submission of controversy without action.

The statement of the agreed facts is as follows:

"1. That J. T. Pilley was duly appointed as commissioner in a special proceeding in the Superior Court of Beaufort County, entitled, 'J. T. Pilley and wife, Mattie E. Pilley, and Kathleen Lamm, by next friend, J. T. Pilley and Sidney Lamm, her husband,
(495) *ex parte*,' and as such commissioner, duly authorized and empowered to convey to J. B. Sullivan the tract of land known as the A. S. Pilley land, containing 100 acres, more or less. The said proceeding being regular and sufficient to authorize conveyance of said land.

"2. That the said land was devised by Alfred S. Pilley by his will, dated August, 1913, and recorded in Beaufort County, in Book of Wills No. 4, at page 36, the material parts of which said will are as follows:

" 'Third item. I give and devise to my daughter, Harriet Chauncey, twenty-five acres of land to be divided off from the west end of my home tract.

" 'Fourth. I give and devise unto my son, John T. Pilley, and his wife, Mattie E. Pilley, a life estate in all my lands and tenements, with such privileges as may be necessary for their conven-

ience and comfort during their natural lives, except the twenty-five acres above devised to my daughter, Harriet Chauncey.

" 'Fifth. I give and devise to my granddaughter, Kathleen Pilley, the above mentioned land whereon I live after the death of her father and mother, John T. and Mattie E. Pilley, all except the 25 acres above devised to my daughter Harriet.

" 'It is my will and desire, and it is hereby stipulated that the devisees of my land herein named shall not sell or convey the said land, or any part thereof, to any individual or incorporative company, but the same shall descend by inheritance to their next of kin, and if either or both should die without heirs or intestate, then it shall be equally divided among all my children's heirs, share and share alike.'

"3. It is agreed that said John T. Pilley and wife, Mattie E. Pilley, are now living, and Kathleen Pilley has married one Sidney Lamm and now has one living child.

"4. That the special proceeding authorizing sale of said land required and directed that the proceeds therefrom should be invested in land in Greenville, N. C., the title of which should be held under the same terms and conditions as set out in said will; that the agreed consideration to be paid for the conveyance of said land by J. B. Sullivan was $1,000.

"5. That in the event that the court shall be of the opinion that the said John T. Pilley and wife, Mattie E. Pilley, and the said Kathleen (Pilley) Lamm took a fee-simple estate under the provisions of said will, then the plaintiff is entitled to recover of the defendant the agreed consideration of the said conveyance of $1,000 upon the delivery to the defendant of the deed making the conveyance of said land; but that if under the said will the estate of said parties is less than fee simple, it be subject to be defeated by conditions therein stated, then the plaintiff shall not recover anything; that cost shall be taxed against the losing party."

His Honor rendered judgment directing the plaintiff to deliver and the defendants to accept a deed to the land described. The defendant excepted, and appealed. (496)

Harry McMullan for plaintiff.
A. W. Bailey for defendant.

ADAMS, J. The contention of the parties presents for determination the quantity of the estate embraced in items four and five of the last will and testament of Alfred S. Pilley. The clause which purports to ingraft upon the devise an unlimited restraint on alien-

ation is not only repugnant to the estate devised, but is in contravention of public policy, and therefore void. *Latimer v. Waddell,* 119 N.C. 370; *Wool v. Fleetwood,* 136 N.C. 461; *Christmas v. Winston,* 152 N.C. 48; *Lee v. Oates,* 171 N.C. 717.

Lord Coke is credited with the observation that "Wills and the construction of them do more perplex a man than any other learning; and to make a certain construction of them, this *excedit jurisprudentum artem.*" Nevertheless, the courts have established canons of construction, which are designed as guides to the discovery of the testator's intent, for the primary purpose in construing a will is to ascertain and give effect to the intention of the maker. Accordingly, the entire will should be considered; clauses apparently repugnant should be reconciled; and effect given wherever possible to every clause and to every word. One of the arbitrary canons of construction sometimes requires that the word "or" be construed as meaning "and." 28 R.C.L. 204 *et seq.; Satterwaite v. Wilkinson,* 173 N.C. 38; *Ham v. Ham,* 168 N.C. 487. In *Dickerson v. Jordan,* 5 N.C. 380, the testator devised certain land to his grandson in fee, with the limitation that if he died before he arrived at lawful age or without leaving issue, the land should go to his other grandson in fee. Judge Taylor said: "According to a literal construction of the will, the occurrence of either event would vest the estate in John Spier; but it is evident that such was not the testator's intention, and this intention ought always to be effectuated when it does not contravene the rules of law. He could not have intended that the issue of William Spier Stewart should be deprived of the estate, if their father died under age; for that would operate to take all from those who appear to have been the principal objects of his bounty; yet such would be the effect of a literal interpretation of his will. His intention seems to have been that the fee should remain absolute in William S. Stewart on the happening of either event, either his leaving issue or attaining to lawful age; or, in other words, that both contingencies, to wit, his dying under age, and without leaving issue, should happen before the estate vested in John Spier. To
(497) give effect to this intention, it is necessary to construe the disjunctive *or* copulatively; and there are various clear and direct authorities which place the power of the Court to do this beyond all doubt." *Ham v. Ham, supra,* and cases cited. An application of this principle requires that the word "or" be read "and," in the expression "without heirs or intestate."

The testator evidently did not intend that the limitation over should take effect in case Kathleen, although leaving heirs, should die intestate. It is equally manifest that the words "heirs" in the

expression referred to should be construed as meaning children. *Francks v. Whitakers,* 116 N.C. 518; *May v. Lewis,* 132 N.C. 115. The clause "but the same shall descend to their next of kin" should be interpreted not so much as directing the course of descent as indicating the testator's reason for the attempted restraint on alienation. The words "either or both," in the clause "if either or both should die without heirs or intestate," cannot be construed as applying to John T. Pilley and Mattie E. Pilley for the reason that they are only tenants for life, and upon the termination of their life estate, whether they die testate or intestate, the remainder will vest in the granddaughter, Kathleen Pilley. In this connection it will be noted that the limitation over is to "all my children's heirs, share and share alike." In point of legal interpretation the substance of the devise in items four and five is this: "I give and devise unto my son, John T. Pilley, and his wife, Mattie E. Pilley, an estate in all my lands and tenements, with such privileges as may be necessary for their convenience and comfort, during their natural lives, except the twenty-five acres devised to my daughter, Harriet Chauncey; and after their death I give and devise said land to my granddaughter, Kathleen Pilley, and if she should die intestate and without children, then said land shall be divided among all my children's heirs, share and share alike." The testator gave to John Pilley and his wife a life estate with remainder in fee to Kathleen Pilley, defeasible in the event of her dying intestate and without children. The plaintiff, therefore, cannot convey an absolute fee to the defendant.

For the reasons given the judgment is

Reversed.

Cited: Snow v. Boylston, 185 N.C. 326; *In re Wolfe,* 185 N.C. 565; *Christopher v. Wilson,* 188 N.C. 760; *Westfeldt v. Reynolds,* 191 N.C. 805; *Van Winkle v. Missionary Union,* 192 N.C. 134; *Roberts v. Saunders,* 192 N.C. 193; *Mangum v. Trust Co.,* 195 N.C. 471; *Washburn v. Biggerstaff,* 195 N.C. 625; *West v. Murphy,* 197 N.C. 490; *Heyer v. Bulluck,* 210 N.C. 326; *Hampton v. West,* 212 N.C. 318; *Richardson v. Cheek,* 212 N.C. 512; *Williams v. McPherson,* 216 N.C. 566; *Jones v. Waldrop,* 217 N.C. 188.

(498)

W. W. GAITHER v. CHARLOTTE MOTOR CAR COMPANY.

(Filed 23 November, 1921.)

1. Courts—Jurisdiction—Contracts—Waiver.

A stipulation in a contract that requires future action thereon if any disagreement should arise, must be brought in a certain county wherein one of the parties resides, concerns the remedy created and regulated by law, C.S. 463 *et seq.*, the place of venue being within the discretion of the Legislature; and the principles upon which a defendant is deemed to have waived his right, after action commenced, by not demanding in writing in apt time a removal of the cause to its proper venue, has no application.

2. Courts — Jurisdiction — Venue — Contracts — Statutes — Removal of Causes—Transfer of Causes.

There is a difference between the venue of an action, the place of trial, and the jurisdiction of the court over the subject-matter of the action, and the parties to a contract may not, in advance of any disagreement arising thereunder, designate a jurisdiction exclusive of others, and confine the trial thereto in opposition to the will of the Legislature expressed by the statutes on the subject, C.S. 463 *et seq.*; and a motion to remove a cause brought in the proper jurisdiction on the ground that the contract otherwise specified it, will be denied.

APPEAL from a judgment of *Ray, J.*, at June Term, 1921, of RICHMOND, on defendant's motion to remove the cause to MECKLENBURG.

The plaintiff is a resident of Richmond County, and the defendant a corporation engaged in business in Mecklenburg. The plaintiff and the defendant, on 26 January, 1920, entered into a written contract, by the terms of which the plaintiff, called the dealer, was to sell Hupmobiles for the defendant, called the distributor. The plaintiff deposited with the defendant $250, which was to be returned upon plaintiff's giving up the agency. The contract was terminated 1 January, 1921, and the plaintiff demanded the return of his money. In February, 1920, the plaintiff went to Chicago to assist the defendant in shipping cars, and remained there until the first day of April. The plaintiff alleged that the reasonable value of his services was $343. He brought suit to recover these two sums from the defendant. When the cause came on for hearing, the defendant made a motion for the removal of the cause to Mecklenburg. The motion was denied, and the defendant excepted and appealed.

The basis of the defendant's motion is the following stipulation in the contract: "In case of any disagreement between the distributor and the dealer, any action that may be taken against the distributor shall be brought in the city of Charlotte."

Fred W. Bynum for plaintiff. (499)
C. H. Gover for defendant.

ADAMS, J. The single question is whether this agreement is enforceable at the election of one party against the will of the other. The argument of the defendant's counsel rests upon the contention that venue, unlike jurisdiction, is in the nature of a personal privilege, which may be waived by the parties, and that an antecedent agreement designating the place of trial is no more obnoxious to the provisions of the statute than is a waiver of the proper venue resulting from failure to object before the time of answering expires. The counsel insists that this proposition is particularly sound where the agreement, as in this case, designates as the place of trial a county in which one of the parties resides.

At the outset we may say that the general policy of the courts is to disregard contractual provisions to the effect that an action shall be brought either in a designated court or in a designated county to the exclusion of another court or another county in which the action, by virtue of a statute, might properly be maintained. Several reasons may be assigned in support of this policy. In the first place, stipulations of this kind concern the remedy, and the remedy is created and regulated by law. The regulation of venue is a matter within the discretion of the Legislature. At common law the place of trial was determined not so much by the residence of the parties as by the nature of the action, but the common-law regulation has been modified by statute. Accordingly, the counties in which actions of the various classes may be brought are distinctly defined. C.S. 463 *et seq.* To permit parties to a contract to enforce a stipulation which purports definitely to fix the forum long before there is a cause of action would be to nullify the law and to substitute the will of the parties in its stead. It is true that an action may be tried in a county not designated by the statute unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county; but the failure of the defendant to object, after the summons has been served and the complaint filed, bears faint resemblance to an agreement made, it may be, months or years before, and induced, perhaps, by necessity. "Any citizen may, no doubt, waive the rights to which he may be entitled. He cannot, however, bind himself in advance by an agreement which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented." *Paper Co. v. Paper Co.*, 223 Mass. 8.

There is another objection. Certainly there is a difference between venue and jurisdiction. If venue signifies the place of trial

and jurisdiction the power, right, or authority of the court
(500) to hear and determine a cause, it is somewhat difficult to understand why the practical effect of the agreement in question, if enforced, would not be to deprive the Superior Court of Richmond of its jurisdiction — not its jurisdiction of other actions of similar character, but its jurisdiction of this particular action, its jurisdiction of a cause which it has the legal right to determine. The purpose of this agreement is to limit jurisdiction of the action to the courts of Mecklenburg County. But if jurisdiction can be limited to one county, it may be limited to any other county. Parties cannot, by contract made in advance, oust the jurisdiction of the courts.

We refer to some of the decisions. A leading case on the subject under discussion is *Nute v. Ins. Co.*, 6 Gray 174. Suit had been brought to recover on a policy of insurance, in which it was stipulated that the assured might, within four months after the determination of the loss, institute his action "at a proper court in the county of Essex," where the defendant conducted his business. The assured, within the four months prescribed, brought suit in the county of Suffolk, and the court of common pleas held that the action could not be maintained. In granting a new trial, Chief Justice Shaw said: "In cases recently determined, it has been held that a stipulation in a policy of insurance, or in a by-law constituting in legal effect a part of such policy, by way of condition to their liability, that no recovery shall be had unless a suit is commenced within a certain time limited, was a valid condition, and that, unless complied with, the plaintiffs were not entitled to recover. *Cray v. Hartford Fire Ins. Co.*, 1 Blatchf. C. C. 280; *Wilson v. Ætna Ins. Co.*, 27 Verm. 99. In this case it is strenuously insisted that a stipulation that an action shall be brought in a particular county, where by law it may be brought, is strictly analogous, and ought to be enforced as a condition precedent by a court which, without such stipulation and condition, would clearly have jurisdiction of the subject-matter and of the parties. . . . Upon the particular question here presented, the Court are of opinion that there is an obvious distinction between a stipulation by contract as to the time when a right of action shall accrue and when it shall cease, on the one hand, and as to the forum before which and the proceedings by which an action shall be commenced and prosecuted. The one is a condition annexed to the acquisition and continuance of a legal right, and depends on contract and the acts of the parties; the other is a stipulation concerning the remedy, which is created and regulated by law. Perhaps it would not be easy or practicable to draw a line of distinction precise and accurate enough to govern all these classes

of cases, because the cases run so nearly into each other; but we think the general distinction is obvious.

The time within which money shall be paid, land conveyed, a debt released, and the like, are all matters of contract, and depend on the will and act of the parties; but (501) in case of breach the tribunal before which a remedy is to be sought, the means and processes by which it is to be conducted, affect the remedy, and are created and regulated by law. The stipulation that a contracting party shall not be liable to pay money or perform any other collateral act before a certain time is a regulation of the right too familiar to require illustration; a stipulation that his obligation shall cease if payment or other performance is not demanded before a certain time seems equally a matter affecting the right. A stipulation that an action shall not be brought after a certain day or the happening of a certain event, although in words it may seem to be a contract respecting the remedy, yet it is so in words only; in legal effect it is a stipulation that a right shall cease and determine if not pursued in a particular way, within a limited time, and then it is a fit subject for contract, affecting the right created by it.

But the remedy does not depend on contract, but upon law, generally the *lex fori*, regardless of the *lex loci contractus*, which regulates the construction and legal effect of the contract. *Hall v. Ins. Co.*, 6 Gray 185; *Amesbury v. Ins. Co., ib.*, 596. In *Matt v. Aid Association*, 81 Iowa 135, where action was brought in another county of the same state in which the county specified was situated, the Court held that "a condition in the contract limiting the venue or place where the action shall be brought is invalid."

We have said that the agreement, if enforced, would empower the defendant, contrary to the will of the Legislature, to choose the courts in which its case should be tried, and thereby deprive of jurisdiction one of the courts authorized to hear the cause. The overwhelming weight of authority is against the exercise of such right. *Paper Co. v. Paper Co., supra; Life Asso. v. Woolen Mills*, 27 C.C.A. 212; *Bartlett v. Ins. Co.*, 46 Me. 500; *Shipping Co. v. Lehmann*, 5 L.R.A. 464. In *Rea's Appeal*, 13 W.N.C. (Pa.) 546, it was held that a clause in a trust agreement restricting the jurisdiction to the court of a certain county was entirely without effect, that jurisdiction was not thereby conferred upon the court of the county named and that the jurisdiction of courts designated by law was not thereby ousted. We are not inadvertent to the fact that there are cases apparently maintaining the contrary doctrine. Some of them are cited in the brief of the defendant's counsel; but upon examination it will be seen that the apparent lack of uniformity may generally be found

in the difference between provisions that are statutory and those that are contractual. For the reasons given, we hold that there is no error in the ruling of his Honor. The judgment is therefore

Affirmed.

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(502)

KENNETH F. LOWDERMILK v. BENJAMIN F. BUTLER.

(Filed 23 November, 1921.)

1. Corporations—Dissolution—Continuance for Certain Purposes—Deeds and Conveyances—Statutes.

The certificate of dissolution of a corporation of the Secretary of State continues the corporation for three years, making the directors trustees unless otherwise ordered by the court, with full power, among others specified, to settle its affairs, close its business, etc., C.S. 1193, and the provisions of the following section, 1194, that the directors as trustees may sell and convey the corporate property, does not exclude the idea that they may do so in the name of the corporation in whom the original legal title was originally vested.

2. Same—Probate.

Where the certificate of the probate of a deed from a corporation, dissolved upon certificate of the Secretary of State, made within the time allowed by C.S. 1193, recites as a fact judicially found that the deed was made in the name of the corporation by the order of the directors, the trustee's, under the statute, objection that it was not executed in the method required by C.S. 1194, is untenable; and the signature of the agent in charge, if made upon the mistake that he was in law the assignee of the mortgage, is only surplusage, and harmless.

3. Appeal and Error—Opinions—Stare Decisis—Justices' Courts—Judgments—Superior Courts—Docketing—Rules of Property.

The doctrine of *stare decisis* is established by the Court under an ancient and unbroken line of decisions, and when involving the title to lands, should be regarded and upheld by the courts, though this rule is not inflexibly binding upon their judgment in avoiding palpable error: *Held*, in this case, the Court will not disturb the precedent established that an execution may not validly issue against lands when docketed in the Superior Court more than a year after its rendition in the courts of the justice of the peace. The doctrine of *stare decisis* and its requisites, and of *fiat justitia ruat coelum*, discussed by WALKER, J.

4. Deeds and Conveyances—Mortgages—Judgments—Execution Sales—Title.

The owner of land conveyed to A., taking immediately a mortgage to secure the purchase price, and thereafter the land was sold in execution of a judgment against A., under which the defendant claims title by deed

accordingly made: and the plaintiff claims as a purchaser under the executed power of sale contained in the mortgage: *Held*, the title remained in the mortgagee and the purchaser at the mortgage sale and his grantee obtained a good title as against that claimed under the execution sale, notwithstanding the mortgage note may have been assigned to a third person. *Semble*, the title passed immediately from A., under the mortgage, leaving none upon which the execution under the judgment could take effect.

APPEAL by defendant from *Ray, J.*, at the May Term, 1921, of MOORE. (503)

This is an action to settle the title to land described in the pleadings, the plaintiff and defendant each claiming under the Piedmont Plantation Company, as the origin of title.

The Piedmont Plantation Company conveyed the land to A. Legler, 20 April, 1912, and on the same day A. Legler, to secure the purchase money, made a mortgage to it. The mortgage was recorded 4 June, 1912, and the deed thereafter on 27 August, 1912.

On 28 May, 1913, the Piedmont Plantation Company and R. W. Pumpelly (who claimed in the deed to be the assignee of the mortgage), after sale under the power contained in the mortgage, conveyed the land to the plaintiff by deed, which is copied in the record.

To establish title in himself and disprove title in plaintiff, the defendant relied on the following records and deeds introduced in evidence by him:

1. A judgment in favor of C. S. Fry and against Alexander Legler, rendered before a justice of the peace on 25 September, 1909, and docketed in the Superior Court of Moore County on 21 July, 1911, on a transcript of said judgment from the justice of the peace. The transcript itself was issued by the justice of the peace on the same date as the rendition of the judgment, and was docketed in the Superior Court more than twelve months from said date, but prior to the date of the original deed from Piedmont Plantation Company to Alexander Legler, and some time before the mortgage from Legler to Piedmont Plantation Company, upon which plaintiff relies to make out his title, was recorded.

2. Deed from D. Al. Blue, sheriff of Moore County, to George H. Humber, dated 21 August, 1913, and recorded 23 August, 1913, in Book of Deeds No. 57, at page 244. This deed is set out in the record in full, from which it will appear that it was made pursuant to a sale of the land in controversy under an execution issued on the judgment of C. S. Fry against Alexander Legler aforesaid, at which sale George H. Humber became the purchaser.

3. The evidence of M. M. Stutts, shown in the record, that Alex-

ander Legler was a nonresident of the State during the year 1913, the date of the sale of the land by the sheriff of Moore County under the execution to George H. Humber.

4. Several successive deeds, beginning with that of George H. Humber and wife, conveying ultimately such title as Humber received under the sheriff's deed to the defendant.

5. The record of the dissolution of Piedmont Plantation Company, a corporation, as contained in the record book of incorporations No. 2, at page 32, in the office of the clerk of the Superior Court of Moore County. This record is fully set out in the case on appeal, from which it will appear that by voluntary pro-
(504) ceedings as provided by law, Piedmont Plantation Company was dissolved as a corporation by the Secretary of State on 5 July, 1912, prior to the execution of its deed to plaintiff, on which he relies for title, which is dated 28 May, 1913.

The following is Section 1194 of the Consolidated Statutes, relating to conveyances of property belonging to dissolved corporations:

"DIRECTORS TO BE TRUSTEES; POWERS AND DUTIES.

"On the dissolution in any manner of a corporation, unless otherwise directed by an order of the court, the directors are trustees thereof, with full power to settle the affairs, collect the outstanding debts, sell and convey the property, and, after paying its debts, divide any surplus money and other property among the stockholders. The trustees have power to meet and act under the by-laws of the corporation and, under regulations to be made by a majority, to prescribe the terms and conditions of the sale of such property, and they may sell all or any part for cash, or partly on credit, or take mortgages or bonds for part of the purchase price for all or any part of the property. They have power to sue for and recover the said debts and property in the name of the corporation, and are suable in the same name for the debts owing by it, and are jointly and severally responsible for such debts only to the amount of property of the corporation which comes into their possession as trustees."

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

H. F. Seawell for plaintiff.
U. L. Spence for defendant.

WALKER, J., after stating the case: We will consider the questions raised by this appeal in the order of their statement in the assignments of error, briefs and argument before us.

1. The plaintiff attacks the last deed on the ground that on 5 July, 1912, the Secretary of State certified to the clerk of the Superior Court of Moore County that the Piedmont Plantation Company on that date had filed its consent in writing to the dissolution of the corporation, executed by the requisite number of stockholders, Raphael W. Pumpelly being the agent therein named and in charge thereof, and that the corporation could not thereafter convey its property. This contention, as we think, is based upon a misconception of the statute. The corporation did not cease to exist at the date of the filing of the certificate of dissolution, as contended by appellant, but continued three years from that date as a body corporate, by express provision of C.S., sec. 1193, which is, that all corporations whose charters expire, by their own (505) limitation, or are annulled by forfeiture, or otherwise, shall continue to be bodies corporate for three years after the time when they would have been dissolved, "for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of their property, and to divide their assets," etc. But the defendant relies upon the provisions of the next section (1194), which is above set out, in our statement of the case. It appears therefrom that the "directors, as trustees, may sell and convey the corporate property upon such terms as they may prescribe," but this does not exclude the idea that, in conveying the property, they may not do so in the name of the corporation in whom the legal title was originally vested. It may be conveyed in the name of the corporation by their order or direction, or perhaps they may convey it in their own names as directors and trustees. It appears in this record, and in the certificate of probate, as a fact judicially found by the clerk of the Superior Court, that the deed was made in the name of the corporation by order of the directors who, under the statute, were the trustees. So that the statute was fully complied with.

By reason of his appointment as agent in the dissolution proceedings of the corporation, it is probable that R. W. Pumpelly concluded he was thereby made the assignee of the mortgage, and out of abundance of caution joined the corporation in the sale of the land and in the execution of the deed to the plaintiff. If he was not such assignee, his joining in the sale, and in execution of the deed, were harmless acts.

2. The defendant, through his counsel, further contends that on 25 September, 1909, C. S. Frye recovered a judgment for $26.89 against A. Legler, before a justice of the peace of Moore County, which was filed and docketed in the Superior Court on 21 July,

1911, more than a year after its rendition, and that execution issued on it from the Superior Court, and the land in controversy was levied on as the property of A. Legler, and sold and conveyed by the sheriff to G. H. Humber, from whom, by *mesne* conveyances, the defendant claims title.

It is well to observe, in passing, that the judgment roll, introduced in evidence by defendant, shows that all of the executions issued to the sheriff on this judgment were returned by him without action, even down to 6 May, 1918, and the clerk was still issuing executions thereon so late as 1 April, 1921.

In order to sustain the claim of title by the defendant under the sheriff's sale and deed, the appellant's counsel frankly admitted that it is necessary for this Court to overrule several of its well-considered decisions heretofore rendered and to upset a doctrine which has existed and been recognized as a rule of property for well-
(506) nigh half a century. *Williams v. Williams,* 85 N.C. 383; *Woodard v. Paxton,* 101 N.C. 26; *Cowen v. Withrow,* 114 N.C. 558. No good reason has been advanced for such action on our part. What this Court would decide, if the question were *res nova,* or presented now on its legal merits, for the first time, it is futile to declare, as we are satisfied that those cases should stand unmolested, after such repeated adjudications, as it is the interest of the State that there should at some time and somewhere be an end of controversy. Some questions may fairly and justly be considered as closed by the former decisions of this Court, and especially where rights of property are involved, and even those of contracts, in some cases, in order that it may be known how to deal safely in our daily transactions. We should impart firmness and stableness to them, so that what we have declared to be the law in the past may not be easily assailed and overthrown in the future, thereby impairing public confidence in the integrity, performance and reliability of what we may decide to be the rule of reason, and of conduct, which is sanctioned by the law. This is essential that our judgments may acquire permanency and become trustworthy, and never subject to change, unless after maturer consideration we may be convinced that there is palpable error, and that it is better to retrace our steps and change our former decisions because of the greater benefit to be derived therefrom. But such instances are very rare, and if possible should be reduced to the minimum, as change in our opinions is far more apt to result in harm than in any indispensable benefit. *Stare decisis et non quieta movere,* the Latin phrase, which means to stand by decided cases and uphold precedents by maintaining former adjudications rather than unsettle those things which have been estab-

lished, is one of the ancient maxims, which has improved by its age, and is worthy of the greatest reverence, and the fullest acceptation. It was said many years ago that a point which has often been adjudged should be permitted to rest in peace. *Spicer v. Spicer,* Cro. Jac. 527 (79 Eng. Reprint 451); 1 Kent's Com. 477. The rule expresses the principle, in tangible form, upon which rests the authority and binding force of judicial decisions as precedents in subsequent litigations. When more mildly expressed, the rule means, in general, that when a point has been once settled by judicial decision it forms a precedent for the guidance of the courts in similar cases. The Madrid, 40 Fed. Rep. 677, 679. But it has been said that where grave and palpable error, widely affecting the administration of justice, must either be solemnly sanctioned or repudiated, the maxim *Fiat justitia ruat coelum* should apply, and not the rule of *stare decisis. Ellison v. Georgia, etc., R. Co.,* 87 Ga. 691. As a general rule, where a principle of law has become settled by a series of decisions, it is binding on the courts and should be followed. But it has been determined that a single decision is not necessarily bind- (507) ing. Again the maxim *stare decisis* is not imperative; and an opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court from which the opinion emanates. A decision in conflict with prior decisions, and not supported by reason or authority, will not be adhered to where it is not probable that property rights will be seriously affected, and positive authority of a decision is coextensive only with the facts upon which it is founded. 11 Cyc. 745, and notes; *Gage v. Parker,* 178 Ill. 455; *Lawson v. Bank,* 92 N.W. 729. It has been well and wisely said that precedents are to be regarded as the great storehouse of experience; not always to be followed, but to be looked to as beacon lights in the progress of judicial investigation which, although at times they be liable to conduct us to the paths of error, yet may be important aids in lighting our footsteps on the way to truth. *Leavitt v. Morrow,* 6 Ohio St. 71.

After all has been repeated, that has been, or can be said pro or con upon this important question, we concur in the view taken by a court of the highest authority in another case, that whatever difference of opinion may have existed in this Court originally in regard to these questions, or might now exist if they were open for reconsideration, it is sufficient to say that they are concluded by the former adjudications. The argument upon both sides was exhausted in the earlier cases. It could subserve no useful purpose again to examine the subject. *Parker v. W. L. Cotton, etc., Co.,* 2 Black 545 (67 U.S. 545), 17 L. Ed. 333.

It all comes to this that former precedents should not be reversed except upon strong and imperious necessity. The Federal Supreme Court, and some courts in other jurisdictions, have held that a decision is not an authority upon a question not considered by the court, though involved in a case decided. *Durouseau v. U. S.*, 6 Cranch 307 (3 L. Ed. 232); *Buel v. Van Ness*, 8 Wheaton 312 (5 L. Ed. 624); *New v. Oklahoma*, 195 U.S. 252 (49 L. Ed. 182); *U. S. v. Mire*, 3 Cranch 159 (2 L. Ed. 397); *Cross v. Burke*, 146 U.S. 82 (36 L. Ed. 896); *McCormick H. Mach. Co. v. Aultman Co.*, 169 U.S. 606 (42 L. Ed. 875), and other cases cited in notes to 2 Digest U. S. S. C. Reports (L. Ed.), p. 2327.

We admit that the rule which requires us to uphold former decisions upon the same subject is not an inexorable one, nor is it mandatory upon the Court. *Hertz v. Woodman*, 218 U.S. 205. There is some flexibility in it, and it has been said that it should not be employed to perpetrate error (15 Corpus Juris, p. 956, sec. 357), but the Court will not listen readily, and surely not with favor, to appeals for reversals of former adjudications, where manifest error is not first shown. But there is none such shown here. With regard to this rule we have ourselves quite recently said that the
(508) people are supposed to have confidence in their highest Court, at least to the extent of ascribing to it the virtue of consistency and a desire to see that by no lack of stability in its decisions shall any citizen be jeopardized or prejudiced in his rights, because he has simply acted upon the supposition that what the Court has so solemnly determined will again be its decision upon the same state of facts, or that, at least, if it does change its mind, his rights and interests will be thoroughly safeguarded. If courts proceeded upon any different theory in the decision of causes, the people would be left in a state of uncertainty as to what the law is, and could not adjust their business affairs to any fixed and settled principles which would, of course, produce most mischievous, if not disastrous, consequences. *Hill v. R. R.*, 143 N.C. 581. See, also, *Mason v. Cotton Co.*, 148 N.C. 492, and *Williamson v. Roban*, 117 N.C. 302. A great law writer once said about this rule of the law that he did not wish to be understood to press too strongly the doctrine of *stare decisis*, when he recollected that there are more than one thousand cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application. It is probable that the records of many of the courts in this country are replete with hasty and crude decisions; and such cases ought to be examined without fear, and revised without reluctance, rather than to have the character of our law impaired, and

the beauty and harmony of the system destroyed by the perpetuation of error. Even a series of decisions are not always conclusive evidence of what is law; and the revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule, and the extent of property to be affected by a change of it. Lord Mansfield frequently observed, that the certainty of a rule was often of much more importance in mercantile cases than the reason for it, and that a settled rule ought to be observed for the sake of property; and yet, perhaps, no English judge ever made greater innovations and improvements in the law, or felt himself less embarrassed with the disposition of the elder cases when they came in his way to impede the operation of his enlightened and cultivated judgment. The law of England, he observed, would be an absurd science were it founded upon precedents only. Precedents were to illustrate principles and to give them a fixed certainty. His successor, Lord Kenyon, was said to have acted like a Roman dictator, appointed to recall and reinvigorate the ancient discipline. He controlled or overruled several very important decisions of Lord Mansfield as dangerous innovations, and on the ground that they had departed from the precedents of former times and disturbed the landmarks of property, and had unauthorizedly superadded equity powers to a court of law. "It is my wish and my comfort," said that venerable judge, "to stand *super antiquas vias*. I cannot legislate, but by my (509) industry I can discover what my predecessors have done, and I will tread in their footsteps." The English courts seem now to consider it to be their duty to adhere to the authority of adjudged cases, when they have been so clearly and so often, or so long established as to create a practical rule of property, notwithstanding they may feel the hardship, or not perceive the reasonableness of the rule. There is great weight in the maxim of Lord Bacon, that *optima est lex, quae minimum relinquit arbitrio judicis; optimus judex, qui minimum sibi*. The great difficulty as to cases consists in making an accurate application of the general principle contained in them to new cases, presenting a change of circumstances. If the analogy be imperfect, the application may be erroneous. The expressions of every judge must also be taken with reference to the case on which he decided; we must look to the principle of the decision and not to the manner in which the case is argued upon the bench, otherwise the law will be thrown in to extreme confusion. The exercise of sound judgment is as necessary in the use as diligence and learning are requisite in the pursuit of adjudged cases. Considering the influence of manners upon law, and the force of opinion, which

is silently and almost insensibly controlling the course of business and the practice of the courts, it is impossible that the fabric of our jurisprudence should not exhibit deep traces of the progress of society, as well as of the footsteps of time. The ancient reporters are going very fast, not only out of use, but out of date, and almost out of recollection. The modern reports, and the latest of the modern, are the most useful, because they contain the last, and, it is to be presumed, the most correct exposition of the law, and the most judicious application of the abstract and eternal principles of right to the refinements of the science of the law relating to property. They are likewise accompanied by illustrations best adapted to the inquisitive and cultivated reason of the present age. But the old reporters cannot be entirely neglected.

Counsel for the defendant in this case very ably and zealously pressed upon us the necessity for overruling several decisions of this Court of comparatively recent date (*Williams v. Williams,* 85 N.C. 283; *Woodard v. Paxton,* 101 N.C. 26; *Cowan v. Withrow,* 114 N.C. 558), on the ground that they were opposed to the mandate of a statute in regard to docketing justices' judgments and the lien acquired thereby, but we do not think that this is the case, but, on the contrary, that they are not plainly inconsistent therewith, even though a contrary construction may have been permissible. If the reasoning of the Court is not unanswerable, it is not palpably illogical, or erroneous, and defendant has, therefore, not made out a case which will induce us to reconsider those decisions. C. S. Fry was dilatory in docketing his judgment against Alexander Legler,
which was done more than one year after its rendition, and
(510) those cases clearly decide that this was too late, and he acquired no lien thereby. We adhere, without hesitation, to the former precedents. It may not be absolutely important in this case to decide that question, as we are of the opinion that if the Fry judgment has been docketed within the time prescribed by the statute, the lien of the judgment could not prevail against the title of the plaintiff acquired by him under the deed to Legler, the mortgage back from him to the Piedmont Plantation Company and the deed from them to the plaintiff. The fact, if it be so, that the debt secured by the mortgage had been assigned to R. W. Pumpelly did not show that the Plantation Company had no further interest in the matter, because it held as mortgagee the legal title, which carried with it the power of sale, and it was necessary for the company to join with Pumpelly in the sale under the power and in the deed to plaintiff in order to a valid exercise of the power (*Williams v. Teachey,* 85 N.C. 402), and the conveyance of the legal and equit-

able title, though for the purposes of this action the company having the legal title could convey such an interest as would enable the plaintiff, its assignee, to recover in ejectment. *Wittkowski v. Watkins*, 84 N.C. 456, where Justice Ruffin said: "The position taken for the plaintiffs in regard to the point of evidence raised on the trial cannot be questioned. They were so clearly entitled to recover the possession of the land in dispute, upon the strength of their legal title as mortgagees, even if their sale to Jones and his reconveyance to them should be held to be invalid, as to make it perfectly useless to inquire into that matter. That may become of interest to the parties at some future day, but could not possibly affect the issues involved in the present action, and therefore was correctly excluded upon the ground of its immateriality."

Plaintiff contended that the title never rested in Legler for even a moment, as he conveyed back to the company, by way of mortgage, at the same time he received the legal title from it, under *Moring v. Dickerson*, 85 N.C. 466; *Hinton v. Hicks*, 156 N.C. 24, and therefore that the lien of the judgment, if it ever existed, did not attach to the land, and while this may be so, it is not necessary that we should decide as to it, and we do not, as we have held that defendant's judgment was never a lien, because not docketed within the time fixed by statute. Whether the fact that the mortgage of Legler back to the company was registered before the deed of the company to him, would play any part in the solution of the matter, we also leave undetermined and as an open question.

We conclude that in no view of the case should the judgment of the court below be disturbed by us.

No error.

Cited: Spitzer v. Comrs., 188 N.C. 32; *Crews v. Crews*, 192 N.C. 683; *Smith v. Dicks*, 197 N.C. 362; *S. v. Davis*, 229 N.C. 392.

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(511)

D. W. MITCHEM v. GASTON COUNTY DRAINAGE COMMISSION ET AL.

(Filed 23 November, 1921.)

1. Drainage District—Discretionary Powers—Statutes—Assessments.

The Legislature, in authorizing the establishment of a drainage district, may very largely commit to the commissioners the exercise of their judgment as to what should be done in carrying out the general provisions specified by the statute, and the special act of the Legislature creating the

Gaston County Drainage Commission, ch. 427, Public-Local Laws of 1911, thus construed, does not relieve a landowner therein from paying his authorized assessments for benefits solely because the commission failed to strictly and literally divide the lands into the number of classes therein set out.

2. Same—Meetings—Notice—Exceptions—Actions—Injunction.

Where a drainage district has been formed under the provisions of statute, a landowner therein may not attend a meeting regularly had by the commissioners for the purpose of assessing the landowners for benefits, etc., make no objection or take no exception to that placed upon his own land, or fail to proceed in the manner prescribed by the statute, and instead collaterally, by injunction, restrain the collection of these assessments by sheriff's sale; and this applies to his grantee, who knew that the lands were situate within the district and subject to the assessments. *Mabry v. Drainage District*, 163 N.C. 24, cited and applied.

3. Same—Appearance—Waiver.

Where the owner of land in a drainage district, formed under the provisions of statute, appears at a meeting of the commissioners held for the purpose, and is silent, making no objection or exception to the assessment imposed upon his land, the question as to whether he had been sufficiently served with notice of the meeting becomes immaterial, his appearance being construed as a waiver thereof, or rather as dispensing with formal notice.

4. Drainage Districts—Proceedings—Presumptions—Notice.

The presumption is in favor of the regularity of the official proceedings of the commissioners of a drainage district, and applies as to the sufficiency of notice to a landowner within the district of a meeting duly had to assess such owners according to benefits received from the improvements therein.

5. Same—Waiver—Assessments—Benefits.

The question as to whether an owner of land within a drainage district has realized the benefits anticipated is eliminated when there is the establishment of the district upon the report; and where such owner remains silent or makes no objection at the proper time as to the proceedings of the board, his silence is a waiver of any right he may have therein had, and the independent remedy by injunction is not open to him.

6. Drainage Districts—Benefits—Formation of District—Presumptions.

The claim of the plaintiff, an owner of land within a drainage district established by authority of statute, that his land had received no benefit is held untenable upon the record in this case, as he is concluded by the report and judgment of the commissioners, to which no exception was taken at the proper time.

APPEAL by plaintiff from *Harding, J.*, at the April Term,
(512) 1921, of GASTON.

This action was brought by the plaintiff to restrain the collection of drainage assessments levied by the Gaston County Drainage Commission No. 1, of Gaston County, N. C., against cer-

tain lands within such drainage district now owned by the plaintiff. This drainage commission was created by a special act of the Legislature, chapter 427, Public Local Laws of 1911.

The drainage district was established in 1912 in pursuance of such act, and at the time of its establishment A. C. Stroup was the owner of the forty-three acres of land in such district now owned by this plaintiff. Stroup owned the lands when they were classified and when assessments were first levied, and he attended the meetings of the commission, and was present at the time the commission sat as a body to hear and determine complaints from the landowners, as provided for in the act.

Stroup did not except to the findings of the commission, or to the establishment of the district with said forty-three acres included within it, nor to any action of the commission the day it sat as a body to hear and determine complaints, fix the classifications and rate and the amount of assessments, nor did he except or take an appeal from any of the actions of the commission.

Plaintiff Mitchem afterwards purchased said forty-three acres of land with full knowledge that the same was included within the drainage district, and that assessments had been levied against the lands. Since plaintiff has owned the lands, other assessments have been levied, and plaintiff has not at any time excepted to or appealed from any of the orders of the commission. He has not paid any of the assessments levied upon the lands. After he had constantly refused to pay, and in order to force collection of the assessments, the lands were advertised for sale by the tax collector. Plaintiff, pending the date of sale, brought this action and obtained a temporary restraining order, which was dissolved at the hearing before Judge Bryson. This action came on for trial before Harding, J., at April Term, 1921, when, at the close of plaintiff's evidence, and upon motion of defendant, the court rendered judgment as of nonsuit, from which the plaintiff appealed to this Court.

Woltz & Woltz, and Mangum & Denny for plaintiff.
Carpenter & Carpenter for defendant.

WALKER, J., after stating the case: The plaintiff in his brief has abandoned all of the irregularities complained (513) of in his complaint except two, which briefly stated are: (1) The commission failed to divide the land into five classes, and (2) it abandoned the dredging of the stream.

In order that we may intelligently present this matter, we first direct attention to the act of the Legislature creating this drainage commission, Public-Local Laws 1911, ch. 427. It is apparent from a

perusal of this act the Legislature realized that many details of the drainage scheme contemplated by it would have to be threshed out by the local drainage commission. The Legislature outlined the general purpose, but very properly left the practical development and execution of the same to the commission, thereby committing the administration of the act to the sound judgment and discretion of it. We give here a few excerpts from the act which show this to be true:

"Section 1. They shall have power generally to do whatever may be necessary to be done in order to make effectual the drainage of Big Long Creek," etc.

"Sec. 2. Shall have authority in the discretion of the said commission" to do certain things therein mentioned.

"Sec. 3. The commission shall make a just estimate of all of the lands along Big Long Creek and its tributaries within Gaston County and within the terminal points mentioned and designated in section one that will in their judgment be benefited, either generally or specifically.

"Sec. 8. This section also refers to the drainage commission, as to what things it may do, and (among them) 'it may make such changes as it may deem proper.'

"Sec. 10. (the latter portion). That every privilege, power and right to carry out the provisions of this act are granted to said commission."

We might cite other provisions of the act which tend to show that it was the intention of the Legislature to give the commission authority to administer the various provisions, in accordance with its best judgment and discretion, but we deem it unnecessary to do so. It seems clear, we think, that the Legislature was providing for the commission merely a basis upon which to work, but not tying its hands with any prescribed formula or with any set of rules.

The principal question for consideration is whether the fact that the drainage commission did not classify the lands in strict, and even literal, compliance with the act, renders their entire action void and of no effect as to the plaintiff's interest therein. Counsel for him have argued that he was not bound by the proceedings of the commissioners, as he was not properly or legally served with notice, but we do not consider it necessary to decide whether or not he was served
(514) with formal process or notice, as we find in the record ample evidence to the effect that the owner was actually present when the assessments were made, and that he made no objection to them, and noted no exception, nor did he attempt, in any proper way, to have them reviewed. All this is to be found in the testimony of plaintiff's witnesses, giving him the most favorable and

allowable construction of it, and it further appears that he took no such position at the hearing as he now insists on, that he had not received the proper formal notice of the hearing, nor did he ask for further time in order that he might be better prepared with evidence and otherwise to protect or defend his interests. The case of *Newby & White v. Drainage District,* 163 N.C. 24, seems to answer all the objections made in this case, and the purport of that decision is thus substantially stated or summarized in the head-note: A drainage district laid off under the provisions of the act of 1909 is a *quasi*-municipal corporation, partaking to some extent of the character of a governmental agency, and neither its existence nor the regularity of its proceedings can be collaterally impeached in an action for trespass for cutting down trees in constructing the drainage canal. The Drainage Act of 1909 affords ample opportunity and machinery for the landowner in a district laid off thereunder to assert his rights, including those of damages to his land, with the right of appeal to the Superior Court; and he is concluded under the express provision of the statute by order of the court confirming the final report of the viewers, unless he has preserved his rights in accordance with the statutory requirements. The pendency of a proceeding to lay off a drainage district under the provisions of the act of 1909 is notice as to all the lands embraced in the district, and the grantees thereof are bound by the statutory requirements as to the procedure to recover damages to the lands, as were their grantors who were parties to the proceedings and who owned the lands at that time.

The plaintiff, testifying in his own behalf, confessed that he could not state positively whether he had received formal notice, and also stated that he did not know whether the notice was written or merely verbal, but he was there and made no protest against any failure to formally notify him. Mr. Stone testified that plaintiff's assignor, Mr. Stroup, who was then the owner of the land, was at the meeting when the question of assessments and other matters were discussed and settled, and it appears that he apparently was satisfied with what was done. A man who is silent when he should speak, will not be heard when common fairness and justice requires that he should be silent. There is supposed to be a seasonable time for all things. The world in its development and progress towards higher and better conditions cannot be stopped, for those who have lagged behind to be heard on a question so vitally affecting (515) the public good, and especially is this true of judicial proceedings where the complainant has had his day in court, or a fair opportunity to be heard, if he has any meritorious ground of objection to what is done or about to be done. The law comes to the aid of the vigilant and not to those who sleep upon their rights.

We said in *Drainage Commission v. Parks,* 170 N.C. 435-438: The statutes under which this proceeding was brought and conducted to final judgment seem to provide for an appeal at two stages thereof, one under Public Laws of 1909, ch. 442, sec. 8, when the drainage district has been laid off, and another under sec. 17, when the time for and adjudication upon the final report of the viewers has arrived. The complainant did not appear and except to either of these reports, the preliminary or the final, and the court therefore erred in allowing him to do so upon the application of the plaintiff for an additional issue of bonds. He could except then and be heard only as to any matters involved in the petition for the additional issue of bonds which affected his interests, but he cannot be permitted to go back of this and change the formation of the district and the classification and assessments already made, by attacking the reports of the engineer and viewers, and withdrawing a large part of his land from the district, especially after bonds had been issued on the basis of those reports and their confirmation and sold to innocent holders. It would be unjust to them, if not illegal, as it would greatly impair their security, there being nothing substituted for the land thus taken out of the district to preserve the value of that security. *Broadfoot v. Fayetteville,* 124 N.C. 478; *McCless v. Meekins,* 117 N.C. 35. But whether or no the bondholders could object, if they were parties, upon the ground that their rights would be, in a legal sense, impaired, it is sufficient to say that it would be unjust to them, and there is nothing in the statutes which allows an exception as to matters already settled at such a stage in the proceedings. This view is sustained by the following decisions on similar statutes, citing *Zeigler v. Gilliatt,* 105 N.E. 707; *Trigger v. Drainage District,* 193 Ill. 230; *Hatcher v. Supervisors,* 145 N.W. 12; *Allen v. Drainage District,* 64 So. 418.

In the more recent case of *Gibbs v. Commissioners of Mattamuskeet Drainage District,* 175 N.C. 5, the Court, by the Chief Justice, states and applies these principles in such way as to leave not a vestige of ground upon which plaintiff can stand and successfully defend his position. And, in the case of *Carter v. Board of Drainage Commissioners* (of the same district), 156 N.C 183, the same principle is asserted, and it was also held, as it was in the *Gibbs* case, *supra,* that works of this character being of a *quasi*-public nature, will not be interfered with, that is stopped or delayed, by
(516) collateral attacks of those who have lost their right to be heard in the proper way by inexcusable laches, and an injunction, which is the relief sought in this proceedings, was denied. In the more recent case of *Mann v. Mann,* 176 N.C. 353, which was a motion in the original cause where Mattamuskeet Lake District

was established (*Carter v. Commissioners, supra*), this Court reviewed the same subject and the authorities somewhat extensively, and arrived at the same conclusion as formerly in the numerous cases decided by it up to that time, and held, as appears from a part of the syllabus, that a final judgment rendered, in due course, in proceedings to establish a drainage district may not be amended at a subsequent term of the court to supply an alleged omission to limit the assessments to be made on the land in accordance with that stated in the petition, there being nothing to show that the judgment was not recorded by the clerk as actually given to him, or that it had been omitted by inadvertence of the judge or the mistake of any one. The correction of a final judgment for error rendered by a court having jurisdiction over the parties and subject-matter is by appeal, and it may not be collaterally attacked except for fraud, collusion, etc., or when it is void, and its validity appears upon its face, or otherwise in some cases. Where a final judgment has been rendered between the same parties on the same subject-matter, it is not essential that a later action or proceeding be identical in form for it to estop the parties therein, as *res judicata*. One who has been defeated on the merits in an action at law cannot afterwards resort to a bill in equity upon the same facts for the same redress. Upon this motion, made in the cause to amend a final judgment in proceedings to form a drainage district so as to restrict the amount of the assessments made upon the lands, and especially after the issuance of bonds thereon, the principle is applied that the one of two innocent persons must suffer whose conduct has occasioned the loss. Where by motion at a subsequent term of the court a final judgment entered in proceedings to establish a drainage district, under the provisions of a statute, is sought to be amended so as to include a provision limiting the amount of assessments to be made on the lands, the mere failure of the parties at the time to request that the provision be inserted in the judgment does not alone entitle them to the relief sought. A provision in the petition limiting the amount of assessments to be made on lands within a drainage district being formed under the provisions of the statute, which was not inserted in the final judgment rendered in due course, may not at a subsequent term be supplied by amendment, being also contrary to the statutory provisions and invalid.

Ruling Case Law, Vol. 9, p. 637, says that the presumption in favor of the regularity of official proceedings puts (517) the burden on the landowner who claims that proper notice of the proceedings has not been given, and even in cases in which notice is necessary, any subsequent joinder in the proceedings will constitute a waiver. There is no evidence tending to show that either

Stroup or the plaintiff himself took proper advantage at any time of the remedies provided in the act, and it is too late now to hear him. *White v. Lane,* 153 N.C. 16.

In *Spencer v. Wills,* 179 N.C. 177, it was said that we have held in sundry cases appertaining to the same subject, that parties to proceedings of this character, and in reference to their lands situated within the district, are estopped from questioning, by independent suit, the judgment establishing the district, or the validity and amount of the assessments made in the cause or the matter of burdens and benefits affecting the property. These and other like rulings must be challenged, at the proper time, in the course of the proceedings, and unless objection is successfully maintained, the parties are concluded. Also the Court said in the case of *Drainage District v. Parks, supra,* 439, that exceptions and appeals are provided for in the statutes, and the time fixed when they must be noted. As complainant did not appear, and *except* at the proper time, it must be assumed that he was satisfied with what had been done and waived his right. He can file exceptions to any action taken in regard to new matter, but not to the former proceedings, which are not open to him, but past and closed forever. *Griffin v. Comrs.,* 169 N.C. 642. We further said that this is a question (in speaking of benefits anticipated and not realized) that was settled at the time the report was adopted and the district was established, and may not be questioned in a proceeding (injunction) of this character.

It was urged, in the able argument of Mr. Mangum, that neither Stroup, the original owner of the land, nor the plaintiff, who is his assignee, had received any benefit from the drainage, but we think, upon a close study of the record, that it will appear otherwise. But, if it does not, we held in *Griffin v. Comrs., supra,* that the collection (of assessments) should not be stayed because the scheme has not afforded to a landowner the drainage he had anticipated.

The claim of plaintiff that no work has been done on his land which facilitates its drainage, is clearly untenable. It appears from the testimony that a gorge below his lands has been removed and work in removing a large shoal has been also done, and perhaps more even than that much. Whether the work actually done was as beneficial as plaintiff, or his predecessor in title anticipated, is a matter not before us, as it was settled at the hearing before the commissioners, when the report was adopted and the district
(518) established, and may not now be questioned, as we held in *Griffin v. Comrs., supra.* The outcome of these enterprises cannot be absolutely predicted, and they may even result in the abandonment of the project, but probable feasibility has been shown,

and the district in consequence organized, and preliminary work must then be done and its cost must be met. It is work undertaken by the district, and in the present case the district was created upon an adequate showing of basis, and it is not disputed that the plaintiffs received the notice to which they were entitled, or were actually present, and were thus apprised of whatever legal consequences attached the formation of the district with their lands in it. The same was said in *Houck v. Little River Drainage District*, 239 U.S. 254. There was testimony for plaintiff that he attended the meetings of the drainage commissioners, and that he did not take any action about what was done there until this suit was commenced.

The plaintiff's reliance upon *Spencer v. Wills, supra*, to show that the landowner may bring suit for damages when there has been a substantial departure from the scheme authorized by the commissioners, is without avail to him, as the principle does not apply to this case, and that case expressly recognizes and supports the rule which underlies our present decision. The case of *County Collector v. C. I. Traction Co.*, 108 N.E. (Ill.) 687, is manifestly not applicable, as there was a classification here, and if it was erroneous, plaintiff should have excepted to it.

Upon a review of the entire case, we have discovered no error of the court in granting a nonsuit.

No error.

THE BUILDERS SASH AND DOOR COMPANY v. W. D. JOYNER.

(Filed 16 November, 1921.)

1. Deeds and Conveyances—Title by Estoppel — Feeding an Estoppel — Purchasers for Value—Notice—Registration.

The principle upon which title by estoppel, called feeding an estoppel, is allowed where a person having no title to lands assumes to convey it by deed with warranty and thereafter acquires the title, does not prevail against that acquired by a purchaser for full value, without notice, under a prior registered conveyance of his chain of title, and such purchaser is not affected with constructive notice of deeds or claims against his immediate or other grantor prior to the time when such grantor acquired the title.

2. Same—Equity.

The principle upon which title by estoppel may be acquired against one conveying land by deed with warranty, at a time he had no title and has afterwards acquired it, called feeding an estoppel, is an equitable one, not

available against purchasers who have acquired the legal title by prior registered deed for value without notice. As to whether title by estoppel would prevail against one holding by a prior registered conveyance with or without notice, *Quere?*

3. Same—Married Women—Statutes.

As to the doctrine of title by estoppel applying to a married woman under the provisions of C.S. 250, who has joined with her husband in a deed to his lands with warranty, the wife's interest not appearing on the face of the instrument, but which title the wife afterwards acquired, *Quere?*

APPEAL by defendant from *Calvert, J.*, at the February
(519) Term, 1921, of NASH.

Action of trespass and to remove a cloud from plaintiff's alleged title to a piece of real estate.

The court charged the jury that on the facts in evidence, if accepted by them, they would find for plaintiff. Verdict for plaintiff, and defendant excepted and appealed.

Battle & Winslow for plaintiff.
E. B. Grantham for defendant.

HOKE, J. The evidence tended to show that on 27 February, 1913, Davis conveyed the lot to Jones Smith, and it is not controverted by the parties that under this deed said Jones Smith acquired the true title. For plaintiff it is shown that on 28 February, 1913, Jones Smith and wife, Nellie Smith, conveyed the land to J. B. Ramsey to secure a debt to B. H. Bunn, said deed being duly registered in the county on 11 April, 1913, deed of foreclosure, under said deed of trust, to Mrs. Ella B. Ramsey, dated 11 December, 1914, registered 9 January, 1915; third deed of bargain and sale for value, from the purchaser, Mrs. Ella Ramsey to Nellie Smith, dated 20 August, 1917, registered 22 August, 1917, and a warranty deed from Jones Smith and wife, Nellie, to plaintiffs, dated 24 November, 1917, registered 25 January, 1918.

And for defendant:

1. Deed of bargain and sale with covenant of warranty from Jones and Nellie Smith, his wife, to William Bullock, dated 10 April, 1913, registered 11 March, 1914.

2. Mortgage deed from William Bullock and wife to J. N. Bone, securing a debt, dated 10 March, 1914, registered 11 March, 1914.

3. Deed from J. N. Bone, mortgagee, to W. D. Joyner, defendant, pursuant to foreclosure under the mortgage deed, dated 10 October, 1916, registered 5 February, 1917.

There was proof also, and without contradiction, that plain-

tiff had acquired its title and paid for same without (520)
any actual notice and knowledge of defendant's claim, or
the deeds upon which it is made to rest.

From this statement it appears that the plaintiff's claim of title rests upon a connected line of deeds beginning under a deed from the true owner, Jones Smith, duly registered in the county on 11 April, 1913, that of defendant under deeds beginning by a deed from Jones Smith and wife, with covenants of warranty, registered in the county 11 March, 1914, and plaintiff's title from the true owner having the prior registry should prevail in the case unless, as defendant contends, the title of plaintiff's immediate grantor, Nellie Smith, inured to support and validate the deed of bargain and sale, made by said Nellie Smith and her husband to William Bullock, which was registered 11 March, 1914, and passing the title from Nellie Smith *eo instanti,* that the same was subsequently acquired under the deed from Ella Ramsey, etc.

This doctrine of title by estoppel, and under which a subsequently acquired title inures to make good a former deed of the grantor, made at a time when such grantor had no title, has been approved and applied in several decisions with us, and is very generally recognized. *Hallyburton v. Slagle,* 132 N.C. 947; *Wellborn v. Finley,* 52 N.C. 228-237; *Hagensick v. Castor,* 53 Neb. 495; *Van Rensselaer v. Kearney et al.,* 52 U.S. 297-327; *Doe v. Oliver,* 2d Smith's Leading Cases 568. The headnote in this last case thus stating the principle: "The interest when it accrues feeds the estoppel."

Whether this mode of acquiring title shall be regarded as a conveyance taking effect as of the date of the former deed, or as an equitable principle made available under common-law forms as suggested by Mr. Rawle in his valuable work on Covenants, is not a settled position. Numerous cases have undoubtedly treated it as a conveyance, but in many of them the position was recognized as necessary to enable the claimant under the former deed to properly protect the estate against the intervening acts of trespassers and others, strangers to the title; but as against purchasers of this title the better doctrine is that this mode of acquiring title rests upon equitable principles and is not available against purchasers who have acquired the legal title for value and without actual notice. Both Mr. Rawle and Mr. Bigelow, in their work on Estoppel, favor this view. Rawle on Covenants, secs. 259-265; Bigelow on Estoppel, p. 418 *et seq.,* and the same position is maintained by Judge Hare in his note to *Doe v. Oliver,* Smith's Leading Cases, *supra.*

Whatever may be the weight of judicial decisions on this subject, under general principles, the better considered authorities are agreed that under and by virtue of our registration acts, the

(521) prior registry shall prevail as against a title of estoppel except as to a purchaser with notice. And in determining this question of notice, the decisions hold that a purchaser having the prior registry is not affected with constructive notice by reason of deeds or claims arising against his immediate or other grantor prior to the time when such grantor acquired the title, but the deed or instrument first registered after such acquisition shall confer the better right. *Wheeler v. Young,* 76 Connecticut 44; *Way v. Arnold,* 18 Ga. 181-193; *Bingham v. Kirkland et al.,* 34 N.J. Eq. 229; *Calder v. Chapman,* 52 Pa. St. 359; *Ford v. Unity Church Society,* 120 Mo. 498, reported also in 23 L.R.A. 561, with an instructive note on the subject. 2 Dev. on Deeds, p. 1332.

In the construction of our registration laws, this Court has very insistently held that no notice, however full and formal, will supply the place of registration. *Dye v. Morrison,* 181 N.C. 309; *Fertilizer Co. v. Lane,* 173 N.C. 184; *Quinnerly v. Quinnerly,* 114 N.C. 145. And under such interpretation there is dobut whether this doctrine of title by estoppel would be allowed to prevail against one holding by a prior registry, whether with or without notice. In the Georgia case heretofore cited, 18 Ga., at page 193, Judge Lumpkin gives decided intimation that the doctrine of title by estoppel no longer prevails as against the provision and policy of our registration acts. The question, however, does not arise in this record, as all the evidence is to the effect that the plaintiff having the prior registered title, acquired the same for full value and without notice of defendant's claim.

Plaintiff contends also that the doctrine of title by estoppel does not apply to a married woman who has joined in a conveyance of her husband's land, though the deed may contain general covenants of warranty, and the wife's interest does not appear on the face of the instrument, and cites authorities which seem to favor this view. 10 R.C.L. 741, and cases cited. Under terms of the deed in this case and the broad provisions of our enabling statutes known as the Martin Act, C.S. 2507, the position may be otherwise in this jurisdiction, but we now make no definite ruling on the question, preferring to rest our decision on the right arising to plaintiff by reason of the priority of registration and the purchase without actual notice of defendant's claim.

There is no error, and the judgment for plaintiff is affirmed.

No error.

Cited: Jackson v. Mills, 185 N.C. 55; *Bank v. Smith,* 186 N.C. 641; *Matthews v. Griffin* 187 N.C. 603; *Whitehurst v. Garrett,* 196 N.C. 157; *Duncan v. Gulley,* 199 N.C. 557; *Cooper v. Trust Co.,* 200

N.C. 726; *Bender v. Tel. Co.*, 201 N.C. 356; *Bank v. Johnson*, 205 N.C. 184; *Croom v. Cornelius*, 219 N.C. 762; *S. v. Speller*, 229 N.C. 67.

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(522)

IN RE WILL OF MRS. BETTY V. JOHNSON.

(Filed 23 November, 1921.)

1. Courts—Probate—Motions to Set Aside—Fraud—Jurisdiction.

A court, vested with power and jurisdiction to admit wills to probate, may, on motion and after due notice, set aside such proof in common form and recall the letters testamentary issued thereon, when it is shown that an invalid or spurious will has been imposed upon the court by reason of perjured testimony or other fraudulent means and practices effective in procuring judgment.

2. Same—Trial by Jury.

Upon the hearing of a motion before the clerk of the court to set aside a will for fraud, etc., that has been admitted to probate in common form, a jury trial is not allowed as of right, but the matters in dispute are considered and determined as questions of fact by the clerk before whom the action is pending, or the court to which it may have been properly carried on appeal.

3. Same—Matter of Right—Laches.

A petition to set aside a probate to a will for fraud imposed upon the court is not granted as a matter of strict right, but by analogy to the relief afforded in setting aside irregular judgments and orders, and is referred to the sound legal discretion of the court, and to be allowed only on full and satisfactory proof and on condition that the applicant has proceeded with proper diligence.

4. Wills—Probate—Statutes—Time of Discovery of Fraud—Laches.

Our statute allowing three years from the time of the discovery of a fraud within which an action thereon must be commenced, applicable to an adversary proceeding between litigants, is not necessarily controlling upon the hearing upon petition before the clerk of the Superior Court to set aside for fraud or imposition on the court, the proceedings admitting a paper-writing to probate as a will; and were it otherwise, it is required that the petitioner show that he could not sooner have discovered the fraud by the exercise of ordinary care, which in the instant case he has failed to do.

5. Wills—Witnesses—Attestation—Signature of Testator—Requisites.

Upon the trial of an issue of *devisavit vel non* submitted in accordance with the statutes appertaining to the subject, and authoritative decisions construing the same, an instruction is correct upon relevant evidence that it was not required that the witnesses to the will should sign in the pres-

ence of each other, or that the will should be manually signed by the alleged testatrix if her name was signed thereto by some one in her presence, by her direction, or if such a signature was acknowledged by her as her signature to the instrument presented as her last will.

6. Wills—Fraud — Trials — Issues — Appeal and Error — Limitation of Actions.

On this appeal from the trial of *devisavit vel non*, there was conflicting evidence as to whether the testatrix signed the paper-writing and had it attested at the time thereon appearing, when her mind was sufficient to make a valid will, or a year thereafter, when she did not have sufficient mentality; or whether the signature was an outright forgery or procured by fraud: *Held*, the trial was free from error, leaving only the question of the bar of the statute of limitations also presented on the record, before the court.

7. Wills—Probate—Caveat—Statutes—Limitation of Actions—Laches — Fraud.

By ch. 862, Laws 1907, now C.S. 4158, the Legislature recognizes that it is against the sound public policy to allow probate of wills and settlements of property rights thereunder to be left open to such uncertainties for an indefinite length of time, and required that caveats to a will should be entered at the time of application for probate in common form or at any time within seven years thereafter, etc., excepting cases of infants, married women, or insane persons; and where none of these disabilities are shown, the right to enter a caveat is barred after the seven-year period, without regard to the time the caveator should have, by ordinary care, discovered the fraud upon which he relies to invalidate the writing. C.S. 441, subsec. 9.

APPEAL by caveator from *Kerr, J.*, at the January Term,
(523) 1921, of HALIFAX.

Petition to set aside probate of will of Mrs. Betty V. Johnson, and to recall letters testamentary issued therein, heard on appeal from the clerk of Superior Court of Halifax County.

From the record it appears that the last will and testament of Mrs. Betty V. Johnson, deceased, had been formally admitted to probate before the clerk of Halifax County, acting as probate judge, on 17 May, 1907, said will purporting to have been made and duly witnessed on 1 June, 1906; that Dr. J. A. H. Edwards, a nephew of testatrix, had heretofore, in 1920, instituted an action in the Superior Court in the nature of a bill in equity against the devisees in said will to set aside the same and the probate thereof, on the ground of fraud and undue influence, etc.; that said cause had been dismissed on the ground that the plaintiff's remedy, if he had one, should be sought by direct proceedings before the clerk, where the probate was had. See case reported in 180 N.C. 55. That opinion having been certified down, the plaintiff, in November, 1920, filed this petition before said clerk acting as probate judge, alleging that the probate of

said will had been procured by fraudulent and perjured testimony; that same had not been made of its purported date, but in 1907, when the alleged Mrs. Johnson, his aunt, had been taken to the hospital, and when she was mentally and physically unable to execute this or any other instrument affecting her property, and said will had been thus fraudulently imposed upon the court, and was in fact and truth a spurious will, etc. These allegations were all denied by the propounders, whereupon the petitioner demanded and moved that a jury be allowed on the facts and the cause be transferred to the Superior Court in term for that purpose. This motion (524) was overruled and petitioner excepted. Thereupon the parties offered full affidavits in support and resistance of the petition, and the clerk having heard and considered the same, entered judgment as follows: "The court is of opinion and finds as a fact that no fraud has been perpetrated upon the undersigned clerk at the time of the probate of said will, and the issuing of letters testamentary; that said last will and testament was duly probated as provided by law, as appears from such probate, and the undersigned finds as a fact that said paper-writing is the last will and testament of the said Betty V. Johnson; that the said proceedings be dismissed and petitioner taxed with the costs."

On appeal, this cause was again considered by his Honor, John H. Kerr, judge presiding, and judgment entered fully confirming the action of the clerk. From which said judgment petitioner, Dr. Edwards, appealed.

It appears, also, that in November, 1920, the petitioner, Dr. Edwards, in a separate proceeding entered a caveat to said will and the probate thereof, and on the issues and *devisavit vel non* and the statute of limitations, which had been duly pleaded, the cause was tried before his Honor, Kerr, J., and a jury, at said January Term, 1921, of Halifax court, and verdict and findings made as follows:

"1. Is the paper-writing propounded, and every part thereof, the last will and testament of Mrs. Betty V. Johnson, deceased? Answer: 'Yes' (by the jury).

"2. Is the caveat filed in this proceeding barred by the statute? Answer: 'Yes' (by consent, the court answered the last issue)."

There was judgment establishing the will, and also to the effect that on the admitted facts the right of caveator to proceed was barred by the statute applicable. Caveator excepted and appealed.

R. B. Blackburn and Don Gilliam for appellant.

Travis & Travis, A. P. Kitchin, Stuart Smith, and Daniel & Daniel for appellee.

HOKE, J. On petition to set aside the probate: It is recognized in this State that a court vested with power and jurisdiction to admit wills to probate may, on motion and after due notice, set aside such proof in common form and recall the letters testamentary issued thereon, when it is shown that an invalid or spurious will has been imposed upon the court by reason of perjured testimony or other fraudulent means and practices effective in procuring the judgment. *Edwards v. Edwards,* 25 N.C. 82; *Dickenson v. Stewart,* 5 N.C. 99. And on a hearing of this character a jury trial is (525) not allowed as of right, but the matters in dispute are considered and determined as questions of fact by the court before which the action is pending or to which it may be properly carried by appeal. *In re Battle,* 158 N.C. 388; *Taylor v. Carrow,* 156 N.C. 6; *Edwards v. Cobb, Executor,* 95 N.C. 5. Under proper procedure, therefore, both the clerk and the judge on appeal from him, after fully considering the evidence offered, have found that the petitioner's allegation of perjury and fraud are not sustained, but that the will, and every part thereof, is the last will and testament of Betty V. Johnson, the alleged testatrix. Apart from this, a petition of this kind is not granted as a matter of strict right, but by analogy to the relief afforded in setting aside irregular judgments and orders, the same is referred to the sound legal discretion of the court to be allowed only on full and satisfactory proof and on condition that the applicant has proceeded with proper diligence.

From a perusal of the facts in evidence it appears, and without substantial contradiction, that this petitioner was aware of this will and its contents very shortly after its probate in 1907; that for nearly ten years he made no efforts to investigate the facts attendant on its execution and took no steps to challenge the validity of this probate until his suit commenced in 1919 or 1920, nearly thirteen years after the probate of the will in common form, which he now seeks to set aside. It is urged for petitioner that he did not know of the impeaching facts now advanced and insisted on by him till 1917, and within three years before his suit in the Superior Court, and by analogy to the statute allowing a suit on account of fraud or mistake to be instituted within three years after discovery of the facts constituting the fraud, he should now be heard. This statute applicable to an adversary proceeding between litigants is not necessarily controlling in a hearing of this character, but if it were otherwise, the position would not avail the petitioner on the facts presented in the record, for the courts, in the interpretation of the statute referred to, have held that "under this section a cause of action will be deemed to have accrued when the fraud was known or should have been dis-

covered in the exercise of ordinary care." *Peacock v. Barnes*, 142 N.C. 215, and speaking further to the question in that case, the Court said: "We do not hold, as appellant contends, that the statute begins to run from the actual discovery of the fraud, absolutely and regardless of any negligence or laches of the party aggrieved. A man should not be allowed to close his eyes to facts observable by ordinary attention and maintain for his own advantage the position of ignorance. Such a principle would enable a careless man, and by reason of his carelessness, to extend his right to recover for an indefinite length of time, and thus defeat the very purpose the statute was designed and framed to accomplish. In such case, a man's failure to note facts must be imputed to him for (526) knowledge, and in the absence of some actual effort to conceal a fraud or some of the essential facts embraced in the inquiry, we think the correct interpretation of the statute should be that the cause of action shall be deemed to have accrued from the time the fraud was known or should have been discovered in the exercise of ordinary diligence."

The condition of this testatrix when taken to the hospital in 1907, the time petitioner alleges the fraud took place, was known to him, or could have been readily discovered. Every witness that he now offers has all along been available to him. It is not shown that anything has been done by the propounders nor any one else to conceal the facts or mislead the petitioner in any way, nor that the facts could not have been readily ascertained if he had chosen to make inquiry. It is in keeping with a second public policy that the settlement of these estates and titles and ownership under them should not be kept open indefinitely, and in any aspect of this evidence we are of opinion that the prayer of the petitioner has been properly denied.

Affirmed.

HOKE, J. In the caveat proceedings: As heretofore stated, the cause in the caveat proceedings was determined on two issues:

1. Whether the paper-writing offered, and every part thereof, was the last will and testament of Betty V. Johnson, deceased?

2. Is the caveat filed in this proceeding barred by the statute?

On the first issue there was evidence offered by the propounders tending to prove the formal execution of the will, which was submitted in accord with the statutes appertaining to the subject and authoritative decisions construing the same, the court instructing the jury, among other things, that it was not required that the witnesses to a last will and testament should subscribe in the presence

of each other, nor was it necessary to a valid written will that it should be manually signed by the alleged testatrix, but if her name was signed thereto by some one in her presence and by her direction, or if such a signature was acknowledged by her as her signature to the instrument as her last will, it would suffice. *Watson v. Hinson*, 162 N.C. 72; *In re Broach's Will*, 172 N.C. 520; *In re Herring's Will*, 152 N.C. 258; C.S. 4131-4144.

And in reply to the impeaching evidence on the part of the caveator there was further evidence for the propounder tending to support the validity of the will. For the caveator there were facts in evidence permitting the inference that the paper-writing offered was not signed or executed at the time it purported, in 1906, but was in fact written in 1907, after the alleged testatrix had been taken to the hospital, when she was entirely unfitted and incapable of making any valid disposition of her property. And further, that the alleged will was either an outright forgery, or procured by the fraud of the propounder, the executor named therein, and one of the chief beneficiaries.

(527)

In a clear and comprehensive charge, in which this opposing testimony and every position arising thereon in favor of either party was intelligently referred to, the cause was submitted. The jury on the first issue have rendered a verdict sustaining the will, and the court trying same by consent of parties, finds on the second issue that the caveator's right is barred by the statute of limitations, and on careful examination we find nothing in the record to justify us in disturbing the results of the trial.

While there seems to be no error in the determination of the first issue, we do not deem it necessary to refer specially to the objections urged to that portion of the verdict for the reason that we concur fully in the ruling of his Honor that in any aspect of the testimony the appellant's right to enter and maintain the caveat is barred by the statute controlling the matter. Prior to 1907, there was no statute making direct provision as to the time within which a caveat could be entered, but in that year the Legislature, recognizing that it was clearly contrary to sound public policy that the probate of wills and settlements of propperty thereunder should be left open to such uncertainties for an indefinite length of time, in ch. 862, Laws 1907, provided that such caveats should be entered at time of application, and probate of a will in common form or at any time within seven years thereafter, that any person interested in the estate might enter a caveat to a will, and as to all wills theretofore admitted to probate, a caveat must be entered within seven years from ratification of the act, to wit, 11 March, 1907.

The statute also contained the proviso that if any one entitled to file a caveat should be at the time within the age of twenty-one years or a married woman or insane, they should have three years to file a caveat after the removal of the disability, etc. On the facts presented, this statute, appearing in C.S. 4158, in our opinion operates as a complete and conclusive bar to the maintenance of this caveat, it appearing by the admitted facts that the probate in common form was had before the clerk of the Superior Court of Halifax County, the proper tribunal, in 1907, and since that time the caveator, being under no disability, has done nothing to challenge or in any way question the validity of the will or probate thereof until 1919 or 1920. It is very earnestly insisted for the appellant that the statutory period should commence to run only from the time when he became aware of the essential facts, but the statute makes no such exception, and we are not allowed to make this addition to the statutory provisions. And if it were otherwise, if, as the appellant contends, we could apply to this case the statute governing ad- (528) versary actions instituted on the ground of fraud, that same could be commenced within three years after fraud discovered, C.S. 441, subsec. 9, it would not avail the appellant on the facts presented in this record.

As shown in the appeal on caveator's motion to set aside the probate in this case, our Court, in construing the statute referred to, has held that the cause of action will be deemed to have accrued at the time when the fraud was known or could have been discovered in the exercise of ordinary care. *Peacock v. Barnes,* 142 N.C. 215. And in this case it appears that the caveator was aware of this will and its contents at the time or very shortly after it was admitted to probate in common form, and for nearly thirteen, and certainly for ten years thereafter, he seems to have done nothing to investigate the matter and to have made no inquiry concerning it, although the witnesses on whom he now chiefly relies, the doctor and nurses at the hospital where the deceased was in her last illness and the alleged fraud was perpetrated, have been available to him during the entire period. The jury, after a full and fair hearing, have found the issue of fraud against the appellant, and, in any event, owing to his long delay and his own neglect, the law provides that a further inquiry is no longer open to him, and the judgment on the verdict must, therefore, be affirmed.

No error.

Cited: Latham v. Latham, 184 N.C. 64; *In re Meadows,* 185 N.C. 101; *In re Martin,* 185 N.C. 475; *In re Will of Witherington,*

186 N.C. 154; *Clark v. Holmes,* 189 N.C. 711; *In re Will of Efird,* 195 N.C. 84; *Stancill v. Norville,* 203 N.C. 461; *In re Will of Smith,* 218 N.C. 163; *In re Will of Hine,* 228 N.C. 410; *In re Will of Pruett,* 229 N.C. 11; *In re Will of Franks,* 231 N.C. 255; *In re Will of Williams,* 234 N.C. 235; *Yount v. Yount,* 258 N.C. 239.

H. G. NASH ET AL., V. J. T. SHUTE.

(Filed 23 November, 1921.)

1. Judgments—Estoppel—Courts—Jurisdiction.

Judgments may not operate as an estoppel as to such matters as extend beyond the jurisdiction of the court to determine the rights of the parties, though embraced within the scope of the pleadings and inquiry.

2. Same—Clerks of Court—Dividing Line—Statutes—Easements.

The clerk of the Superior Court, under a statute controlling proceedings to determine a dividing line, has no jurisdiction as to title or character of the possession of the claimants on either side of the dividing line of lands authorized to be ascertained or determined by him under the provisions of C.S. 361 *et seq.*, the occupancy alone being sufficient to confer jurisdiction, sec. 361; and where the clerk has acted within his jurisdiction in such proceedings, his judgment may not estop a party in a separate action to show the character or extent of his possession, or to establish an easement by adverse possession in the lands occupied by the other.

3. Judgments—Estoppel—Lands—Ownership—Easements.

A judgment in processioning proceedings as to ownership of the land in dispute does not necessarily include the question of an easement by adverse possession under the statute of limitations, defined to be "a liberty, privilege, without profit in the land of another, existent distinct from the ownership of the soil," and such conclusion does not of itself necessarily work an estoppel on the question of an outstanding easement in the land claimed by a party in an independent action.

APPEAL by defendant from *Ray, J.*, at the May Term,
(529) 1921, of UNION.

Plaintiff, claiming ownership of a lot in city of Monroe, abutting on Hayne Street, institutes this action, alleging that defendant, owner of a lot to south of plaintiff's, has built a brick opera house and postoffice thereon, which, in the eaves and other incidents above the surface, wrongfully project over plaintiff's line, causing water from defendant's building to fall on plaintiff's said lot, and otherwise interfering with plaintiff's rightful enjoyment of his property, and the prayer is for a mandatory injunction, requiring de-

fendant to remove the eaves and other projections, to restrain the trespass and nuisance thereby caused, and for general relief.

Defendant answers, admitting plaintiff's ownership of the lot as claimed, and alleging in effect a prescriptive right to maintain said projections and the effects of same, etc., by open and adverse user for more than twenty years next before action brought. On the hearing, and in support of his position, plaintiff offered in evidence the record in a proceeding before the clerk to establish the line between the two lots under C.S., ch. 9, sec. 361 *et seq.*, in which said proceedings plaintiff alleged ownership of present lot. That defendant owned the lot just adjoining on the south and defendant claimed the true dividing line was as much as five feet in and upon the lot as claimed by plaintiff, and beyond the brick buildings which defendant had constructed upon his property.

Defendant answered, admitting plaintiff's ownership as claimed, alleged that defendant had never claimed the true line to be five feet north of defendant's buildings, but admitted that the true dividing line was as plaintiff claimed, and on these admissions, appearing in defendant's answer, the clerk entered the following judgment:

"This cause coming on to be heard before the undersigned clerk of Superior Court of Union County, N. C., upon the verified pleadings filed in the cause, and it appearing to the court that the defendant admits the location of the lines claimed by plaintiffs to be at the places where plaintiffs contend that they are, and that there are not issues either of fact or law to be decided by a court and jury:

"Now, therefore, upon motion of plaintiffs, it is ordered, adjudged, and decreed that the true dividing line between the lot of plaintiffs and the lot of the defendant J. T. Shute is a line commencing at the northwest corner of J. T. Shute's brick opera house building on the eastern boundary of Hayne Street and running thence with the northern wall of said brick opera house building and (530) with the old postoffice building of J. T. Shute about north 87 east 180 feet, more or less, to Beasley Street, the northeast corner of said J. T. Shute's postoffice building; and it is further ordered, adjudged, and decreed that the true dividing line between the lot of plaintiffs and the lot of defendant S. B. Hart is a line commencing at a point on the eastern boundary of Hayne Street 30 feet north of the northwest corner of the said J. T. Shute's brick opera house building and running thence parallel with the dividing line between the lot of plaintiffs and the lot of the defendant J. T. Shute to Beasley Street; and the cost of this action be divided between the plaintiff and the defendant J. T. Shute.

"This 6 November, 1919. R. W. LEMMOND, C. S. C."

The record was admitted by defendant, and the court being of opinion that defendants were estopped by the proceedings and judgment before the clerk from maintaining any claim for an easement or other right in plaintiff's property, judgment was entered substantially as claimed by plaintiff, and defendants excepted and appealed.

Stack, Parker & Craig for plaintiffs.
Vann & Millikin for defendant.

HOKE, J. In *Coltrane v. Laughlin,* 157 N.C. 282, it was held, in effect, that "when a court having jurisdiction of the cause and the parties enters judgment therein purporting to determine the controversy, the judgment will estop the parties and their privies as to all issuable matters directly presented by the pleadings, and though not issuable in the technical sense, it will conclude, among other things, as to all matters within the scope of the pleadings, which are material and relevant and were in fact investigated and determined."

And this statement of the principle is in accord with numerous decisions where the subject has been directly considered. *Holloway v. Durham,* 176 N.C. 550; *Propst v. Caldwell,* 172 N.C. 594; *Cropsey v. Markham,* 171 N.C. 44; *Gillam v. Edmondson,* 154 N.C. 127; *Tyler v. Capehart,* 125 N.C. 64; *Jordan v. Farthing,* 117 N.C. 188.

The record relied upon by plaintiff as an estoppel in the present case is a proceeding before the clerk, and terminated before him, to settle the location of a disputed boundary line under the provisions of C.S., ch. 9. Proceeding under this statute, the Court is bound by its limitations and restrictions, *Proctor v. Comrs., ante,* 56, and the law confers on the clerk no jurisdiction to settle questions of title. He can only authoritatively determine the location of a disputed line, and very properly this is all that his judgment pro-
(531) fesses to decide. "It is ordered and decreed that the true dividing line between the lot of plaintiffs and the lot of defendant J. T. Shute is a line commencing at the northwest corner of J. T. Shute's brick opera house building on the eastern boundary of Haynes Street, and running thence with the northern wall of said brick opera house building and with the old postoffice building about north 87 east 180 feet, more or less, to Beasley Street, the northwest corner of said J. T. Shute's postoffice building."

The statute itself provides, in section 362: "That the occupation of land constitutes sufficient ownership for the purposes of this chapter." The judgment of the clerk only undertook to determine the location of the surface line between the parties, and did not purport

to settle the extent or character of the proprietary interests of the owners or claimants on either side. Not only were these matters not investigated or determined in any hearing before him, but the clerk, as stated, was without jurisdiction over them, and the parties are therefore not concluded by his judgment in respect to them. The decisions which were cited by counsel as upholding the claim of an estoppel by judgment were cases where, the issue of title being raised in the pleadings, the cause was transferred to the Superior Court, and under the statute applicable became, in effect, an action to determine the title, etc., that court having general jurisdiction could enter a judgment concluding the parties as to the questions presented by the pleadings. *Hilliard v. Abernethy,* 171 N.C. 644; *Maultsby v. Braddy,* 171 N.C. 300; *Woody v. Fountain,* 143 N.C. 66.

There is nothing in *Whitaker v. Garren,* 167 N.C. 658, that militates against this ruling. In that case the trial judge, under several decisions construing a former statute, had held that in a subsequent suit between the parties to try out the question of title, a proceeding under the statute before the clerk to settle a disputed line could be allowed no effect whatever, and could not be received in evidence. The Court, in *Whitaker v. Garren, supra,* only held that under the statute now prevailing, "the action of the clerk in a proceeding to settle the line was admissible as to the location of the line," but it was not held that the judgment of the clerk in a proceeding which terminated before him could work an estoppel on questions of title.

Apart from this, in a proceeding of this character a finding on the question of ownership does not necessarily signify the holder of an unincumbered title. A recognized definition of easement is "a liberty, privilege, without profit, in the land of another, existent distinct from the ownership of the soil," and unless it should appear from the issue and evidence pertinent that a full and unincumbered title was the question determined, such a finding would not of itself necessarily work an estoppel as to the existence of an outstanding ease-
ment in the property. *Stokes v. Maxon,* 113 Iowa 122; *Burr* (532)
v. Lamaster, 30 Nebraska 688; 9 R.C.L., pp. 735-736.

On the record, we are of opinion that the proceedings and judgment of the clerk as to correct placing of a surface line does not work an estoppel on defendants as to the easement claimed by them, and the cause must be remanded that the issues arising on the pleadings may be properly determined.

Error.

Cited: *Davis v. Robinson,* 189 N.C. 598; *Craver v. Spaugh,* 227 N.C. 131; *Bumgarner v. Corpening,* 245 N.C. 43; *Morganton v. Hutton & Bourbonnais Co.,* 251 N.C. 539.

J. A. FAY & EAGAN COMPANY v. G. EDWARD CROWELL.

(Filed 30 November, 1921.)

1. Vendor and Purchaser—Contracts—Warranty—Conditions Precedent.

Where under a written contract for the sale of machinery the purchaser has agreed that his receipt thereon and retention for more than thirty days shall be considered an absolute acceptance, his retaining them beyond the time specified will be regarded as an admission that the machinery was as warranted, and conclude his right of action thereon, in the absence of fraud, accident, or mistake.

2. Same—Waiver.

Where there is a stipulation in a written sale of machinery that it shall be returned by the purchaser in case it was not as represented, the purchaser is entitled to no redress in the event of a breach by the seller of his warranty, unless he has first offered to perform the condition in the absence of fraud or of such conduct as amounts to a waiver by the seller.

3. Same—Inferior Quality.

A contract for the sale of machinery, free from ambiguity or fraud, accident or mistake, is binding upon the purchaser under conditions requiring him to return the machinery if not as warranted, within a stated time, or providing that its retention beyond that period would be regarded as an absolute acceptance; and this applies when the purchaser has retained the machinery beyond the stated time and attempts to claim damages for the seller's breach of warranty in sending a different machine, or one of inferior quality, to that agreed upon.

APPEAL by plaintiff from *Ray, J.,* at February Term, 1921, of STANLY.

Civil action to recover balance due on ten promissory notes executed by the defendant and delivered to the plaintiff for a certain quantity of mill machinery. Defendant denied full liability, and alleged that said notes "would have been paid in full if the plaintiff had given defendant proper adjustment and offsets on the machine No. 257, known as the resaw, on account of the defects in said machine as hereinbefore fully set out." Defendant also alleged that the machinery shipped was different from and less valuable
(533) than that which he had ordered; and that the same was defective in certain particulars, said defects being set up and pleaded by way of counterclaim.

Upon issues submitted, the jury returned the following verdict:

"1. In what sum, if any, is the defendant indebted to the plaintiff? Answer: '$1,010, with interest on same from 8 February, 1919.'

"2. Did the plaintiff ship the defendant a different band resaw machine from that ordered under the contract of 23 January, 1919? Answer: 'Yes.'

"3. What difference in value, if any, was there in the machine shipped by the plaintiff and the one contracted for by the defendant? Answer: '$250.'

"4. What damage, if any, is defendant entitled to recover on the counterclaim? Answer: '$150.'"

From a judgment reducing the amount of plaintiff's recovery in accordance with the jury's answer to the third and fourth issues, the plaintiff appealed.

Sinclair, Dye & Clark for plaintiff.
R. L. Smith & Son for defendant.

STACY, J. On 23 January, 1919, the plaintiff, through its agent, sold to the defendant a certain quantity of mill machinery, guaranteeing the same in every respect; and, in payment therefor, it was agreed that the plaintiff would accept in exchange the defendant's second-hand machine as part payment, $525 in cash, and his promissory notes for the balance. The contract was in writing and contained the following stipulation: "That in case of rejection the undersigned will promptly deliver it (the machinery) to consignor, f. o. b. Cincinnati, Ohio; that this contract is not modified or added to by any agreement not expressly stated herein, and that a retention of the property forwarded, after thirty days from its arrival at destination, shall constitute a trial and acceptance, be a conclusive admission of the truth of all representations made by or for the consignor, and a fulfillment of all its contracts of warranty, express or implied."

Within thirty days after the receipt of said machinery the defendant notified plaintiff's agent by wire that the same was not satisfactory, and asked him to "come to Oakboro at once in regard to resaw." The agent did not come, but immediately called over the telephone; and, in answer to plaintiff's inquiry about a missing handwheel, stated that this was not necessary, as the machine was equipped with a "lever-shift." Defendant further testified: "Later on in the year Mr. Whitlock (plaintiff's agent) came up. I told him about it and showed him the machine, and told him the defect, and he said he would have it adjusted. He never said a (534) word about it not being the machine he sold. I told him it

was not the machine, and he said they would have it fixed. I never had any other negotiations with them. Never heard anything, and they didn't fix it. I had no more negotiations with the company in regard to the machine after that; it just rocked along. I was waiting on them."

The defendant continued to use the machine and still has it in his possession. There is no contention about the balance of the machinery. The "resaw" alone is in controversy. After the property had been used for several months, the defendant made a further payment of $50 on one of the notes; and he says the payments already made are sufficient to cover the value of the machinery, not including the resaw.

The agreement between the parties to this suit in regard to the subject-matter of the action is in writing. It is clear and free from any ambiguity. Hence, both sides must stand or fall by the terms of the written instrument—there being no claim or suggestion that the contract was entered into as a result of any fraud, accident, or mistake. *Harvester Co. v. Carter,* 173 N.C. 229; *Machine Co. v. McClamrock,* 152 N.C. 405. In some of the cases and by a number of writers it has been styled a "contract of sale and return" (*Mfg. Co. v. Lumber Co.,* 159 N.C. 507); because it is stipulated as a part of the warranty that the goods shall be promptly returned if not as represented. It is further specified that a retention of the property for more than thirty days after its arrival at destination shall constitute an absolute acceptance, etc. This may not have been a very wise provision, but the parties have so contracted, and it is but meet that they should abide by whatever obligations they have voluntarily assumed. *Burch v. Bush,* 181 N.C. 125. This is the law of contracts fairly and freely made. *Clancy v. Overman,* 18 N.C. 402; *Bland v. Harvester Co.,* 169 N.C. 418; *Guano Co. v. Livestock Co.,* 168 N.C. 447, and cases there cited. Any other rule would render all business transactions relating to sales of personal property unsafe and subject vendors to many hazards, and possibly grievous burdens. *Parker v. Fenwick,* 138 N.C. 209. The retention by the defendant of the property during the time referred to in the above stipulation amounted to an admission that the representations made by or for the plaintiff were true and avoided all warranties. *Fay & Eagan Co. v. Dudley,* 58 S.E. 826 (which, by the way, is a case on all-fours with the one at bar and involving the identical contract now before us).

It has been the settled holding with us, in a long line of decisions, that where there is an express warranty in the sale of personal property, and it is stipulated as a condition of the contract of sale that the property is to be returned within a specified time, if

not as represented, the complaining party is entitled to no redress by reason of a breach of the warranty, in the absence of fraud or a waiver of the condition, without first offering (535) to return the property within the time fixed by the contract. *Robinson v. Huffstetler,* 165 N.C. 459, and cases there cited. See, also, 35 Cyc. 437.

In the absence of fraud, this rule applies equally to a case where the goods delivered are different from, and inferior to, those sold, as where the property, though corresponding in description with the article purchased, is defective or wanting in quality. If the vendor tender goods of less value than those purchased, the vendee is not bound to accept them. But if he does accept them, under the terms of his agreement, he is deemed to assent to a fulfillment of the contract on the part of the vendor. *Pierson v. Crooks,* 115 N.Y. 539. And in the instant case such acceptance and retention afford a "conclusive admission of the truth of all representations made by or for the consignor, and a fulfillment of all its contracts of warranty, express or implied." See, also, *Farquhar Co. v. Hardware Co.,* 174 N.C. 369, and *Ward v. Liddell, ante,* 223, and cases there cited.

The Supreme Court of Utah, in a comparatively recent case, states the law with clearness as follows: "The rule is well established that when the quality of an article sold is guaranteed by warranty, one of the conditions of which being that, in case of a defect being discovered, the seller shall be liable only on condition of the production or return of the defective article, such condition is a condition precedent, and must be complied with or there can be no recovery (citing authorities). The rule deduced from the authorities is that when the parties have not stipulated as to the course which shall be taken in case of a failure of the warranty, the vendee has his election either to sue on the warranty or to rescind the contract by returning the property and bringing an action for the money received by the seller. But it is competent, however, for the parties to provide by contract that a particular course shall be pursued on a failure of the warranty." *Wasatch Orchard Co. v. Morgan Canning Co.,* 12 L.R.A. (N.S.) 540. See, also, *Frick v. Boles,* 168 N.C. 654, and cases there cited.

In the light of the foregoing authorities, and upon the record, we think his Honor should have directed a verdict in favor of the plaintiff for the balance due on the unpaid notes.

New trial.

WALKER, J., dissenting.

(536)

W. L. WHITE v. CAROLINA REALTY COMPANY.

(Filed 30 November, 1921.)

1. **Negligence — Proximate Cause — Concurrent Negligence — Joint Tort Feasors—Actions.**

Where an injury to a third person is proximately caused by the negligence of two persons, to whatever degree each may have contributed to the result, the negligence of the one may not exonerate the other, each being a joint tort feasor, and the person so injured may maintain his action for damages against either one or both.

2. **Same—Automobiles—Collisions—Passengers.**

The negligent acts of the driver of an automobile in which the plaintiff was riding at the time of receiving a personal injury thereby caused, is not imputable to the plaintiff, who is neither the owner nor exercises control over the driver, and where this injury is proximately caused by the negligence of the driver of this machine and that of another one concurrently causing the injury complained of, and not solely by the negligence of the one in which he was riding, the plaintiff may maintain his action against the owner of the other automobile responsible for the negligence of the driver.

3. **Instructions—Appeal and Error—Harmless Error—Negligence—Automobiles—Collisions—Joint Tort Feasors.**

A charge of the court will not be construed disjointedly, but as a whole, in relation to each subject-matter, and where the defendant's liability depends upon the concurrent negligence of the driver of his own automobile and the negligence of the driver of another one, in proximately causing a personal injury to a passenger in his machine, an instruction by the court on the issue of defendant's negligence which leaves out the question of the proximate, sole, and efficient cause, though error in itself, will not be considered for reversible error, if immediately followed by an instruction correcting this omission, and so repeated elsewhere in the charge that the jury must have understood the correct principle for their guidance in rendering their verdict.

APPEAL by defendant from *Harding, J.*, at March Term, 1921, of MECKLENBURG.

Civil action to recover damages for an alleged negligent injury to plaintiff in a collision between a Ford automobile, in which the plaintiff was a passenger, and a truck belonging to the defendant.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Was the plaintiff's injury caused by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. What damages, if anything, is the plaintiff entitled to recover? Answer: '$2,500.' "

From a judgment on the verdict in favor of plaintiff, the defendant appealed.

F. M. Redd and D. E. Henderson for plaintiff. (537)
Clarkson, Taliaferro & Clarkson for defendant.

STACY, J. This is an action brought by W. L. White to recover damages for an alleged negligent injury caused by a collision between a Ford automobile, in which the plaintiff was riding as a passenger, and the defendant's truck, said collision occurring on West Trade Street in the city of Charlotte at an early morning hour on 23 September, 1920.

There was evidence tending to show that the defendant's truck was standing at the intersection of Linden Avenue and West Trade Street in a manner violative of a traffic ordinance of the city, when the Ford automobile, owned and driven by one E. H. McQuay, and in which the plaintiff was riding as a passenger, ran into and collided with the defendant's truck, causing serious and permanent injuries to the plaintiff. The accident occurred about 7:30 a.m. during a heavy equinoctial storm, when the fog, rain, and wind made it difficult for the occupants of the car to see very far ahead.

The evidence was conflicting as to the exact position of the truck at the time of the injury, and as to whether the defendant's driver had violated any of the traffic ordinances of the city of Charlotte; but, under his Honor's charge, the jury have found these matters in accordance with the plaintiff's contention.

From all the evidence it clearly appeared that the plaintiff was a passenger in McQuay's car, and exercised no authority or control over its management, and had nothing to do with the manner in which it was driven.

Upon these, the facts chiefly relevant, we think the defendant's motion for judgment as of nonsuit was properly overruled.

Conceding that McQuay, the owner and driver of the Ford machine, was negligent, as it is quite apparent from the evidence he was, yet this would not shield the defendant from suit if its negligence was also one of the proximate causes of the plaintiff's injury. *Crampton v. Ivie,* 126 N.C. 894. There may be two or more proximate causes of an injury; and where this condition exists, and the party injured is free from fault, those responsible for the causes must answer in damages, each being liable for the whole damage instead of permitting the negligence of the one to exonerate the others. This would be so though the negligence of all concurred and contributed to the injury, because, with us, there is no contribution among joint tort feasors. *Wood v. Public Service Corp.,* 174 N.C. 697.

In *Harton v. Tel. Co.,* 141 N.C. 455, the following statement of the law is quoted with approval: "To show that other causes con-

curred in producing or contributing to the result complained of is no defense to an action of negligence. There is, indeed, no (538) rule better settled in this present connection than that the defendant's negligence, in order to render him liable, need not be the sole cause of the plaintiff's injuries. When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable." See, also, 21 A. & E. (2 ed.) 495, and note.

His Honor correctly charged the jury that if the negligence of McQuay, the owner and driver of the Ford car, was the sole and only proximate cause of plaintiff's injury, the defendant would not be liable; for, in that event, the defendant's negligence would not have been one of the proximate causes of the plaintiff's injury. *Bagwell v. R. R.*, 167 N.C. 615. But if any degree, however small, of the causal negligence, or that without which the injury would not have occurred, be attributable to the defendant, then the plaintiff, in the absence of any contributory negligence on his part, would be entitled to recover; because the defendant cannot be excused from liability unless the total causal negligence, or proximate cause, be attributable to another or others. "When two efficient proximate causes contribute to an injury, if defendant's negligent act brought about one of such causes, he is liable." *Wood v. Public Service Corp., supra*, and cases there cited.

There is no contention that the negligence of McQuay, the driver of the Ford car, is in any way imputable to the plaintiff, who, at the time, occupied the position of a passenger in said car. In a number of cases it is stated, as a general rule, that the negligence of the driver of an automobile will not be imputed to one who is a passenger therein, unless such passenger be the owner of the car, or unless he exercise some kind of control or authority over the driver. This position has been approved by us in a number of decisions, and is undoubtedly the prevailing view. *Pusey v. R. R.*, 181 N.C. 137, and cases there cited; 2 R.C.L. 1207.

The defendant relies upon its exception to the following portion of his Honor's charge: "If the plaintiff has satisfied you by the greater weight of the evidence that the defendant was negligent, as I have attempted to apply the rules of law, as the court observes it from the evidence in this case, you will answer the first issue 'Yes.'"

This excerpt, standing alone, might appear to be erroneous, but in the very next sentence his Honor continued: "If the plaintiff has failed to satisfy you that the defendant was negligent, or that, if he was negligent, that it was not a proximate cause of the injury, then you would answer the first issue 'No.'"

In other portions of the charge the court correctly stated the law

as bearing upon this point; and when we consider the charge as a whole, as we are required to do, it is clear that the jury could not have been misled by this slight inadvertence. Besides, it was immediately corrected in the following sentence; and this shows the necessity of examining the charge, not disconnectedly, but as a whole, or at least the whole of what was said regarding any one phase of the case, or law bearing thereon. *Moore v. Lumber Co.*, 175 N.C. 205. (539)

No sufficient reason for disturbing the verdict and judgment having been shown, the exceptions must be overruled; and it is so ordered.

No error.

Cited: Tyree v. Tudor, 183 N.C. 349; *Graham v. Charlotte*, 186 N.C. 665; *Williams v. R. R.*, 187 N.C. 355; *Hanes v. Utilities*, 188 N.C. 468; *Mangum v. R. R.*, 188 N.C. 696; *Williams v. R. R.*, 190 N.C. 368; *Albritton v. Hill*, 190 N.C. 431; *Hanes v. Utilities*, 191 N.C. 19; *Earwood v. R. R.*, 192 N.C. 30; *Clinard v. Electric Co.*, 192 N.C. 743; *Gillis v. Transit Corp.*, 193 N.C. 349; *Odom v. R. R.*, 193 N.C. 443; *Evans v. Construction Co*, 194 N.C. 33; *Ballinger v. Thomas*, 195 N.C. 520; *Ralsey v. Power Co.*, 195 N.C. 793; *Dickey v. R. R.*, 196 N.C. 728; *Jordan v. Hatch*, 198 N.C. 540; *Moss v. Brown*, 199 N.C. 192; *Campbell v. R. R.*, 201 N.C. 107; *Godfrey v. Coach Co.*, 201 N.C. 266; *Sanders v. R. R.*, 201 N.C. 676; *Eller v. Dent*, 203 N.C. 439; *Keller v. R. R.*, 205 N.C. 278; *Bullard v. Ross*, 205 N.C. 496; *Gaffney v. Phelps*, 207 N.C. 558; *Brown v. R. R.*, 208 N.C. 59; *Myers v. Utilities Co.*, 208 N.C. 295; *West v. Baking Co.*, 208 N.C. 529; *Smith v. Sink*, 210 N.C. 817; *Harper v. R. R.*, 211 N.C. 402; *Lewis v. Hunter*, 212 N.C. 508; *York v. York*, 212 N.C. 703; *Cunningham v. Haynes*, 214 N.C. 458; *Mason v. Johnston*, 215 N.C. 97; *Daniel v. Packing Co.*, 215 N.C. 765; *Bechtler v. Bracken*, 217 N.C. 522; *Rattley v. Powell*, 223 N.C. 136; *Barber v. Wooten*, 234 N.C. 109; *Tillman v. Bellamy*, 242 N.C. 204; *Faircloth v. Bennett*, 258 N.C. 518; *Pearsall v. Power Co.*, 258 N.C. 642.

SELWYN HOTEL COMPANY v. JAMES P. GRIFFIN ET AL.

(Filed 30 November, 1921.)

Appeal and Error—Motion to Dismiss — Rules of Court — Frivolous Appeals—Relief—Judgments—Abuse of Process—Procedure.

Where the appellant's case on appeal is due to be heard at the next ensuing term of the Supreme Court at the call of the district to which it belongs, and the appellee has moved to dismiss under Rule 17, upon the certificate of the clerk of the trial court and affidavits filed, showing that appellant's defense was frivolous and only for advantages to be gained by delay to the appellee's loss, and that the appellant had lost the right to have the case settled on appeal for the Supreme Court, and his answer to the motion is also frivolous, this Court will affirm the judgment in appellee's favor rendered in the court below, and order the judgment to be certified down *instanter* to afford the appellee relief from the appellant's abuse of the court's process and procedure.

APPEAL by defendants from *Ray, J.*, at September Term, 1921, of MECKLENBURG.

This was a proceeding in summary ejectment, begun before a justice of the peace and tried at September Term, 1921. On 11 November, 1921, the defendants not having docketed a transcript, the plaintiff filed a certified statement from the clerk, from which it appears that at the trial the jury, upon issues submitted, found that the plaintiff was entitled to possession of the premises; that the market rental value since 1921 was $125 per month; and that the judge rendered judgment in favor of the plaintiff for possession of the premises and $125 per month rental from 1 January, 1921; that the defendant Charles H. Garmon appealed; that he had been allowed 15 days in which to serve case on appeal; that the term of court adjourned 17 September, 1921; that the defendant did not serve his case on appeal within said 15 days, and thereafter, on application to the judge, he was allowed another 15 days to make up and serve case on appeal, and that at the expiration of said time he had not done so, and upon said record the plaintiff moved to docket and dismiss under Rule 17, and also because upon its face the appeal was frivolous.

(540) *H. C. Dockery and John M. Robinson for plaintiff.*
Jake F. Newell for defendants.

CLARK, C.J. In addition to the facts above set out, W. T. Wilson, an officer of the plaintiff, the Selwyn Hotel Company, files an affidavit that the defendant C. H. Garmon and associates were occupying the barber shop in the Selwyn Hotel in Charlotte, N. C., under a three-year lease, which expired 31 December, 1920; that the

said Selwyn Hotel Company duly leased said premises for the year 1921 to other parties for a monthly rental of $150 per month; that the defendant C. H. Garmon led the plaintiff and the said lessees to believe that he would vacate the premises at the termination of the lease, but at the end of his lease he wrongfully and illegally refused to give up possession of said premises, and has wrongfully withheld the same to the serious damage and inconvenience to the plaintiff and the lessees since 1 January, 1921; that the only defense which the said defendant has ever asserted was the failure of the plaintiff to give him notice of the termination of the lease, but that he has wrongfully and illegally held possession of said premises without any just cause or excuse, and that the appeal which he took from the justice of the peace to the Superior Court, and that the appeal which he took from the Superior Court to the Supreme Court were taken solely for purposes of delay, and that this delay is resulting in serious loss and inconvenience to the plaintiff.

This motion, with affidavits and certificate, was served on the attorney of the defendant 9 November, 1921. The defendant, answering the appeal, simply asserts that he was not bound to bring up the appeal to this term of the Court, and that he has been unable to get a stenographer to make a copy of the transcript, she being very busy.

It is apparent that this is purely an attempt to use the process of the court, which is intended to correct errors, for the purposes of delay, and that the appeal is entirely frivolous. It does not appear that there was any assertion of a *bona fide* defense either before the justice or in the Superior Court, nor is there any allegation of any defense in the answer to this motion.

In *Barnes v. Saleeby,* 177 N.C. 260, upon somewhat similar circumstances this Court held: "The plaintiff's motion to dismiss in this Court should be allowed whenever it appears in the record, as in this case, that no serious assignment of error is made. *Blount v. Jones,* 175 N.C. 708; *Ludwick v. Mining Co.,* 171 N.C. 61."

In *Blount v. Jones,* 175 N.C. 708, a case exactly in point, this Court held: "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," citing *Ludwick* (541) *v. Mining Co.,* 171 N.C. 61, in which this Court held, Brown, J., delivering the opinion, that, "While ordinarily an appeal lies to the Supreme Court from the Superior Court, as a matter of right it is required that it must be *bona fide* for the purpose of reviewing some alleged error; and when from the record it appears

that the appeal is frivolous and made solely for delay it will, upon due notice to the appellant, be dismissed upon appellee's motion."

It not only appears upon the record sent up, and by the affidavit in support of the motion to dismiss, to be a frivolous appeal, and from the answer thereto that there is no *bona fide* defense, but is not even alleged that the defense has given bond for payment of the judgment of the rent. But even if this had been done, though not alleged, still there is no allegation of a *bona fide* defense even suggested in the answer, and as the defendant has lost the right to have the case settled on appeal by not having done so within the prescribed time, to carry the case over to the spring term could only result in the appeal being affirmed at that time, and the plaintiff would be wronged by being kept out of possession for several months more. The courts cannot allow their process to be thus abused.

Final judgment will be entered here affirming the judgment below, and this opinion will be certified down *instanter* to the Superior Court of Mecklenburg, *Caldwell v. Wilson,* 121 N.C. 473, 474, and the plaintiff will be put in prompt possession of the premises. *Barnhill v. Thompson* 122 N.C. 498, and other cases are to the same purport.

Affirmed.

Cited: *Ross v. Robinson,* 185 N.C. 550; *Pruitt v. Wood,* 199 N.C. 792.

J. W. HULIN v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 30 November, 1921.)

Appeal and Error—Verdicts—Issues—Instructions—Nonsuit—Telegraphs—Mental Anguish.

Where a complaint states two causes of action to recover damages for mental anguish against a telegraph company for negligent delay in the transmission and delivery of two messages, one relating to the illness and the other to the death of the plaintiff's mother, and the cause has been dismissed, without exception taken as to the first, and as to the second the issue of negligence refers to both messages or "either of them," which was emphasized in the instruction of the court and found in the affirmative by the jury, the verdict does not necessarily show a finding of negligence as to the death message, the one under investigation, and a new trial will be ordered on appeal.

(542) APPEAL by defendant from *Bryson, J.,* at March Term, 1921, of RANDOLPH.

Civil action to recover damages for an alleged negligent failure to transmit and promptly deliver two telegrams — one announcing the serious illness, and the other the death of plaintiff's mother.

The first message was sent from Star, N. C., at 1 p.m. on 26 December, 1919, approximately an hour before the death of plaintiff's mother, and the second, or death message, was sent from Troy, N. C., at 5:12 p.m. on the same day. This last message was taken "subject to delay," as the defendant had no telegraph office at Denton, N. C., the plaintiff's home. Both telegrams reached the plaintiff by mail about 5 p.m. on the following day.

The plaintiff had seen his mother on Thursday before Christmas, and knew of her illness; she was about ninety years old, and her demise was not unexpected. Plaintiff lived between twenty and twenty-five miles from his mother's home; and, while he had no telephone in his house, nor she in hers, yet such communication was available.

At the close of plaintiff's evidence his Honor granted the defendant's motion for judgment as of nonsuit on the first cause of action, or the one growing out of the defendant's alleged negligent failure to deliver the first message within a reasonable time.

On the second cause of action, or the one based upon the defendant's alleged negligent failure to deliver the death message, as required by law, the jury returned the following verdict:

"1. Did the defendant receive for transmission, and negligently fail to transmit and deliver the telegrams mentioned in the complaint, or either of them? Answer: 'Yes.'

"2. What damages, if any, is the plaintiff entitled to recover? Answer: '$1,250.' "

From a judgment on the verdict in favor of plaintiff, the defendant appealed.

Hammer & Moser for plaintiff.

J. A. Spence and Tillett & Guthrie for defendant.

STACY, J. The ruling of his Honor in granting the defendant's motion for judgment as of nonsuit on the initial cause of action, or on the one growing out of the defendant's alleged negligent failure to deliver the first message within a reasonable time, is not before us for review, as the plaintiff has not appealed. But it would seem that this position is entirely correct, in so far as any substantial damages are concerned; for, even if the telegram had been delivered without delay, the plaintiff could not possibly thereafter have reached

the bedside of his mother prior to her death. The question
(543) of a technical breach of duty, involving only nominal damages, is not presented for consideration. *Smith v. Tel. Co.*, 167 N.C. 248, and cases there cited.

Notwithstanding the judgment of nonsuit on the initial cause of action, it will be observed that the issues submitted to the jury are not confined to the second cause of action, or to the one based upon the defendant's alleged negligent failure to transmit and deliver the death message in due time, or with reasonable dispatch. The first issue in terms refers to both of the telegrams, or to *either of them.* Hence, it does not conclusively appear, because the verdict does not necessarily mean that the defendant was negligent with respect to the handling of the second, or death message. The alternative wording of the issue is further intensified by the following portion of his Honor's charge, to which the defendant has excepted and the same is assigned as error: "Has the plaintiff satisfied you from the evidence, or its greater weight, that the defendant received the message spoken of, that it negligently failed to transmit them, or either of them? If the plaintiff has so satisfied you, answer the first issue 'Yes.'"

Having entered a judgment of nonsuit on the first cause of action, we think this instruction was erroneous, because it required an affirmative answer, though the jury may have found no negligence as alleged for the basis of the second cause of action. It may have been answered from the evidence bearing upon the transmission and delivery of the first message, or the one sent from Star.

For the error, as indicated, the case will be remanded, to the end that there may be another trial, or a *venire de novo.*

New trial.

L. C. McKAUGHAN v. MERCHANTS BANK AND TRUST COMPANY.

(Filed 30 November, 1921.)

1. Banks and Banking—Checks—Mortgages—Forgeries—Deeds and Conveyances.

A depositor of defendant's bank obtained a loan from the plaintiff, secured by mortgage on his sister's land, with a certificate made by a notary public, and deposited the check, and obtained the money thereon for his own use, from the bank, by endorsing his sister's name as her agent, without her authority or knowledge. The mortgage and the note it secured were forgeries: *Held*, the defendant bank was liable to the plaintiff for the amount of the check so endorsed and paid, and the principle upon

which a bank may not be held responsible for cashing a forged check of the depositor where the drawer is at fault, or has received the benefit, etc., has no application.

2. Same—Drawers of Checks—Canceled Montgages—Actions—Reinstatement of Liens—Negligence.

A lender of money upon a forged note and mortgage made the check payable to the supposed mortgagor, and gave it to her brother, who placed it to his own credit in the bank, and he gave the lender his check on the proceeds for a former debt due by himself to the lender and secured by a mortgage on his own land: *Held*, the bank was entitled to credit for the amount of the borrower's check credited back to the lender; and if the lender has canceled the mortgage made by the brother to him, his remedy would be by suit to reinstate his lien.

APPEAL by both plaintiff and defendant from *Webb, J.*, at March Term, 1921, of FORSYTH. (544)

The defendant bank paid and charged to plaintiff's account a check with an unauthorized endorsement. The plaintiff was a lender of money, and one W. B. Byerly, being indebted to him in the sum of $1,000, with interest, and the debt being past due, applied to the plaintiff for an additional loan, out of which the old loan was to be taken up. The new loan was to be $3,000, out of which Byerly was to pay the plaintiff the old loan, amounting, with interest, to $1,065.84.

Byerly stated to plaintiff that he would give as security a deed of trust on 10 acres of land belonging to his sister, Adella Byerly. The plaintiff had the papers drawn and delivered them to Byerly for execution. Byerly brought them back with their due execution certified by a notary public, whereupon the plaintiff made out a check payable to Adella J. Byerly (whose name purported to be signed to the deed in trust) for $2,848.15 (having deducted from the loan certain fees and costs), and gave the said check to W. B. Byerly, to whom the loan had been made.

W. B. Byerly occupied offices across the hall from the plaintiff, and was associated in the real estate business with one Sid Venable, who had been in jail about a real estate transaction. There was evidence that Venable came over to the plaintiff to get the check, and was present in plaintiff's office when the check was drawn and was handed to W. B. Byerly. The plaintiff's partner, H. O. Sapp, lived near W. B. Byerly and his sister, Adella J. Byerly.

W. B. Byerly presented the check to bank, where he had long had his account, endorsed "Adella J. Byerly, by W. B. Byerly." The proceeds of the check ($2,848.15) were placed to the credit of W. B. Byerly on 5 August, 1919, and were subsequently drawn out on his order. On 6 August, 1921, a check for $1,065.84 from W. B. Byerly

back to plaintiff was deposited with the bank by plaintiff and paid. At no time did Adella Byerly apply to plaintiff for a loan or come to his office, and there was no communication between them, although she lived only a short distance. The loan was to W. B. Byerly, and the security he offered of a mortgage on his sister's property was a forgery and void.

(545) Adella Byerly testified that she never authorized W. B. Byerly to sign any papers or endorse any checks for her, and that the signature on the check, "Adella J. Byerly," was not written by her, nor authorized by her; that she knew nothing about it, and did not execute the deed in trust in question; that her name is Adella L. Byerly, but that she usually drops the L.; that neither the deed in trust on the land nor the check was signed by her or by her authority or with her knowledge. The notary public who took acknowledgment states that Adella Byerly is not the person who signed and acknowledged the deed in trust before him, and he is of the opinion that the woman who signed and acknowledged the deed in trust was the wife of W. B. Byerly. Thomas Maslin, president of the defendant bank, testified that on 5 August, 1919, before this check of $2,848.15 was put to the credit of W. B. Byerly, he had a balance to his credit of 13 cents, and that out of this deposit check for $1,065.84 was paid and charged to W. B. Byerly, and was credited to the plaintiff.

The court instructed the jury that if they believed the evidence that they should answer "No" to the second issue, "Did the negligence of the plaintiff cause said payment to be made by the defendant bank as alleged in the answer?" To this instruction the defendant excepted. There was no contest that the defendant paid and charged to the plaintiff's account the check described in the complaint, upon the unauthorized endorsement of the payee; that the plaintiff was not indebted to the drawee of said check at the time it was issued, and that the drawee of said check (Adella Byerly) had no information of its being drawn; that the plaintiff, the drawer of said check, received $1,065.84 out of proceeds of said check, and the court so instructed the jury, and, also, that if they "believed all the evidence in the case to answer the issue $1,782.31, with interest from 5 August, 1919."

The defendant excepts because of the instruction as above in regard to the second issue, and the plaintiff excepts because the amount of the payment, $1,065.84, which he received from the bank out of the proceeds of the check, was deducted from the amount of his check paid by the bank under the instruction as to the fifth issue. Both parties appealed.

H. O. Sapp, Swink & Hutchins, and O. O. Efird for plaintiff.
J. E. Alexander for defendant.

CLARK, C.J. The plaintiff having canceled the security he held for the $1,065.84, contends that though he was paid by Byerly's check that sum out of the proceeds of the check which he handed to Byerly he is entitled to recover the full amount of the check which he made payable to Adella Byerly, and which by an endorsement unauthorized by her was paid the bank.

A bank is liable for the payment of a check on a forged endorsement, unless the drawer was guilty of some negli- (546) gence which caused the bank to pay it. "A bank is authorized to pay only to the person designated by the depositor. It cannot charge against the depositor's account an amount paid by it on a forged endorsement of the depositor's check unless such payment is properly attributable to the negligence or other fault of the depositor, or unless the money has actually reached the person who the drawer intended should receive it, or the drawer himself." 7 C.J., sec. 414, p. 686.

In 2 Daniels Neg. Instruments, it is said, as quoted in note 23 to 7 C.J. 678: "Cases have arisen in which checks have been paid on forged endorsements made by the person to whom the drawer delivered the check, mistaking his identity for the one who is designated as payee; and although it be a forgery of the name of the person whom the bank took him to be, it has been considered that the bank should be protected in paying the check because the drawer was in fault in the first instance, and the person who forged the instrument was the person to whom the drawer actually delivered the instrument." We do not think this quotation, however, is in point. For there was no mistake as to the person, W. B. Byerly, to whom the check was paid, which was endorsed "Adella J. Byerly by W. B. Byerly."

We do not think these, and other similar authorities, have a bearing upon this question. The endorsement of the check to the bank was not forged by W. B. Byerly who obtained the money thereon. The check was obtained from the plaintiff by the forgery of a mortgage purporting to be signed by Adella Byerly, and the check procured on such forgery was handed by the drawer to W. B. Byerly, but the check was made payable to Adella J. Byerly. Whether the plaintiff was negligent or not in making a check payable to Adella J. Byerly upon the faith of a forged mortgage purported to be executed by her, and acknowledged before a notary public, who certified that Adella J. Byerly had signed the deed in trust, is not the issue in this case.

The plain fact here is that the plaintiff gave a check, payable to Adella J. Byerly, and that check was paid by the bank, not upon her forged signature, but to W. B. Byerly, a depositor well known to the bank, who endorsed the check "Adella J. Byerly, by W. B. Byerly." It is, therefore, not the case of the payment of a check upon a forged endorsement, but upon a genuine endorsement made by W. B. Byerly, and the defect is not a forgery, for there was none in this respect, but the bank negligently assumed that W. B. Byerly had authority to endorse the paper "Adella J. Byerly, by W. B. Byerly." There was no negligence of the plaintiff shown to justify this negligence of the bank.

Upon the evidence the court properly directed the jury
(547) to answer all the issues in favor of the plaintiff, except as to the fifth issue, as to which he directed the jury to credit the check with the amount of $1,065.84, repaid to the plaintiff out of the proceeds of the plaintiff's check, which had been credited to Byerly.

The amount returned to the plaintiff came out of the proceeds of the check issued to Adella J. Byerly, and, inasmuch as the plaintiff had canceled the mortgage held by him against W. B. Byerly by reason of the forged instrument delivered to him, such cancellation, as between the plaintiff and W. B. Byerly, was a nullity, and his remedy as to so much of the proceeds ($1,065.84) as was repaid to him is to be sought by reinstatement of his lien against Byerly; and if that has been lost by the sale of the property in the meantime to other parties, it is the plaintiff's loss.

As between the plaintiff and the bank the amount of the check paid by it on Byerly's unauthorized endorsement should be credited with the $1,065.84, which was repaid to the plaintiff by Byerly out of the proceeds of the check, for this measures the loss which the plaintiff has sustained by reason of the payment of the check upon the endorsement thereof by W. B. Byerly. The $1,065.84, if lost by plaintiff, has been lost by his acceptance of the forged security.

As to both appeals we find

No error.

Cited: Bell v. Bank, 196 N.C. 237; *Bank v. Bank*, 197 N.C. 533; *Construction Co. v. Trust Co.*, 266 N.C. 653.

M. F. BUTLER v. HOLT-WILLIAMSON MANUFACTURING COMPANY.

(Filed 30 November, 1921.)

1. Evidence—Nonsuit—Trials—Statutes.

Where exception is taken to the refusal of the court to dismiss the action, as in case of nonsuit, both after the close of plaintiff's evidence and after the defendant's evidence has been introduced, only the exception taken after the close of all the evidence will be considered on appeal, under the express provision of C.S. 567, and, so considered, the evidence must be accepted as true and construed in the light most favorable to the plaintiff.

2. Principal and Agent—Damages—Scope of Agency.

The principal is only bound by such acts of his agent as are within the scope of the duties the agent owes him and which he has been authorized to perform, and none other, though the agent may have therein acted with the intent to benefit his principal.

3. Same—Special Police—False Arrest—Night Watchman.

The responsibility of defendant for damages for false arrest and imprisonment of the plaintiff, in his action for damages, by a night watchman, whose duties to the defendant were confined to a certain area within an enclosure at defendant's mill and settlement, and for whom the watchman had been deputized as a special policeman, does not extend beyond the area restricted on the defendant's premises, and an arrest beyond them is not within the scope of the employment of the watchman, or within the scope of his duties to the defendant.

4. Same—Evidence—Nonsuit—Trials.

Where there is evidence tending to show that defendant's night watchman was employed to perform his duties only within a certain enclosure at the defendant's mill; that he had also been deputized by the town authorities to act for defendant as special policeman; that he had arrested the plaintiff at a remote place on the mill settlement property, where he was not authorized by the defendant to guard, and caused his incarceration in the city jail; that the case was dismissed by the justice of the peace for the lack of evidence and the plaintiff finally discharged: *Held*, a question for the jury in plaintiff's action for damages for false arrest and imprisonment, of whether the defendant's night watchman was acting within the scope of his employment at the time; and a motion as of nonsuit upon the evidence was properly denied.

5. Appeal and Error—Objections and Exceptions—Instructions—Special Requests.

Where the trial judge has assumed to charge upon a principle of law arising under the evidence in the case, he must do so in such way as not to cause prejudice to the appellant's right by an omission of material matter necessary for a comprehensive understanding by the jury of the principle laid down for their guidance, without the necessity of a proffered prayer for special instruction.

6. Same—Special Police—Principal and Agent—Night Watchman.

Where, in an action for damages for false arrest and imprisonment, the defendant, a cotton mill corporation, resists liability upon the contention,

with supporting evidence, that the arrest was made by its night watchman beyond a certain enclosure wherein his duty to it was solely to have been performed, and upon a remote part of the mill settlement; and it appears that this watchman had been officially deputized by the town to act as a special policeman for the defendant, a general instruction resting defendant's liability upon whether the watchman acted within the scope of his employment, as such, without particularizing the law applicable to the defendant's evidence, is reversible error.

APPEAL by defendant from *Daniels, J.*, and a jury, at
(548) the April Term, 1921, of CUMBERLAND.

It is not necessary to set out all the evidence. So much is stated as is necessary to explain the questions presented.

The plaintiff brought suit to recover damages for false arrest and imprisonment. Evidence for the plaintiff tended to show the facts to be as herein stated. The defendant corporation was engaged in manufacturing cotton cloth in the city of Fayetteville. On 3 August, 1920, about sunset, the plaintiff went to Charles Maultsby's store, which was situated near the defendant's mill, to see Maultsby on a matter of business. Soon afterward he started home, and followed
(549) a footpath which led through a field over defendant's land on which the defendant's operatives lived; but this path did not extend through the enclosed mill property. On the way the plaintiff met Ed. Mazingo, the defendant's night watchman, who inquired where the plaintiff was going, and to the plaintiff's answer that he was going to the street, replied, "You can go with me." Plaintiff and Mazingo walked to the street and stopped, and Mazingo asked plaintiff whether he knew any one there, and was referred by plaintiff to Cato Salmon. The two thereupon went to the Holt-Morgan mill and had a conversation with Salmon, in which Mazingo said he had arrested the plaintiff "down the path." A policeman was then called, and the plaintiff and Mazingo went with him in a car to the courthouse, thence to the police station, and the plaintiff was placed in a cell, where he remained about an hour. The plaintiff then gave bond to appear at the trial the next morning, and was released from custody. Upon the hearing the court held the evidence to be insufficient, and the plaintiff was discharged. Mazingo was defendant's night watchman when the arrest was made, and had no warrant; he was not acting as policeman of the city, and was not on the payroll; but the mayor had sworn him in as special policeman to serve the defendant as night watchman.

Evidence for the defendant tended to show the facts to be as follows: Mazingo had been employed by the defendant as night watchman, and had served in this capacity about four years; there was a wire fence eight or ten feet high inclosing defendant's mill, warehouses, and

yard, and it was Mazingo's duty to stay inside this inclosure, to keep watch on the boilers, and to see that no one interfered with any property inside the fence. Mazingo's instructions, given him by the defendant's superintendent, limited his authority to the inclosure, and he exercised no authority outside the fence, and had not done so during his four years service. He had been sworn in as a special policeman of the city of Fayetteville, and had a badge which had been given him by the chief of police. The defendant did not request that he be sworn in as a special policeman, and knew nothing about it. Mazingo was instructed by the city authorities to serve anywhere in the city as policeman. He had made arrests in the city off the defendant's property, and in no case had he made an arrest as night watchman. On the night this plaintiff was arrested, Mazingo was not acting as night watchman; he was off duty, and John Stevens had taken his place. Mazingo arrested the plaintiff, who was on a cement tile in the weeds near a woman's house, because he had been told by two or three people that a man of suspicious conduct had gone there. At the time of the arrest the plaintiff told him he was trying to ascertain whether Overton was going to see a certain woman who lived nearby. After the plaintiff had been taken to police headquarters, a warrant was "written out."

The issues as to the wrongful arrest, and as to compensatory damages were answered in favor of the plaintiff, and (550) the defendant appealed.

Bullard & Stringfield and H. L. Brothers for plaintiff.
Oates & Herring and Sinclair, Dye & Clark for defendant.

ADAMS, J. First at the close of the plaintiff's evidence, and afterward at the conclusion of all the evidence, the defendant made a motion to dismiss the action as in case of nonsuit. Exception was duly entered to the court's denial of each motion. By the express terms of the statute the defendant has the benefit only of the latter exception. C.S. 567; *Riley v. Stone*, 169 N.C. 423. Therefore, all the evidence introduced at the trial must be accepted as true and construed in the light most favorable to the plaintiff. *Rush v. McPherson*, 176 N.C. 562.

The evidence introduced by the plaintiff tended to show that the mayor of the city of Fayetteville had administered the official oath to Mazingo, who was to serve the defendant, not the city, in the dual capacity of night watchman and special policeman; that on the evening of 3 August, 1920, the plaintiff, while on the defendant's premises, was arrested by Mazingo without a warrant, restrained of his

liberty in the mill office, carried thence in a car by Mazingo and a city policeman to police headquarters, and there confined in a cell for the space of one hour; that he was then released from custody, having given bond to appear for trial on the day following; and that upon the hearing he was discharged by the court for want of sufficient evidence. The record does not show definitely that the mayor of the city administered the official oath to Mazingo at the request of the defendant, but it does tend to show that Mazingo had served the defendant as night watchman for a period of four years. There was other evidence tending to corroborate the testimony of the plaintiff concerning the circumstances under which the arrest was made. While we express no opinion as to its weight, we hold that the evidence was sufficient to justify his Honor in declining the defendant's motion.

It is not necessary to discuss all the other exceptions entered of record for the reason that one instruction which his Honor gave the jury entitles the defendant to a new trial. In the argument here the defendant emphasized the contention that if Mazingo in fact made the arrest he did so without the defendant's knowledge or authority, and that there was no evidence of ratification. Whether Mazingo, at the time of the arrest, was acting in the capacity of special policeman for the city, or in the capacity of night watchman for the defendant was a question directly relevant to the defendant's contention. If he made the arrest while purporting to act as night watchman, whether he was acting within the scope of his au-
(551) thority, likewise, became a vital question. The defendant insisted that Mazingo had no authority to perform any duty or to do any act on its behalf outside the wire fence which inclosed the mill, the dyehouse, and the warehouses; and that as the arrest was effected outside this inclosure, the defendant was not liable in damages to the plaintiff.

His Honor delivered his charge to the jury just before the midday recess, and, upon reconvening the court, recalled the jury and gave the following additional instructions, which are numbered merely for the purpose of convenient reference:

1. "I am not sure that I made the statement to you that I intended to make in connection with the rest of my charge, and that was this: that if the arrest was wrongfully made by Mazingo and made about the company's business and within the scope of his employment, and if you are satisfied by the greater weight of the evidence, then you will answer the first issue 'Yes.'

2. "I intended in that same connection to tell you that if Mazingo made the arrest as night watchman, and while in the per-

formance of his duty to the company, and within the scope of his employment, that would be a wrongful arrest, but before you can answer that issue 'Yes,' you would have to determine whether he was doing it about the company's business and within the scope of his employment. You will take this in connection with the rest of the charge I gave you.

3. "In other words, I called you back because I could not remember whether I told you that it would be a wrongful arrest for Mazingo to arrest the plaintiff if he was then acting as night watchman; that would make it wrongful, because as night watchman, according to his own contention, or the contention of the defendant, he had no right to make an arrest outside of the mill inclosure. You will take that in connection with the rest of my charge."

To the paragraphs numbered two and three the defendant excepted.

All the evidence of the defendant directly relevant to the question tended to show that Mazingo was employed to do certain work inside the wire fence, and not elsewhere; that he was not engaged to perform any duty for the defendant beyond the defined area; that he had never exercised or pretended to exercise any authority on behalf of the defendant outside this inclosure; that he received his instructions from the defendant, and knew the limit of his authority.

In Labatt's Master and Servant, sec. 2480, it is said: "The terms upon which a special policeman is appointed are usually such as to limit the exercise of his powers to a certain area. For wrongful arrest made by him at a place which was clearly outside that area, in respect of an offense previously committed, the party at whose request he was appointed cannot be held liable, even though the act was of such a description that, if the element of locality were abstract, the aggrieved party would have been entitled to re- (552)
cover." And in Wood's Law of Master and Servant: "The question usually presented is whether, as a matter of fact or of law, the injury was received under such circumstances that under the employment the master can be said to have authorized the act, for if he did not, either in fact or in law, he cannot be made chargeable for its consequences, because, not having been done under authority from him, express or implied, it can in no sense be said to be his act." Sec. 279.

The question is discussed by Walker, J., in *Daniel v. R. R.*, 136 N.C. 517, in which are cited a number of the leading decisions. Upon a review of these authorities his conclusion is this: "It may then be gathered from the books as a general rule, which is clearly applicable to the facts of this case, that if the servant, instead of doing

that which he is employed to do does something else which he is not employed to do at all, the master cannot be said to do it by his servant, and, therefore, is not responsible for what he does. It is not sufficient that the act showed that he did it with the intent to benefit or to serve the master. It must be something done in attempting to do what the master has employed the servant to do. *Mitchell v. Crasweller,* 76 E.C.L. 246; *Limpus v. L. G. C. Co.,* 32 L.J. (Exch.) 34. Nor does the question of liability depend on the quality of the act, but rather upon the question whether it has been performed in the line of duty and within the scope of the authority conferred by the master. The facts of this case do not bring it within the principle."

Mazingo testified that he was employed to serve as night watchman in the inclosure; to stay within it; to "look out for the boilers"; and to see that no one interfered with any of the inclosed property. His testimony was corroborated by that of the defendant's superintendent.

The arrest was made on a remote part of the defendant's property outside the inclosure. If, then, the jury should find the facts to be as contended by the defendant, it is obvious that Mazingo was not acting within the scope of his authority when he made the arrest.

In paragraph three of the instructions referred to his Honor expressly told the jury that the arrest was wrongful if made by Mazingo as night watchman, and at the same time permitted the jury, in response to the instruction in paragraph two, to pass upon the question whether Mazingo as night watchman was acting within the scope of his authority, without applying the instruction to the defendant's version of the evidence.

Without having tendered a written request, the defendant was entitled to the further instruction that if the jury should find from the evidence that Mazingo was employed to do certain work inside the inclosure, and not elsewhere, as contended by the defendant,

(553) and, laying aside this work, he went outside the inclosure and made the arrest a considerable distance away, particularly at the instance of Royall or Brock, they should answer the issue in the negative, because in that event he would not be acting within the scope of his authority.

In *Real Estate Co. v. Moser,* 175 N.C. 259, it is said: "The instruction given is correct as far as it goes, but the judge failed to state the defendant's contention and to instruct the jury that the defendant had a right to withdraw his proposition under certain conditions, and what those conditions were. Even without a specific in-

struction 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. High Point Co.,* 144 N.C. 299; *Lea v. Utilities Co.,* 176 N.C. 514.

His Honor's omission to instruct the jury more definitely upon the law and the evidence relative to the scope of Mazingo's authority was evidently prejudicial, and entitles the defendant to a

New trial.

Cited: S. v. Thomas, 184 N.C. 760; *Construction Co. v. R. R.,* 185 N.C. 48; *Butler v. Mfg. Co.,* 185 N.C. 251; *Bank v. Yelverton,* 185 N.C. 321; *S. v. O'Neal,* 187 N.C. 25; *S. v. Melton,* 187 N.C. 482; *Gallop v. Clark,* 188 N.C. 192; *S. v. Bost,* 189 N.C. 643; *Richardson v. Cotton Mills,* 189 N.C. 655; *Jarrell v. Cotton Mills,* 189 N.C. 837; *Kelly v. Shoe Co.,* 190 N.C. 410; *Milling Co. v. Hwy. Comm.,* 190 N.C. 699; *Mehaffey, Admr. v. Construction Co.,* 194 N.C. 720; *Wilkie v. Stancil,* 196 N.C. 796; *Parrish v. Mfg. Co.,* 211 N.C. 11; *Snow v. DeButts,* 212 N.C. 124; *Ryals v. Contracting Co.,* 219 N.C. 494.

H. H. GROVES ET AL., V. J. WHITE WARE ET AL.

(Filed 30 November, 1921.)

1. Guardian and Ward—Clerks of Court—Summons—Personal Service on Ward—Valid Process—Statutes.

Where a guardian *ad litem* has been duly appointed to represent a party to an action under disability, the court will protect his interest, and though our statute specifies that a summons must be served on such person, no practical harm would result therefrom to the ward where a guardian *ad litem* has been appointed, and he accepts the service of the summons and presumably performs his statutory duties; and the proceedings will not be declared void as to the ward when such has been done. C.S. 451.

2. Guardian and Ward—Disability—Insane Persons—Clerks of Court—Appointment—Certificates—Public Institutions—Statutes— Evidence.

The certificates of the superintendents of hospitals for the insane, which are to be received as sufficient evidence for the clerk of the Superior Court to appoint a guardian for an insane person, etc., when duly sworn to and subscribed before the clerk of the Superior Court, notary public, etc., C.S. 2286, relates to the superintendents of such hospitals under gov-

ernmental control, and do not include within the meaning of the statute superintendents of private institutions of this character, and the appointment by the clerk of guardians *ad litem* on their certificates is void.

3. Constitutional Law—Statutes—Trial by Jury—Insane Persons — Disability—Statutes—Guardian and Ward—Inquisition of Lunacy.

The constitutional provision preserving the right to a trial by jury, Article I, section 19, applies only to cases in which the prerogative existed at common law or by statute at the time the Constitution was adopted, and C.S. 2287, requiring that only six freeholders shall be summoned to inquire into the sanity of the person alleged to be insane, is constitutional, not requiring a jury of twelve.

4. Insane Persons—Disability—Statutes—Inquisition of Lunacy—Partition—Ratification—Deeds and Conveyances—Statutes.

Where the clerk of the court has unlawfully appointed a guardian *ad litem*, upon insufficient evidence, in proceedings to partition land, and thereafter the ward has been adjudged sane under the proceedings of C.S. 2287, the ward may ratify the division of land allotted in the proceedings by receiving the benefits thereof, and executing interchangeable deeds with the other parties.

APPEAL from a judgment of *Shaw, J.*, rendered at cham-
(554) bers in the city of Charlotte on 7 November, 1921, overruling the defendant's demurrer to the complaint, from GASTON.

The following is a concise statement of the plaintiffs' allegations; L. F. Groves died leaving a last will and testament, in which he named as devisees his widow, Sarah E. Groves, and his sons, H. H. Groves, L. C. Groves, E. E. Groves, and Forest M. Groves. H. H. Groves and L. C. Groves duly qualified as administrators with the will annexed of the estate of said L. F. Groves, and thereafter entered upon the discharge of their duties as such administrators. Forest M. Groves had been, and at that time was, confined in the Westbrook Sanatorium in or near the city of Richmond, in the State of Virginia, which is a private sanatorium for the treatment of insane persons and others suffering from nervous and mental disorder. After said administrators had qualified, Dr. James K. Hall, who was in charge of said sanatorium, certified that Forest M. Groves was of insane mind and memory, not capable of managing his financial affairs, and that the said Groves was confined in said sanatorium. Thereafter, application was made to the clerk of the Superior Court of Gaston for the appointment of a guardian for Forest M. Groves, on the ground that said Groves was insane, and the clerk, after notice to said Groves, issued letters of guardianship to E. E. Groves, who took the required oath and qualified as the guardian of said Forest M. Groves. After said E. E. Groves had been appointed guardian, a special proceeding was instituted before the

clerk by Sarah E. Groves, widow, against H. H. Groves, L. C. Groves, E. E. Groves, and E. E. Groves as guardian of Forest M. Groves, for the allotment of the widow's dower in the real estate of her deceased husband, and upon report of the jury allotting dower, said report was confirmed by said clerk. Subsequent thereto an *ex parte* proceeding was instituted by H. H. Groves, L. C. Groves, E. E. Groves, and Forest M. Groves by his guardian, for the partition of the real estate claimed by said devisees as tenants in common, and upon the report of commissioners appointed for the purpose of making such partition, a decree was entered by said clerk confirming the report of said commissioners, and the land was accordingly partitioned among said tenants. After this partition was made, H. H. Groves and his wife conveyed the land, or a part of the land allotted to H. H. Groves, to the defendants, J. White Ware, J. E. Simpson, and J. A. Estridge, at the purchase price of $26,000, which was secured by a deed of trust. J. E. Simpson paid as a part of the purchase price $8,666.67, and the defendants Ware and Estridge refused to complete their payments on the ground that said land had not been legally partitioned, in that E. E. Groves had not been legally appointed guardian for said Forest M. Groves, and that Forest M. Groves had not been personally served with summons. A petition was filed by E. E. Groves for the purpose of having said Forest M. Groves declared sane, and afterward a jury was summoned to inquire into the sanity of said Forest M. Groves, who, after investigation, made report that Forest M. Groves was no longer insane, but was of sound mind and memory, and capable of managing his own affairs. Thereafter, on 8 April, 1921, the clerk of the Superior Court made an order confirming the report of said jury. After this order of the clerk had been made Forest M. Groves tendered to Sarah E. Groves a quitclaim deed for all his right, title, and interest in and to the land allotted her as dower, reserving his rights as remainderman in the same, and tendered also a quitclaim deed to the defendants Ware, Simpson, and Estridge for the lands conveyed to them by H. H. Groves and wife, and, in addition, a quitclaim deed to L. C. Groves and E. E. Groves for the land allotted to them. The widow and the tenants in common have tendered quitclaim deeds to each other, mutually releasing to each other the interest which each tenant had in the land allotted to the other tenants. H. H. Groves endorsed to the Groves Mill Company, Inc., of Gastonia, the note executed as evidence of the purchase price of the land sold by him to the defendants Ware, Estridge, and Simpson.

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The defendants filed a formal demurrer to the complaint, which is as follows: "The defendants demur to the complaint herein on the

grounds that the same does not state a cause of action, particularly in that the said Forest M. Groves was not legally served with summons nor legally brought into court, and that the proceedings for his restoration to a normal and mental condition are not legal, and that the said H. H. Groves and wife cannot deliver to the defendants Ware, Estridge, and Simpson a good, legal, and indefeasible title to the lands which were conveyed by the said H. H. Groves and wife to the said Ware, Estridge, and Simpson, and that the said H. H. Groves has no legal right to collect the purchase money therefor."

(556) Judge Thomas J. Shaw heard the argument at chambers in the city of Charlotte on 7 November, 1921, and rendered judgment overruling the demurrer. The defendants excepted, and appealed to the Supreme Court.

Mangum & Denny for plaintiff.

J. W. Timberlake for the defendants Ware, Estridge, and Simpson.

Clarence N. Austin for Forest M. Groves.

ADAMS, J. The legal propositions upon which the demurrer is based are these: (1) Forest M. Groves was not personally served with summons; (2) the pretended appointment of his guardian is void; (3) C.S. 2287, is unconstitutional. We shall consider the proposition *seriatim.*

C.S. 451, provides that if any defendant in an action or special proceeding is *non compos mentis* he must defend by his general or testamentary guardian, and if he shall have no general or testamentary guardian, and shall have been served with summons, the court may appoint a guardian *ad litem* to defend in his behalf. The requirement of the statute as to the service of a summons on a person who is *non compos mentis* should be strictly observed, but the question here presented concerns the legal effect of a failure to make such service. The guardian *ad litem* accepted service, and presumably performed his statutory duties. In *Matthews v. Joyce,* 85 N.C. 258, Smith, C.J., said: "While, according to recent decisions, jurisdiction over the person of infants is acquired only as in the other cases by the service of process on them, and then it is competent to appoint, in case there is no general guardian, a guardian *ad litem* to act in their behalf and to protect their interests so as to bind them by judicial action, a different practice has long and almost universally prevailed in this State, and this power of appointment has been generally exercised without the issue of process, for

the reason that no practical benefit would result to the infant from such service on him, and the court always assumed to protect the interests of such party, and to this end committed him to the defense of this special guardian." Practically to the same effect is the language of Hoke, J., in *Rawls v. Henries,* 172 N.C. 218: "The facts in evidence strongly tend to show that the proceedings were in all respects regular and that defendant's title has never been open to question; but were it otherwise, and by reason of the fact that summons was not personally served on the minor, our authorities are very uniformly to the effect that the interest of the minor having been presented, and an answer having been filed by his general guardian or guardian *ad litem,* the failure to serve on the minor personally was only an irregularity, to be corrected, if at all, by motion in the cause. *Harris v. Bennett,* 160 N.C. 339; *Glisson v. Glisson,* 153 N.C. 185; *Rackley v. Roberts,* 147 N.C. 201; (557) *Carraway v. Lassater,* 139 N.C. 145; *Carter v. Rountree,* 109 N.C. 29; *Matthews v. Joyce,* 85 N.C. 258. And these authorities are to the effect that, even when properly applied for, an irregular judgment is not to be set aside as a conclusion of law because of the irregularity, but only on a show of merits, and when the complaining party has proceeded with proper diligence."

It is insisted in the next place that the clerk's order appointing a guardian for Forest M. Groves is void, because the clerk had no legal right to make such appointment upon the certificate of Dr. Hall. C. S. 2286, is as follows: "If any person is confined in any hospital for insane persons, in any state, territorial, or governmental asylum or hospital, in this State or any other state or territory, or in the District of Columbia, the certificate of the superintendent of such hospital declaring such person to be of insane mind and memory, which certificate shall be sworn to and subscribed before the clerk of the Superior Court or any notary public, or the clerk of any court of record of the county in which such hospital is situated, and certified under the seal of court, shall be sufficient evidence to authorize the clerk to appoint a guardian for such idiot, lunatic, or insane person."

It was evidently intended by the General Assembly that the certificate of insanity should be received and accepted as evidence only when made by the superintendent of a hospital which is subject to state, territorial, or governmental control, and not when made by the manager or superintendent of a private institution, who occupies no public official position and is not directly subject to governmental supervision. The complaint alleges that Westbrook Sanatorium is a private institution, and for this reason we are of

opinion that the certificate of Dr. Hall was not such as the statute contemplates, and did not authorize the clerk's appointment of the guardian.

The complaint alleges, however, that Forest M. Groves was restored to sound mind and memory, and thereafter ratified the proceedings both for partition and for the allotment of the widow's dower. The demurrer admits this allegation; but the defendants contend that the alleged order of restoration to sanity was based upon a proceeding which is unconstitutional; that the jury was composed of six men, instead of twelve; and that Forest M. Groves was deprived of his property without due process of law. This contention presents the third ground of objection to the complaint.

C.S. 2287, provides that when any insane person becomes of sound mind and memory, a petition in his behalf may be filed before the clerk of the Superior Court of the county of his residence setting forth the facts; whereupon, a jury of six freeholders shall be summoned to inquire into the sanity of the person alleged
(558) to be sane, and if the jury shall find him to be sane, such person may make contracts and sell his property.

The complaint alleges that the fact of Groves' restoration was inquired into and determined by a tribunal created under the provisions of this statute.

It is not necessary to discuss the question at length. That a state cannot deprive a person of his property without due process of law does not necessarily imply that all trials in the state courts shall be by a jury composed of twelve men. *Maxwell v. Dow*, 176 U.S. 603; *Walker v. Sauvinet*, 92 U.S. 92. Nor is the contention of the defendants necessarily determined in their favor by Article I, section 19, of the Constitution of North Carolina. The right to a trial by jury, which is provided in this section, applies only to cases in which the prerogative existed at common law, or was procured by statute at the time the Constitution was adopted, and not to those where the right and the remedy with it are thereafter created by statute. 16 R.C.L. 194. In *Lindsay v. Lindsey*, 45 L.R.A. (N.S.) 914, the Supreme Court of Illinois, in a discussion of the question presented here, said: "On the trial of the case before the county court, a jury of twelve men was demanded and was denied." The statute, as we have said, provided for trial by a jury of six. Upon this question the Court said: "The constitutional provision that 'the right of trial by jury, as heretofore enjoyed, shall remain inviolate,' does not apply. This is not a proceeding according to the course of the common law, in which the right of a trial by jury is guaranteed, but the proceeding is a statutory one, and the statute, too, enacted

since the adoption of the Constitution. There was not, at the time of such adoption, the enjoyment of a jury trial in such a case. In reference to this subject, generally, Judge Cooley, in his work on Constitutional Limitations, p. 319, remarks: 'But in those cases which formerly were not triable by jury, if the Legislature provide for such a trial now, they may doubtless create for the purpose a statutory tribunal composed of any number of persons, and no question of constitutional power or right could arise.' "

The proceeding under section 2287 was not according to the course of the common law, and the constitutional inhibitions do not apply. The judgment overruling the demurrer is

Affirmed.

Cited: McInnish v. Bd. of Ed., 187 N.C. 496; *Hagler v. Hwy. Com.*, 200 N.C. 734; *Wyatt v. Berry*, 205 N.C. 122; *Belk's Dept. Store v. Guilford County*, 222 N.C. 447; *In re Jeffress*, 223 N.C. 275; *Utilities Com. v. Trucking Co.*, 223 N.C. 695; *In re Annexation Ordinances*, 253 N.C. 649; *Kaperonis v. Hwy. Com.*, 260 N.C. 596.

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(559)

MINNIE JORDAN AND HER HUSBAND, J. R. JORDAN, v. INTERURBAN MOTOR LINES, INC., ET AL.

(Filed 30 November, 1921.)

1. Evidence—Expert—Opinion.

Where there is evidence that the negligence of the defendant caused the physical injury to the plaintiff, the testimony of a physician, having qualified as an expert, is competent that following the injury the plaintiff complained of soreness in her side, which he, upon examination, found to have been caused by her ribs there being in a concaved condition.

2. Evidence—Damages—Health—Contradiction.

Where the plaintiff's action is to recover damages for injury to her health caused by defendant's negligence, and a witness in her behalf, on cross-examination, has testified to her having had a "fainting spell" before the injury, tending to show that she was then in bad health, it is competent, upon the redirect examination, for the witness to explain why she, on this occasion, had the "fainting spell," in contradiction of the defendant's contention.

3. Damages—Evidence—Instructions—Profits—Punitive Damages.

In an action to recover damages for an alleged personal injury negligently inflicted by the driver of defendant's motor bus operated for hire,

evidence as to the defendant's profits is harmless, or not prejudicial to the defendant when the charge of the court is correct as to the measure of damages, excludes recovery for punitive damages, and it appears that no profit was derived from the enterprise.

4. Negligence — Evidence — Automobiles — Licenses — Instructions — Appeal and Error—Harmless Error.

Where the defendant's liability for a personal injury depends upon the negligence of one of its drivers of a jitney motor bus for hire, evidence that the driver was without license, if erroneous, is without prejudice to the defendant, where, under the instructions of the court, the jury was excluded from considering it in determining the issues, and the law was correctly charged as to the defendant's responsibility, under the evidence.

5. Appeal and Error—Harmless Error—Instructions—Statutes—Substitution of Words—Negligence.

A substitution of the words "deemed a violation of the statute" for the words "shall be a violation of this section" of the statute regulating automobiles upon the highways, with reference to the defendant's negligence in a personal injury case, is *held* not to be prejudicial to the defendant, or reversible error.

6. Evidence—Negligence—Automobiles—Questions for Jury—Trials.

Held, in this case, there was sufficient evidence to take the case to the jury that the driver of defendant's jitney motor-bus was negligent in not exercising ordinary care in driving between the automobiles on the highway and thus causing a personal injury to the plaintiff in the action.

7. Appeal and Error—Objections and Exceptions—Contentions—Instructions.

Error alleged in the statement by the trial judge of the contentions of the parties must be made in time to allow him to make the necessary correction, or the exception will not be considered on appeal.

8. Negligence—Principal and Agent—Automobiles.

The owners of a jitney motor-bus line for hire are responsible in damages for the actionable negligence of their drivers in causing injury while acting within the scope of their employment.

APPEAL by defendant from *Shaw, J.*, at the March
(560) Term, 1920, of RANDOLPH.

This is a civil action brought to recover damages for personal injuries of the *feme* plaintiff, alleged to have been caused by a collision of her automobile and that of the defendants, which was driven by Earle Murphy, commonly known as Clyde Murphy, the collision being due to the negligence of the said Murphy in driving the defendant's automobile on the road from High Point to Greensboro. As Murphy, who was driving what is known as a jitney-bus, was attempting to pass a Buick automobile, which was standing on the right-hand side of the road, he met the car in which the *feme* plaintiff was riding, and the two cars collided and threw the

plaintiff into the wind-shield of her car, and thence upon the ground several feet away, causing her serious and painful injury. That the plaintiff's car gave the driver of the jitney-bus sufficient space to pass the two other cars in safety, but by careless and even reckless management of Murphy's car by him, the accident occurred.

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

Walter Royal and Hammer & Moser for plaintiffs.
J. A. Spence for defendants.

WALKER, J., after stating the case: 1. There was evidence tending to sustain the cause of action, as alleged in the complaint.

The first objection of the defendant is that the court permitted Dr. Jackson, an expert witness, to testify as to the condition of two of the *feme* plaintiff's ribs, which he said had been concaved by the blow she received in the accident. The *feme* plaintiff testified that she was sore on that side of her body, and, upon examination, the doctor discovered that the ribs were in a concaved condition. The defendant complains that the plaintiff had not first proven that this condition was caused by the accident, but there was ample evidence of this fact, and the testimony of the doctor was, therefore, competent to show what her physical condition was. There is no merit in this exception.

2. The defendant cross-examined the husband of the *feme* plaintiff, who was her witness, and he testified that his wife had fainted once before, and, in order to show what was the cause of her fainting, on redirect examination, the witness was permitted to state the circumstances under which she had the "fainting spell," and we do not see why this was not competent, as the evidence on cross-examination was offered to show that her health had previously been in a frail condition before she received the injuries, and the redirect testimony was in explanation of it. *S. v. Orrell*, 75 N.C. 317; 2d Elliott on Evidence, p. 195; *Smith v. R. R.*, 147 N.C. 607; *S. v. Allen*, 107 N.C. 805 (561)

3. The testimony of Mr. Kirkman, one of the defendants and the owner of the bus, as to the dividends received from his business, was not sufficiently harmful to be noticed, if it was at all prejudicial. The judge absolutely stated what plaintiff must show in order to recover any damages, and then what special damages she could recover, and the jury were restricted in this way, and were not allowed to use the question addressed to Mr. Kirkman as to the profits of his business. There was evidence of recklessness of the driver, and perhaps of wantonness, but his Honor did not permit a

recovery of punitive or exemplary damages, and, even if the court erred in permitting Mr. Kirkman to refer to the dividends of the business, it was surely harmless in view of the strict charge of the judge. But a conclusive answer to this objection is that Mr. Kirkman stated that he had received no dividends since he sold out, and that was in direct response to the question as it was formulated by defendants' counsel, so that there was really no evidence upon the question one way or another, and in this respect it was perfectly harmless.

4. The reference by the court to the fact that Earle (or Clyde) Murphy was driving the jitney without license from the city of High Point was manifestly innocuous, because the plaintiffs were not allowed, under his Honor's charge, to recover anything on that account, or for that reason, but another and more decisive answer to the objection is that the judge was merely stating the allegations of the complaint, or the contentions of the plaintiffs, and in his charge upon the law he gave no heed to this allegation, but based the right of plaintiffs to recover solely upon the negligence of the driver of the jitney-bus, and stated the law correctly in this respect, and the jury could not have acted upon any other ground without disregarding the instructions of the court, and this is not to be presumed.

We recently considered the statute in regard to the speed of automobiles on the public highways of the State and on the streets of cities and towns, in the case of *S. v. Mills*, 181 N.C. 530, and the court charged the jury in this case according to the principles therein stated.

(562) 5. The exception in regard to the substitution of the words "deemed a violation of the statute" for the words "shall be a violation of this section" is without any substantial merit. The jury could not possibly have been misled by the judge's discussion of the statute and his statement of what would be considered as negligence if the requirements of the statute were not observed. There certainly was nothing prejudicial in this part of the charge.

The other exceptions are formal, and need not be considered, except one of them.

If the plaintiffs' evidence in this case should be accepted as true, which was a question for the jury, there was negligence on the part of the driver of the jitney-bus, as the plaintiff gave him sufficient space within which he could safely pass, by the exercise of ordinary care, both the other automobiles, that is, the Buick automobile, which was standing on one side of the road, and the plaintiff's automobile, which had been placed out of his way on the other side, and even off the paved portion of the road.

The sixth assignment of error was taken to the part of the charge of the court in which the judge was stating the contentions of the parties, and, if he did not state them correctly, his attention should have been called to it at the proper time, so that he could make the necessary correction. *McMahan v. Spruce Co.*, 180 N.C. 636; *Spears v. Power Co.*, 181 N.C. 447.

The driver of the jitney-bus was the agent of the defendants, and they were liable, as principal, for what he did which caused the injury to the plaintiff, under the familiar maxim that what one does by another he does by himself, which is but one way of stating the rule that the principal is liable for the acts of his agent if committed within the scope of his authority, and when he is about his principal's business. *Jackson v. Tel. Co.*, 139 N.C. 353; *Flemming v. Knitting Mills*, 161 N.C. 439, and *Rivenbark v. Hines*, 180 N.C. 242.

Upon review of the whole case, we are satisfied that no error has been committed, and we therefore affirm the judgment.

No error.

Cited: *S. v. Beam*, 184 N.C. 744; *Martin v. Hanes Co.*, 189 N.C. 645; *S. v. Johnson*, 193 N.C. 704; *S. v. Sawyer*, 224 N.C. 66; *Hunt v. Wooten*, 238 N.C. 46.

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(563)

MARY ELLMA HAYMAN v. NATHAN M. DAVIS.

(Filed 30 November, 1921.)

1. Contracts—Action—Breach—Quantum Meruit.

Where the daughter has contracted with her father to work his farm and take care of him for life, and after many years of such duty the father has moved from the farm, and his conduct has prevented the daughter, without her consent, from further performing her agreement, the latter may not maintain her action to recover the land, the consideration to be given her for her work and care for the period of her father's life; but the law will imply his promise to pay for the services she rendered before his breach, such amount as they were reasonably worth, if she sues, as in this case, before his death.

2. Same—Pleadings—Remedies—Election.

Where the complaint sets forth a contract that a daughter will take care of her father during his life, and also alleges that, after years of such service, he has breached his contract so as to render it impossible for her to perform her part in order to get full compensation thereunder: *Held*, upon demurrer, the allegations of the complaint will be liberally con-

strued, and in effect it is an abandonment of her action on the special contract and an election to sue for the reasonable worth of the services the daughter has actually rendered.

3. Pleadings—Surplusage—Cause of Action—Dismissal.

While the rules of pleading require that redundant allegations should be omitted, the courts will give them a liberal interpretation and not dismiss the action on that account, if by disregarding surplusage it appears that a good cause of action has been stated.

4. Same—Demurrer—Surplusage—Contracts—Quantum Meruit.

A demurrer to a complaint, in an action to recover the reasonable worth of services rendered in consideration of the defendant's promise to will the plaintiff certain land at his death if she would perform specified services during his lifetime, which he failed to perform, admits the truth of these allegations; and where it appears from an interpretation of the complaint that the plaintiff, during defendant's life, after the latter had rendered further performance by the former impossible, elected to sue to recover the reasonable worth of the services already rendered, an allegation that the plaintiff was ready to receive a deed for the land will be considered as surplusage, as she was not entitled to the land until he died, and had elected to sue for the value of her services before that event occurred.

5. Remedies—Contracts—Quantum Meruit—Election.

Where plaintiff seeks to enforce a special contract to will the plaintiff property for services rendered, and damages are sought to be recovered on a *quantum meruit* at the same time for its breach, the remedies are inconsistent, and the plaintiff is put to his election between the two.

APPEAL by defendant from *McElroy, J.*, at the July Term, 1921, of RANDOLPH.

This is a civil action, brought by Mary Ellma Hayman against Nathan M. Davis, who is her father, on a *quantum meruit* for services rendered to said Nathan M. Davis, covering a period of twenty-two years.

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The complaint alleges that the defendant contracted and agreed with the plaintiff that if she would live with him, take care of him, do the cooking, washing, mending, and work in the house and field, as a dutiful daughter, he would give her the tract of land she was, and is now, living on, and that said tract of land should be the consideration for her services.

That Nathan M. Davis, after the plaintiff had lived with him and cared for him for twenty-two years, and fully performed her part of the contract, breached the said contract by leaving the premises referred to and by refusing to let plaintiff take care of him and carry out her contract, as alleged in the complaint.

The defendant demurred *ore tenus* to the complaint. The court sustained the demurrer, and signed judgment dismissing the action, and plaintiff appealed.

Brittain, Brittain & Brittain for plaintiff.
J. A. Spence for defendant.

WALKER, J., after stating the case: The plaintiff contended that, as there was no evidence taken at the time of the trial, the Court could pass only upon the allegations of the complaint, and it held, and so adjudged, that the plaintiff had not stated a sufficient cause of action. This, the plaintiff insists, was error. There was consent on the part of both the plaintiff and defendant, and if the defendant breached the contract in such a way as to make it impossible for the plaintiff to carry out her contract, as was contemplated at the time of making the contract, and this was done by the defendant without consent of the plaintiff, the former became liable for the services already rendered before the breach in such amount as they were reasonably worth.

The plaintiff alleges in her complaint that she served her father according to the terms of their contract for many years in the house and in the field, where she did a man's work, and by doing so she impaired her health, so that she is not now able to work and labor, as she formerly could, and has thereby diminished her capacity to earn a living. That her father broke the contract by leaving her alone and without the ability to further serve him and continue performance of the contract, so that she can get the full amount of compensation promised to her, and while she does not clearly abandon the special contract, that is, in so many words, the effect of the pleading is, when it is liberally construed, as it should be, that her father has rendered full performance of the contract impossible by his conduct, and, therefore, she elects to treat (565) it as abandoned and fall back upon her right to recover for her services their reasonable value.

The demurrer admits the truth of the allegations of the complaint, the substance of which we have stated. The mere fact of her being ready to accept a deed for the land in full satisfaction should be treated as surplusage, or unnecessary, for she is not entitled to a deed at this time, and if the contract had been kept, not until her father's death, as the stipulation was that she should work for him during his lifetime, and he is still living, and she was not to get the land until he died. She cannot, of course, have the land and full compensation for her services, and, besides, she has no present right of action for the land, but she does allege that defendant, by his conduct, has prevented her from performing the contract, and she asserts her right to damages for such breach, and specifically asks for the value of the services performed by her and for any other amount

to which she may upon the facts be entitled because of such breach by the defendant.

The general rule is that though performance by one party of a part or the whole of his promise may be a condition precedent to the liability of the other party to perform, still his failure to perform will not discharge the latter, if the latter prevented performance. In such a case the party so prevented is discharged from further performance, and may recover damages for the breach or recover on the *quantum meruit* for his part performance. Clark on Contracts (Ed. 1904), p. 468. As we said in *McCurry v. Purgason,* 170 N.C., at p. 469: "The law implies a promise by the party to pay for what has been thus received, and allows him to recover any damage he has sustained by reason of the breach, for this is exact justice." If, when a contract is made of such a character that a party actually received labor or materials, and thereby derived a benefit and advantage, the labor actually done and the value received furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such service to him. This may be considered as making a new case — one not within the original agreement — and the party is entitled to "recover on his new case" for the work done — not as agreed, but yet as accepted by the defendant. *Britton v. Turner,* 6 N.H. 492 (26 Am. Dec. 713). That case (*Britton v. Turner*), says Judge Dillon in *McCray v. Hedge,* 18 Iowa 66, has been criticized, doubted, and denied to be sound, yet its principles have been gradually winning their way into professional and judicial favor. It is bottomed on justice and is right upon principle, however, it may be upon the technical and more illiberal rules as found in the older cases. The case of *McCurry v. Purgason, supra,* goes fully into the law on this subject, where the terms of the contract were strikingly similar to those we have here,
(566) and cites the authorities in this and other jurisdictions. We there said: "The complaint and evidence in this case indicate that plaintiff is suing upon the theory that she could not perform her part of the contract by reason of the testator's conduct, and that her withdrawal from the home place was caused thereby. She seeks to recover, not the price or measure of value fixed by the contract for her services, but on an implied assumption to pay for the actual services rendered what they are reasonably worth. It was said in *Tussey v. Owen,* 139 N.C. 457, at pages 461-462: 'There is a class of cases where, under some circumstances, the rigor of the common-law rule has been relaxed, and a person has been permitted to recover the actual value of his services, although failing to perform the entire contract on his part. In some cases the law implies

a promise to pay such remuneration as the benefit conferred is really worth.' *Dumalt v. Jones,* 23 How. (U.S.) 220. But we know of no authority to support the claim that the plaintiff could recover the full contract price, unless she had performed the contract." This plaintiff has not failed to perform her part of the contract, as was the case in one of the decisions cited, but has, on the contrary, been free from any blame. The *McCurry* case so fully covers the law of this one that we refrain from further discussion in regard to it.

The complaint should have complied more formally with the rule of pleading, that superfluous matter should be omitted, but it is entitled to a liberal interpretation. *Blackmore v. Winders,* 144 N.C. 215; *Brewer v. Wynne,* 154 N.C. 467. Following this rule, and discharging what is immaterial, we conclude that the complaint does substantially state a cause of action on a *quantum meruit.* The judge will, no doubt, permit the plaintiff to amend her pleading, so as to state the cause of action with greater legal accuracy, if so desired, though amendment is not absolutely essential.

The demurrer should have been overruled, and the defendant allowed to answer over.

As the plaintiff is suing on a *quantum meruit,* she thereby renounces all right to recover on the special contract. She is not entitled to recover on both causes, as they are inconsistent remedies, and, therefore, she is required to make her election between the two.

Error.

Cited: Shore v. Holt, 185 N.C. 313; *Harney v. Mills,* 189 N.C. 728; *Eaton v. Doub,* 190 N.C. 16; *Smith v. Smith,* 190 N.C. 766; *Hwy. Com. v. Rand,* 195 N.C. 804; *Harrison v. Sluder,* 197 N.C. 78; *Lipe v. Trust Co.,* 207 N.C. 796; *Barron v. Cain,* 216 N.C. 284; *Goldston Bros. v. Newkirk,* 233 N.C. 432; *General Metals v. Mfg. Co.,* 259 N.C. 713.

(567)

HENRY VANN v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 30 November, 1921.)

1. Railroads — Negligence—Evidence—Automobiles—Crossings—Nonsuit —Questions for Jury.

Where there is evidence that the defendant railroad company has left its track in an unsafe condition at a public crossing, and the plaintiff was injured in consequence while attempting to cross at night in an automobile, the issue as to defendant's actionable negligence should be submitted to the jury, and its motion as of nonsuit thereon is properly denied.

2. Evidence—Opinions—Experts — Qualifications — Appeal and Error — Presumptions—Burden of Proof.

Where a witness has testified as an expert upon the trial in the Superior Court, the presumption on appeal, without more, is that he had qualified as such, or he had been admitted as an expert in the matter, or that no question had been made as to his being one; and the appellant, not having shown error, is concluded.

3. Railroads—Negligence—Crossings—Tracks—Presumption of Safety — Contributory Negligence.

Where the negligence alleged in an action to recover damages against a railroad company for a personal injury, under supporting evidence, is that an additional railroad track at a public crossing, then being laid, was left unfinished at night, so that it projected above the crossties to such an extent as to have caused injury to the plaintiff in attempting to cross in an automobile, the opinion of one qualified as an expert, as to how the track should have been constructed, and under the existing conditions is competent evidence.

4. Damages—Railroads—Negligence—Personal Injury—Measure of Damages.

Where there is evidence that the plaintiff, in his action for damages, has been negligently injured by the defendant railroad company so as to impair his judgment and cause pecuniary loss in his management of his affairs, it is competent to show upon the issue of his damages that before the injury he had made and accumulated money, and since, in consequence of the injury, he has become embarrassed in his affairs and deeply involved.

5. Negligence—Contributory Negligence—Pleadings—Burden of Proof.

The defendant must plead and prove contributory negligence when it relies upon it as a defense in plaintiff's action to recover damages for an injury alleged to have been negligently inflicted.

6. Same—Drunkenness—Questions for Jury—Nonsuit.

Where there is evidence tending to show that the plaintiff was drunk at the time he received an injury while attempting to cross defendant's railroad track in an automobile at a public crossing alleged to have been negligently left there at night in bad condition, an instruction leaving it for the jury to say whether the plaintiff was drunk at the time, or whether such condition of the plaintiff caused the injury, is a proper one, on the issue of contributory negligence.

7. Same—Instructions—Rule of Prudent Man.

One who approaches a public crossing in an automobile at night, for the purpose of going across, may assume that the railroad company has kept its track reasonably safe for such purpose, it being required of him to exercise that degree of care and prudence characteristic of the ideally prudent man, which is ordinary care under the circumstances.

8. Same—Proximate Cause—Comparative Negligence.

Contributory negligence to bar the plaintiff's right to recover damages in his action, must be the direct and proximate cause of his injury, and his contribution to his own injury will not prevent his recovery if there

was negligence by the defendant, which, when compared with that of the plaintiff, was the proximate cause thereof. *McNeill v. R. R.*, 167 N.C. 390, cited and applied.

APPEAL by defendant from *Lyon, J.*, at the June Special Term, 1921, of SAMPSON. (568)

This action was brought to recover damages for personal injuries to the plaintiff, alleged to have been caused by the defendant's negligence in keeping its crossing in an unsafe condition.

On 29 August, 1914, the plaintiff and his companions were driving in a Ford automobile from Falcon, N. C., to Fayetteville, N. C., and after darkness had set in, they attempted to cross over the tracks of the defendant, where the public road from Dunn to Fayetteville intersects with the said tracks, a little above the station at Wade. In so doing the automobile was wrecked, and one of the passengers, Randall Pusey, was killed, and the plaintiff was knocked senseless and otherwise injured. There were two tracks on the crossing, one of which was then being laid, and had not been completed, and, as plaintiff alleges, rendered the crossing unsafe, and even dangerous, as the rails were exposed and high above the surface of the ground, and further, the track and its condition could not be seen in time to avoid the injury. The other facts necessary to an understanding of the matter will be found in the reported case of *Pusey v. R. R.*, 181 N.C. 137.

The case was submitted to the jury, under the evidence and the charge of the court, and the jury returned a verdict for the plaintiff. Judgment thereon, and defendant appealed.

Fowler & Crumpler and Butler & Herring for plaintiff.
Grady & Graham for defendant.

WALKER, J., after stating the case: The evidence as to the negligence was somewhat conflicting, and it was, therefore, properly submitted to the jury, and the motion for a nonsuit overruled.

We will consider the exceptions in the order of their statement in the record, and in the brief of defendant.

1. It was competent for the witness, M. O. Ballard, to state whether the crossing was constructed by the correct (569) method, as he was an expert and no question was made as to this fact. An expert, having special scientific knowledge, which fits him to do so, may give his opinion about the particular matter in controversy. We said in *Summerlin v. R. R.*, 133 N.C. 550, at p. 551: "We must infer from the record one of three things: (1) That

there was evidence of the witness's qualification, and that the fact of his being an expert was found by the court; or (2) that he was admitted to be an expert; or (3) that there was no question made in the lower court in regard to it. These inferences must be made because we cannot presume error, and the burden is upon the appellant to show it, and in this Court we must assume that every fact was proved and everything done necessary to sustain the ruling and judgment of the court below, unless it otherwise appears in the record. Nothing appears in this record tending to show affirmatively that the judge committed any error in respect to the matter we are now considering." We do not see why, within the same principle, the testimony of the same witness as to the measurements was also not competent and admissible.

2. The evidence as to plaintiff's present indebtedness, as compared with his sound financial condition when he was injured bore upon his earning capacity, which he alleges was greatly impaired by the injuries he received when the car was wrecked at the crossing. The impairment of his earning ability is shown by the fact that, owing to it, he has fallen behind, and whereas formerly he could and did make money and accumulate it, he is now embarrassed in his affairs and deeply involved.

3. The motion to nonsuit was, as we have said, properly overruled, because there was evidence of negligence fit to be considered by the jury.

4. There was no error in the charge as to contributory negligence. That defense must be pleaded, and the burden to show it is upon the defendant. C.S. 523; *Kearney v. R. R.*, 177 N.C. 251; *Boney v. R. R.*, 155 N.C. 95; and as to reasons for the change in the former rule, *Horton v. R. R.*, 157 N.C. 146, and *Owens v. R. R.*, 88 N.C. 502.

5. The instruction of the court as to the drunken condition of the plaintiff on the evening of the accident was manifestly correct, as the testimony he mentioned in it was all in the case as to such condition, and it was for the jury to say whether or not he was drunk, and his contributory negligence in this respect caused the injuries.

6. The plaintiff might well assume, in the ordinary course of things, that the defendant's crossing was in a reasonably safe condition, and had been kept so by the defendant. This question was directly involved and decided in *Parks v. R. R.*, 124 N.C. 136, when the learned charge of O. H. Allen, Jr., to the jury is considered in connection with the opinion of the Court. The plaintiff surely had the right to expect that defendant had performed its duty

to the public with respect to this crossing. That, of course, (570) did not exempt the plaintiff from the duty of exercising proper care for his own safety, but what was such care on his part must, of course, be determined by a consideration of the assumption he was permitted to make with respect to the condition of defendant's crossing. It will not, we presume, be contended that plaintiff should have assumed that the crossing was in bad condition. All that was required of him was that he should look out for his own safety and exercise that degree of care characteristic of the ideally prudent man, which is ordinary care under the same circumstances. The duty of a traveler on a highway at a railroad crossing is fully discussed in *Johnson v. R. R.*, 163 N.C. 431, with a full citation of authorities, though it may not be so closely applicable to the particular facts of this case as *Parks v. R. R., supra.* But the case of *Tankard v. R. R.*, 117 N.C. 558, is directly in point, as it was there held that while it is the duty of one crossing a railroad in a vehicle to exercise ordinary care for the safety of the animal he is driving, which was injured, he has the right to assume that the railroad company has discharged its duty to the public by keeping the crossing in safe condition.

7. It was obviously right to charge the jury that the negligence of plaintiff, if there was such, would not bar his recovery unless it directly and proximately contributed to his injury. His contribution to his own injury would not prevent a recovery by him, if there was negligence by the defendant which when compared with that of the plaintiff was the proximate cause of his injuries. *McNeill v. R. R.*, 167 N.C. 390, where the doctrine of proximate cause was fully discussed by Justice Allen. Negligence which is merely passive is harmless. It must be active and efficient in producing the injury in order to be proximate to it.

Plaintiff was, of course, entitled to recover damages for his automobile if it was proximately injured by the negligence of the defendant, in addition to damages for the injuries to herself.

The court granted all of defendant's requests for instructions to the jury.

We find no error that was committed at the trial.

No error.

STACY, J., having presided at one of the former trials of this case in the Superior Court, took no part in the present decision.

Cited: Moore v. Iron Works, 183 N.C. 440; *Ramsey v. Oil Co.*, 186 N.C. 741; *Davis v. Long*, 189 N.C. 134; *Cashatt v. Seed Co.*, 202 N.C. 384.

(571)

BOARD OF EDUCATION OF YADKIN COUNTY v. BOARD OF COMMISSIONERS OF YADKIN COUNTY.

(Filed 7 December, 1921.)

1. Constitutional Law—Statutes—Taxation—Trial by Jury — Schools — School Terms.

C.S. 5488, prescribing the procedure in the event of disagreement between the county board of education and the county board of commissioners, as to the amount to be provided by the county for the maintenance of a six months school term, requiring the judge to hear the same and conclusively find the facts as to the amount needed, confers upon the courts duties of a judicial nature, not requiring a trial by jury to determine the disputed matter upon an issue of fact, and the provisions of this section are not void as being repugnant to Art. I, sec. 19, of the State Constitution. *Board of Education v. Board of Commissioners*, 174 N.C. 469, cited and applied.

2. Same—Appeal and Error—State Board of Education — Mandamus — Counties—Apportionment of Funds.

Where a county has levied the full amount of the taxes limited by sec. 4, ch. 146, Public Laws of 1921, it is required by the statute that "it shall receive from the State public school fund for teachers' salaries an apportionment sufficient to bring the school term in every school district to six months"; and where it does not appear that the State Board has acted accordingly in making this apportionment, but has instituted a proceeding to compel by *mandamus* a county to levy an excess of the statutory limitation, the imperative necessity that it should be done in order to meet the requirements of a six months school provided by Art. IX, sec. 3, of the State Constitution does not arise for the determination of the Court.

3. Appeal and Error—Remanding Case—Constitutional Law—Statutes—Schools—Taxation.

Where, in proceedings for a *mandamus* by the county board of education, a county has been ordered to levy a tax for a six months term of its public schools, in excess of that limited for the purpose by statute, it does not appear whether the plaintiff has apportioned to the county the amount it was entitled to receive under the statute; and if so, whether it was sufficient for a six months term required by Art. IX, sec. 3, of the State Constitution, the case will be remanded for further findings in order to properly present the question for the determination of the Supreme Court whether *mandamus* would lie.

APPEAL by defendant from *Lane, J.*, at chambers, 29 September, 1921, from YADKIN.

Civil action in the nature of a proceeding for a writ of *mandamus*, brought under C.S. 5488, to compel the defendant board of commissioners to levy a special school tax of 41 cents on the $100 assessed valuation of the taxable properties and polls in Yadkin County for the year 1921; it being alleged that such rate is neces-

sary to make provision for a teachers' salary fund and to maintain a six months school term in said county, as required by Art. IX, sec. 3, of the Constitution.

From a judgment granting the relief sought, to the extent of requiring a tax of 40 cents on the $100 valuation of (572) all taxable property in the county, the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for plaintiff.

Williams & Reavis, H. P. Grier, and T. C. Bowie for defendant.

STACY, J. The defendant's first exception is directed to the constitutionality of the statute under which this proceeding is instituted, to wit, C.S. 5488. The act is assailed upon the ground that where issues of fact are raised by the pleadings and the findings of the judge are made conclusive, the right of trial by jury is thereby denied. We do not think the statute is repugnant to Art. I, sec. 19, of the Constitution, which provides that "in all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."

The exact question here presented was before the Court in the case of *Board of Education v. Board of Commissioners*, 174 N.C. 469, and the following excerpt from the opinion delivered in that case by Hoke, J., would seem to be decisive of this exception: "We are not inadvertent to the position earnestly urged for defendant that the act providing for a determination of the amount required for a four-months (now six months) school by the Superior Court judge is unconstitutional, in that it attempts to confer legislative powers on the courts, but we do not think the statute is open to such objection. It only empowers the courts to ascertain and determine a disputed fact relevant to a pending issue between the two boards, and thereupon command that the tax be levied accordingly, both the finding of the fact and the judgment thereon being, in our opinion, judicial in their nature. *In re Applicants for License*, 143 N.C. 1 and 6. The tax, however, is authorized, as it should be, by legislative enactment, and is to be levied and collected by the usual and ordinary administrative and executive officers of the county government."

But we do not think the imperative necessity of levying a rate of tax in full compliance with the plaintiff's demand, or that ordered by the judge, is made to appear from the instant record. The defendant has levied a special tax of 30 cents on every $100 valuation of taxable property within the county, and a corresponding tax on every taxable poll for the purpose of raising the necessary teachers'

salary fund; and it is provided in sec. 4, ch. 146, Public Laws 1921, that no county shall be compelled to levy more than such amount, and when this maximum rate has been levied, and the funds derived therefrom are insufficient for the purpose aforesaid, then
(573) "the county shall receive from the State public school fund for teachers' salaries an apportionment sufficient to bring the school term in every school district to six months." It is further provided in section 2 of said act that the State Board of Education shall apportion annually to those counties which are unable to provide a six-months school term, after levying the maximum rate specified in section 4, "an amount to supplement the county funds sufficiently to provide a six-months term for every school in the county." The clear intent of the Legislature would seem to be that when the maximum tax rate of 30 cents on every $100 valuation of property, real and personal, and a corresponding tax on every taxable poll has been levied for this special purpose by the commissioners of the county, and the amount derived therefrom is insufficient to meet the necessary requirements, then the deficiency shall be supplied, if practicable, by the State Board of Education out of the State public school fund.

It was suggested on the argument, and it is alleged in the complaint, that the equitable apportionment, or ratable part, of this latter fund, which the State Board of Education would be authorized in allotting to Yadkin County, together with the local property tax of 30 cents, and a corresponding tax on the poll, is still insufficient in amount to meet the necessary requirement of Art. IX, sec. 3, of the Constitution with respect to a six-months school term. But this question is not before us, as no such finding appears on the record, and we are not disposed to enter upon a discussion of so important a matter until it is presented directly for our consideration.

On the other hand, it appears affirmatively from his Honor's findings of fact that the State Board of Education has refused to make any apportionment from the State public school fund in order to supplement the county funds sufficiently to provide a six-months term for one or more schools in every district in Yadkin County, unless and until the defendant board of commissioners shall levy a tax in accordance with plaintiff's demand. This would seem to be contrary to the statute. At least, we are unable to find authority for the position, there being no valid reason assigned therefor, and it is possible that the State Board of Education, coöperating with the defendant, may be able to meet the deficiency with moneys out of the public school fund, in which event, the present controversy apparently may be adjusted without further litigation.

The method adopted by the State Board of Education in ascertaining the respective amounts which should be apportioned to the several counties out of the State public school fund, while not before us, is no doubt a fair and legitimate one; but this is a separate and distinct matter from the provisions of the Constitution and the law under which the defendant is asked to proceed. It would seem that Yadkin County should be allowed its (574) equitable part of this State fund, regardless of the amount, when it has met the requirements of the statute. Then should the existing tax levy, together with the allotment from the State fund, prove to be inadequate, the defendant may experience the necessity of determining what further means should be employed to meet the exigencies of the situation. But until this occasion arises, we will not undertake to say what policy should be pursued, in the absence of any legislative declaration.

Upon the record and for the want of any sufficient findings of fact to support it, we must hold that the peremptory *mandamus* was improvidently granted; and, if the appeal was intended to present the question as to whether the defendant board of commissioners should be required to levy a tax in excess of the maximum rate fixed by the statute, in the event the constitutional requirement cannot be met in any other way, we must remand the case for additional findings, as the necessity for a ruling on this point is not now apparent.

Reversed and remanded.

Cited: Coble v. Comrs., 184 N.C. 355; *In re Bd. of Ed.*, 187 N.C. 712; *Admr. Unit v. Comrs.*, 251 N.C. 830.

N. M. CHURCH v. VAUGHAN, HEMPHILL & COMPANY ET AL.

(Filed 7 December, 1921.)

1. Judgments—Consent—Estoppel.

A consent judgment, like any other, does not go beyond the matters embraced in the action, to estop other and independent transactions existing between the parties, and not necessary to its determination, or within the scope of the inquiry.

2. Same — Unrelated Judgments — Principal and Surety — Mortgages — Powers—Void Sales.

A surety on a note whose liability was secured by a mortgage given by the maker on his land, attempted to foreclose under the power of sale,

without having paid the note, and thereafter having paid the debt of the maker, judgment was entered by consent of the parties, whereunder a commissioner sold and conveyed to the plaintiff, and the surety was reimbursed from the proceeds. Prior to the entry of the consent judgment, one of the parties obtained by assignment from another and different judgment creditors two judgments taken in unrelated matters: *Held*, the attempted sale by the surety was void, and the party to the action, who had obtained the judgments by assignment, was not estopped by the consent judgment to have execution issue thereunder on the lands.

3. Judgments—Execution—Prior Liens—Purchaser—Notice—Sales—Appeal and Error—Former Appeal.

A purchaser at the sale of land under execution takes with notice of prior registered judgments, and a sale of the lands under execution on these judgments will not be enjoined when the element of estoppel does not exist; nor will the appellant be concluded by the affirmation of the judgment in a former appeal upon which this phase of the controversy was not presented.

4. Same—Waiver.

The agreement in a consent judgment that the commissioner appointed for the sale of the lands of the judgment debtor to reimburse the surety on the note in suit shall convey to the purchaser will not be construed as a waiver by a party of his existing lien under judgments that were independent of and not considered in the proceedings.

APPEAL by defendants from *Ferguson, J.*, at Fall Term,
(575) 1921, of WATAUGA.

By consent, the judge found the facts. This action is for the permanent restraint of the defendants from the sale of land under execution upon two judgments belonging to them, docketed in the Superior Court of Watauga, one for $45.30, and interest, assigned to them by Hancock Brothers Company, and one for $161.15, and interest, assigned to them by Lynchburg Shoe Company. The plaintiff alleges that the defendants are estopped to sell the land in question under said judgments by reason of a sale of the land under a consent judgment and purchase by plaintiff at a commissioner's sale thereunder.

The defendants denied being estopped by said consent judgment, for that said consent judgment did not in any way refer to or embrace the judgments purchased from Hancock Brothers Company, or the Lynchburg Shoe Company. The defendants caused execution to issue on their above judgments, and had the land advertised for sale, whereupon the plaintiff instituted this action for a perpetual injunction, claiming that the defendants were estopped by the consent judgment to sell the land under said judgments.

The court held as a matter of law that notice to the purchaser, the plaintiff, before the payment of the purchase money, had no effect, and that the defendants are estopped by reason of the con-

sent judgment to sell the land under the judgments herein, that such sale and deed would be a cloud on the plaintiff's title, and rendered judgment perpetually restraining the defendants from selling under said judgment the land described in said consent judgment. The defendants appealed.

No counsel for plaintiff.
R. N. Hackett and Charles G. Gilreath for defendants.

CLARK, C.J. J. C. Cook and wife, on 16 February, 1916, executed to the defendants their two notes, aggregating $1,416.31, on which R. F. Greene was surety, to whom Cook and wife gave a mortgage to secure him against loss. Subsequently, said Greene, without having suffered any loss, and without foreclosure proceeding, sold the land in question, and executed a deed to these defendants as purchasers. This sale was premature, illegal, and (576) void, and at Spring Term, 1918, of Watauga, a consent judgment was entered of record, in an action brought by said Cook against these defendants, wherein said sale by R. F. Greene, mortgagee, was adjudged void and set aside, and, R. F. Greene being made a party, it was decreed that the land should be resold by John H. Bingham, commissioner, who was directed to apply the proceeds of said sale to discharge the indebtedness due on said notes, and on payment of purchase money to execute a title in fee to the purchaser. The property, after due advertisement, was sold by the commissioner on 3 June, 1918. The plaintiff, N. M. Church, became the purchaser, and deed was executed to him in fee. Greene had paid the judgments obtained by defendants on the notes to which he was surety, and the resale was to reimburse him.

Before the plaintiff made payment of the purchase money, he was notified by the defendants that they held these two other judgments for $45.30 and $161.15, respectively, which had been docketed 29 January, 1916, and which had been assigned duly on the judgment docket to the defendants on 13 June, 1917, by the plaintiffs in said judgments.

The question presented, therefore, was whether the consent judgment aforesaid is an estoppel upon the defendants to collect the judgments for an entirely different indebtedness, and which had been assigned to them prior to the foregoing consent judgment. The consent judgment, which is set out in the record, shows that the docketed judgments now sought to be restrained were not considered in or affected by the consent judgment for a resale of the lands theretofore irregularly sold by Greene, whose deed to defendants was set aside as void, to reimburse Greene, who had paid off the de-

fendants' other judgments. The agreement therein that the commissioner should make a conveyance in fee to the purchaser upon payment of the purchase money cannot reasonably be construed as an agreement by the defendants herein to waive the lien of these other judgments taken by other parties for an entirely different consideration, and to which Greene was not a party.

The defendants gave the plaintiff full notice, before he paid over the purchase money, that they held the lien of these judgments on the land prior in date to and independent of the claim which Greene had asserted by reason of his having paid off the judgments in favor of the defendants on an entirely different indebtedness. It was the plaintiff's misfortune that he ignored this notice, even if it were incumbent on the defendants to go beyond the legal notice given by the docketing of the judgments.

A consent judgment, like all other judgments, is an estoppel only as to such matters as are therein litigated or "necessarily embraced and determined." *Tyler v. Capehart*, 125 N.C. 64, and citations thereto in the Anno. Ed.

(577) There was nothing in the consent judgment which can be taken as an agreement to cancel the lien of these judgments held by the defendants which were not embraced in, nor connected with, nor referred to in the consent judgment, nor was there any consideration moving thereto.

This matter was before the Court in this same case, *Church v. Vaughn*, 177 N.C. 432, in which we affirmed the order continuing the restraining order to the hearing. It did not then appear fully, as now, that the judgments sought to be restrained were held by the defendants as assignees, and were in nowise connected with or referred to in the consent judgment, nor within its scope.

Reversed.

H. E. HARROLD v. GOOD ROADS COMMISSION.

(Filed 7 December, 1921.)

Roads and Highways—Top Soil—Condemnation—Compensation — Damages—Value of Improvements—Statutes — Legislative Discretion — Constitutional Law.

It is within the discretion of the Legislature to provide whether or not in asserting the damages of the owner of land, taken in condemnation for a public use, the increased value of the land may be considered in reduction; and where his top soil has been taken under the provisions of

a statute, for the use or maintenance of a public road, providing for compensation, and there is no evidence as to the value of the soil so taken, the measure of his damages will be the difference in the value of the land before and after the soil had been removed.

APPEAL by defendant from *Shaw, J.*, at June Term, 1921, of WILKES.

This was a proceeding under ch. 345, Public-Local Laws of 1915, known as the "Wilkes County Road Law." Section 13 thereof relates to compensation for land taken for rights of way for public roads, and provides that where the land is taken for that purpose, if the owner and the road commission cannot agree upon compensation, he may apply to the clerk of the court to appoint a jury of three freeholders to go upon the land and assess the damages, with a right to either party to appeal to the Superior Court.

Section 15 of the act provides that, "If any owner of land . . . from which stone, gravel, soil, sand, clay, or rock, or other material was taken, as aforesaid (for repairing road), shall present an account for the same to the good roads commission or to its superintendent or other duly authorized employee, it shall be the duty of said commission to pay a just and reasonable price for the same"; and further provides the right to appeal to the Superior Court.

Verdict and judgment for $50, and appeal by defendant.

Charles G. Gilreath for plaintiff. (578)
F. B. Hendren and Hayes & Jones for defendant.

CLARK, C.J. Two actions were brought, one under sec. 13 and the other under sec. 15, ch. 345, Public-Local Laws 1915, and were consolidated, thus making two causes of action, but as the evidence, the trial, the appeal, and the assignments of error are all under section 15, we need consider only that cause of action.

Section 15 provides as to the measure of compensation for taking the top soil as follows: "It shall be the duty of said commission to pay a just and reasonable price for the same." There is nothing said about either special or any other benefit being considered, and on an examination of the charge we do not find that the defendant has suffered any damage. The court told the jury, "In determining what would be a fair and reasonable price for top soil, you can take into consideration the quantity of land they scraped off in taking the top soil, how much top soil was taken off, and in what condition did they leave it — whether anything was growing on the land of any value at the time, and also what effect it had on the land in taking that top soil off. You can take all this into consideration in enabling

you to tell what it was reasonably worth, if there was no market value for it, and there is no evidence of any market value." The court also charged the jury, "These witnesses have been permitted to express their opinion about the condition out there, and about how much was taken, and about what effect it had upon the land that was left, and whether it hurt it or improved it. I have also permitted them to express their opinion about the market value of the land before and after, but that is not the test. The test is, What would be the reasonable market value of this top soil, if it had any, and if not, what was the reasonable price for it?"

The court also charged the jury as follows: "In the outset of this case a whole lot of testimony was attempted to be offered whether the building of the road along there improved the plaintiff's property or was any special advantage to the plaintiff's property, but when we got down to the law in the case, these things don't have anything to do with your answer to this issue. Whether it decreased or increased the value of the plaintiff's property, or was any special benefit, or no special benefit, has nothing to do with it."

In *Miller v. Asheville,* 112 N.C. 768, the Court said: "The Legislature, in conferring upon the corporation the exercise of the right of eminent domain, can, in its discretion, require all the benefits or a specified part of them, or forbid any of them to be assessed as offsets against the damages. This is a matter which rests in its grace, in which neither party has a vested right, and as to which the Legislature can change its mind always before rights are settled
(579) and vested by a verdict and judgment." This case was cited and approved in *Phifer v. Comrs.,* 157 N.C. 152. To same purport, *R. R. v. Platt Land,* 133 N.C. 272.

In *Campbell v. Comrs.,* 173 N.C. 501, the Court held that the Legislature, "in conferring the right of condemnation of lands for public use, may, in its discretion, and in compensation to the owner, require all the benefits, or a specified part of them, or forbid any of them to be assessed as offsets against the damage." These cases have been cited and approved in *Lanier v. Greenville,* 174 N.C. 317; *Powell v. R. R.,* 178 N.C. 249; *Elks v. Comrs.,* 179 N.C. 246.

All the above authorities are as to whether the condemnor is entitled to have the benefits, or any part of them, accruing to the landowner to be assessed as offsets to the damages which he may sustain, and it is held that this is a matter which rests solely in the legislative discretion. In the statute before us, Public-Local Laws 1915, ch. 345, sec. 15, there is no such provision, and the defendant, who is the appellant, taking the surface soil under the right of condemnation has no right to complain of the charge of the court in not allowing benefits, if any, to the owner's land to be assessed as offsets.

There being no proof of the market "value of this top soil," if such proof indeed was possible, we think a reasonable construction of the statute and a correct charge would have been that the plaintiff was entitled to recover compensation to be measured by deducting the market value of the spot after the surface soil was taken off, and the market value before this was done. If there was error, therefore, it was against the plaintiff, who is not appealing. Presumably, the amount allowed him by the jury was satisfactory. The defendant cannot complain that allowance for offsets by reason of benefits to the land, if any, were not considered, for the statute does not provide for this, and they could not have been allowed without statutory authority. The defendant cannot complain of the charge as given.

No error.

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(580)

T. W. MANEY v. ROBERT GREENWOOD, T. E. BLACKSTOCKS, AND JOE M. BURLISON, A PARTNERSHIP.

(Filed 7 December, 1921.)

1. Partnership—Evidence.

Held, in this action upon contract, there was sufficient evidence that the defendants were partners, and liable as such, among other things, their contract among themselves, the admissions of some of them, their putting their refusal to pay the contract price upon a different ground than a denial of the partnership, and the admission in their answer of the allegation of the complaint that they were partners, etc.

2. Partnership—Contracts—Lumber—Evidence—Instructions—Trials.

In an action to recover the contract price of merchantable and sound lumber, bargained, sold, and delivered to the defendant partnership, an instruction of the court placing the burden of proof on plaintiff to show that he had delivered the lumber to the defendants according to his contract was correct, there being evidence to sustain the verdict.

3. Partnership—Undisclosed Partner—Liability.

A partnership liability on a contract by one whose name is not signed thereto may be established upon competent evidence in an action thereon for the purchase price of goods sold and delivered, with the burden of proof on the plaintiff, that such person was in fact a partner in the enterprise.

4. Same—Contracts—Principal and Agent.

Where one partner enters into a contract in behalf of the partnership, without the signatures thereto of all the partners, and it is established on the trial that they were all partners in the enterprise, they will all be

bound by its terms, through those who have, with the proper authority, signed the agreement in their behalf.

5. Trials—Parties—Witnesses—Comment of Counsel—Court's Discretion—Appeal and Error.

Where a party to an action does not go upon the stand to prove or disprove material facts within their knowledge, remarks of opposing counsel to the jury as to their failure to have done so are allowable in the discretion of the trial judge, and where it does not appear that he has not abused this discretion, his action in allowing them to be made is not reviewable on appeal.

6. Contracts—Acceptance in Part—Liability.

Where the defendant has contracted to accept lumber of a certain kind, he is liable for that part he has actually accepted under the terms of his contract, both that expressly and impliedly accepted.

7. Instructions—Interpretation—Connected Whole—Unconnected Parts.

The instruction of the court upon the trial of this action to recover for lumber sold and delivered, laid down the correct rules of law for the guidance of the jury, properly construing the charge as a related whole, and not as to its unconnected parts.

8. Same—Appeal and Error—Harmless Error.

In this action to recover for sound merchantable lumber sold and delivered under a contract, an instruction that the defendant could not reject "any," if some of it was of the required kind, is held to mean that "all" could not be rejected if some of it was of that kind, it appearing, under a proper interpretation of the charge, as a connected whole, that this was the intention of the judge, and that the jury could not have been thereby misled, but that they so understood the charge from the context.

APPEAL by defendants from *Shaw, J.*, at the August Term, 1921, of YANCEY.

This action was brought to recover the price of timber,
(581) bargained and sold to the defendants, at their request, from plaintiff's land, and also damages for the use of certain lands occupied by them as a sawmill yard for sawing and storing timber cut from other lands. Only one issue was submitted to the jury, as follows:

"Are the defendants, or any one or more of them, and if so, which ones, indebted to the plaintiff, and if so, in what amount? Answer: 'Yes, all three, to the amount of $2,212.78.'"

Judgment upon the verdict, and defendants appealed.

Gardner & Hamrick and Watson, Hudgins, Watson & Fouts for plaintiff.

Charles Hutchins and A. Hall Johnston for defendants.

WALKER, J., after stating the case: The question in this case turned largely upon whether the defendants were partners in the

transaction upon which the plaintiff declares. There was more than ample testimony to show that they were such partners. The defendant Joe M. Burlison signed the contract along with the plaintiff, and agreed to take and pay for the timber or logs which were merchantable, and which would saw out sound lumber. The codefendants, Greenwood and Blackstocks, if they were partners of Burlison would, of course, be responsible equally with him. The following are some of the facts tending to establish the copartnership between the defendants: The instrument executed by Greenwood and Blackstocks to Burlison some time after the contract was made, the signature of Burlison and Blackstocks to the note and the statement of Blackstocks that they were partners at the time this contract was made and the conduct of the partners, especially when plaintiff demanded his money, and lastly the most significant fact is the admission of the partnership by defendants in paragraph one of the answer in this action.

1. There was an abundance of evidence to warrant the jury in finding that Greenwood and Blackstocks were partners with Burlison, and certainly enough to go to the jury, and the jury has so found. Greenwood and Blackstocks did not refuse to pay the plaintiff on the ground that they were not partners with him, but stated that the logs did not come up to the contract, and Blackstocks said that the reason Burlison signed his name to the note was that they were partners "over there" at that time, and this is reinforced by the conveyance from Greenwood and Blackstocks to Burlison and other proof of the partnership, as, for instance, the admission in the answer, as above noted, that the three composed the partnership. There is no substantial merit in this exception.

2. The court charged the jury that the burden of proof was on the plaintiff to show that he had complied with the (582) terms of the contract in every respect, and there was also evidence by the witness agreed upon by the plaintiff and defendant to do the measuring of the logs, that he had scaled out all defects and left the logs so that they would saw out sound lumber. Taking the charge of the court altogether, it shows that it was absolutely fair to the defendants.

3. The court stated the contentions of the plaintiff as to the partnership, and also charged the jury that if plaintiff had shown by the greater weight of the evidence that, though Blackstocks and Greenwood may not have signed the contract, they were really interested with Burlison, as partners, in the logs conveyed by the contract, that they were going to manufacture them together, and thus engage in the joint enterprise, and that Burlison only represented them, then, and in that event, not only would Burlison be respon-

sible to the plaintiff, but the other two defendants would be liable to him for all merchantable logs plaintiff delivered to the defendant's yards, the designated place of delivery, provided plaintiff complied with his contract.

4. Counsel do not state enough of the charge of the court to show just what the judge meant when he said that the defendants had not gone on the stand, and when the charge is read, as to this point, it will be seen that the court was giving the contentions of the defendants, and that it was not necessary for them to go upon the stand, since they contended that the logs were not up to the contract. But if defendants failed to prove material facts which they could have shown by their own testimony, their failure to become witnesses was the subject of fair comment. *Goodman v. Sapp,* 102 N.C. 477; *S. v. Turner,* 171 N.C. 803; 16 Cyc. 1062; *Powell v. Strickland,* 163 N.C. 393.

5. It was not denied that the defendants sawed a portion of the logs into lumber, and, of course, this was an acceptance of a portion of the logs, at least, and the court was warranted in so charging to this effect.

6. The court charged the jury that Burlison could not reject all of the logs, but only such part as came up to the contract he would have to take. This was the correct rule of law applicable to the case.

7. There is nothing in the charge to sustain this exception, and the same has been fully answered in the remarks above. When all the charge is taken and construed together, as it should be, the rule of law was correctly laid down by the court.

8. We can see no error in this exception. The court charged the jury, at all times, that the burden of proof was on the plaintiff to satisfy them by the greater weight of the evidence that he had complied with the terms of the contract, which had been offered in evi-
dence, before they could answer the issue in favor of him,
(583) and if he failed to satisfy the jury by the greater weight
of the evidence, they should answer the issue against the plaintiff.

That part of the charge, as to accepting a part of the timber being equivalent to an acceptance of all, was evidently meant to be confined to the merchantable timber, or such as complied with the description of the contract, and it was not intended to say that an acceptance of the merchantable timber would bind the defendants to take the whole lot whether of that kind or not. We could not possibly attribute any such meaning to the very learned and accurate presiding judge, and, besides, the context discloses the real meaning to be that defendants were bound only to take the timber,

which was of the kind they contracted to receive and pay for, and could not reject "any" if some of it was of that description, the word "any" being palpably used for "all," and the jury could not, as intelligent men, have otherwise understood the language of the court, even though the phraseology may not have accorded with the highest and best standard of expression. The charge must be taken and construed as a whole, in the same connected way it was delivered to the jury, and we must not trust to mere conjecture that they may, perhaps, have misunderstood, and thus have been misled, but it should clearly so appear before we can reverse for that reason. It would not be fair to the judge to select only one isolated passage in his instructions, but each clause should be considered in the light of what precedes and follows it, so that we may look at the charge in its entirety. This has always been the rule here and elsewhere, for it is the essence of reason and justice. *S. v. Exum,* 138 N.C. 599; *Kornegay v. R. R.,* 154 N.C. 389; *In re Hinton's Will,* 180 N.C. 206, 213.

As to the failure of the defendants to take the stand as witnesses in their own behalf, the case of *Goodman v. Sapp,* 102 N.C. 477, furnishes a full answer to this objection, but as this practice does not seem to be well understood, we will refer more particularly to some of the authorities. The power and duty of the court to check counsel when abusing his privilege in commenting on witnesses and their testimony, and on the conduct of parties to the action, is clearly settled by many decisions. Very soon after the change by statute, allowing parties to actions to testify, it was adjudged that the mere fact that a party, plaintiff or defendant, did not testify in his own behalf was not the proper subject of comment. In *Devries v. Phillips,* 63 N.C. 53, the court was asked to charge the jury: "That inasmuch as the defendant was a competent witness, the fact that he did not offer himself as a witness in his own behalf, authorized the jury to presume the facts against him. His Honor declined to give the instruction, but charged the jury that they might consider the circumstances and give to it what weight they might think proper." In commenting on this ruling, Reade, J., said: "It (584) is true, as a rule of evidence, that when, in the investigation of a case, facts are proved against a party which it is apparent he might explain, and he withholds the explanation, the facts are to be taken most strongly against him." . . . "We conclude that the fact that a party does not offer himself as a witness, standing alone, allows the jury to presume nothing for or against him, and can only be the subject of comment as to its propriety or necessity in any given case, according to the circumstances, as the introduc-

tion or nonintroduction of any other witness might be commented on." In *Gragg v. Wagner,* 77 N.C. 246, but three persons were present at the bargain and execution of the deed in controversy — the plaintiff, the draftsman, and the defendant. The two former were examined on behalf of the plaintiff. The defendant was not present, but was in the State of Oregon, and it was not alleged that he knew the facts other and different, in connection with the execution of the deed, from those testified to by the witnesses present, and counsel was not permitted to comment upon the fact that he had not offered himself as a witness. The Court held that it is the privilege, and not the duty, of a party to an action to offer himself as a witness in his own behalf, and he is not the proper subject for unfriendly criticism, because he declines to exercise a privilege conferred upon him for his own benefit merely. The fact is not the subject of comment at all; certainly not, unless under very peculiar circumstances, which must necessarily be passed upon by the judge presiding at the trial, as a matter of sound discretion. Only an abuse of that legal discretion is reviewable here. *Peebles v. Horton,* 64 N.C. 374; *S. v. Williams,* 65 N.C. 505; *Jenkins v. Ore Co.,* 65 N.C. 563; *S. v. Bryan,* 89 N.C. 531; *S. v. Sugg,* 89 N.C. 527; *Guy v. Manuel,* 89 N.C. 83; *S. v. Rogers,* 94 N.C. 860, and *Chambers v. Greenwood,* 68 N.C. 274, and numerous other authorities, settle the general principle that the extent to which counsel may comment upon witnesses and parties "must be left, ordinarily, to the sound discretion of the judge who tries the case, and this Court will not review his discretion, unless it is apparent that the impropriety of counsel was gross and calculated to prejudice the jury." It was said by Reade, J., in *Chambers v. Greenwood, supra,* that "the mere manner of conducting the trial below is, and ought to be, so much within the discretion of the presiding judge that an alleged irregularity must be palpable, and the consequences important, to induce us to interfere." And this is held in citing and approving *Devries v. Phillips, supra,* where it is stated that his introduction or nonintroduction should be the subject of comment only as the introduction or nonintroduction of other witnesses might be. We think this is the necessary result of the change made by The Code, sec. 1350. It will be noted that there is a difference between The Code, sec. 1350, which relates to civil
(585) actions, and section 1353, which relates to criminal actions. In the latter it is expressly declared that a failure of the defendant to testify "shall not create any presumption against him." The reason for the difference readily suggests itself. The doctrine laid down is not in conflict with *Wilson v. White,* 80 N.C. 280; *Greenlee v. Greenlee,* 93 N.C. 278; *Kerchner v. McRae,* 80 N.C. 219,

or *Blackwell v. McElwee,* 96 N.C. 71. If the defendant in the present case had had any witness present who was cognizant of and could have contradicted the damaging facts testified to, and failed to introduce such witness, we think it would have been the subject of proper comment, and the ruling of his Honor in this respect does not entitle the defendant to a new trial. See, also, *Yarborough v. Hughes,* 139 N.C. 199; *Powell v. Strickland, supra,* and *Stone v. Texas Co.,* 180 N.C. 546.

It seems that *Goodman v. Sapp, supra,* and the later cases approving it, has settled the law in this respect, notwithstanding the varying and not altogether consistent expressions used in some of the previous decisions cited above.

We have examined the record with care, and can find no reason to disturb the verdict of the jury or the judgment of the court below. On the contrary, we are of the opinion that the case has been properly, fairly, and correctly tried, and that the jury drew the right conclusion from the evidence.

No error.

Cited: Gaither v. Clement, 183 N.C. 455; *S. v. Love,* 189 N.C. 773; *Lamborn v. Hollingsworth,* 195 N.C. 353.

JOHN PERRY, JR., v. MARTHA A. AND LUCY U. NORTON.

(Filed 7 December, 1921.)

1. Contract—Parol—Statute of Frauds—Breach — Equity — Damages — Lands.

Upon equitable principles, administered in our courts having jurisdiction of both law and equity, where a contract resting in parol will not be specifically enforced in regard to lands, it is unconscionable for the owner of lands to receive the benefit of permanent improvements made thereon and services rendered in good faith, upon consideration of an agreement to convey them, and not be held to liability therefor upon his pleading the statute of frauds, to the extent that the lands were enhanced in value.

2. Same.

One who has permanently improved the lands of the owner and continued in his service for a comparatively small wage for years, relying upon a parol agreement that the owner would convey the lands in consideration of the permanent improvements and the services thus rendered, upon the happening of a certain event, which the owner has refused to perform under the plea of the statute of frauds, may recover for the

value the services thus rendered, and the increased value of the land by reason of the improvements, though he may not enforce a specific performance of the verbal contract.

3. Same—Judgments—Interest—Statutes.

Where it has been ascertained by the verdict of the jury, upon a trial free from error, that the plaintiff is entitled to recover of the defendant the value of permanent improvements he has put upon the defendant's land under a parol agreement that the latter would convey a part of the lands in consideration thereof, void under the statute of frauds, to the extent that the improvements have enhanced the value of the land, interest is properly allowed in the judgment from the time of the defendant's breach, on the amount ascertained to be due at that time; and objection that the jury may have included the interest in their verdict is untenable when it appears that nothing was said by counsel or court in respect to it, the presumption being to the contrary. C.S. 2309.

ADAMS, J., not sitting.

APPEAL by defendants from *Adams, J.*, at the June Term, (586) 1921, of HENDERSON.

This action was brought to recover damages for improvements made upon land, which defendants promised by parol to convey, but which they failed to do, and for money expended and services rendered in reliance upon said promise so repudiated.

In the case at bar the plaintiff alleges that he had been in the employ of the defendants since he had been large enough to earn his own living, and, in July, 1913, he was offered very much higher wages than the defendants were paying, and he went to defendants and told them that he wanted to serve notice of his leaving their employ. Defendants were so anxious to keep plaintiff that they made him a proposition that if he would not leave and go to the better-paying job they would continue to pay him $40 per month, charge no house rent, and when their large plantation was sold, or they dispensed with his services, they would deed him the cottage and lot he was occupying in lieu of the higher wage he would receive at the other place. He took the offer under consideration, and, on the day following, he went to defendants and told them he had decided to accept the same. He therefore exercised a sole, and even despotic, dominion over the house and lot as his own, building a fence around it and erecting a barn on it, at his own cost and expense, and continued to serve the defendants at the same wage of $40 per month for four years — three of them years of world war — uncertainty and unprecedented inflated prices for living commodities, and labor wages never before heard of — a period in which skilled workmen such as he (a landscape gardener, plumber, and general utility man) were in great demand and earning anywhere from $150 to $300 per

month the country over. For all this period the defendants got this man's services on the same basis — never any change — allowed him to build the barn, and expend his own money (587) in improving the place, believing it to be his, as soon as the plantation could be sold, and when his services to defendants were no longer needed, assured for themselves a permanent supply of skilled labor from him through all the chances and vicissitudes of the war, and then, when the plantation is sold, included the lot and house they had contracted to convey to him with the whole estate, and made no other compensation for the sacrifice of his opportunities, and the benefits that they had received from his hard toil, freely given, and induced by the false promise.

The jury returned the following verdict:

"1. Did the defendants contract with the plaintiff to pay him for his services more than $40 a month, and for the use of the house and lot, as alleged in the complaint? Answer: 'Yes.'

"2. If so, in what amount are the defendants indebted to the plaintiff? Answer: '$1,700.' "

Judgment on the verdict, and defendants appealed.

Ewbank & Whitmire for plaintiff.
Martin, Rollins & Wright for defendants.

WALKER, J., after stating the case: 1. The defendants' first ground of exception is the court's instruction to the jury that the burden was upon the plaintiff to satisfy them by the greater weight of the evidence that the alleged contract was made, and if, upon consideration of all the evidence, the plaintiff has satisfied them that the defendants made the contract upon which he relies, that is, a contract to convey to him the house and lot, to pay him money, and give him the use and occupation of the house and lot, they will answer the first issue "Yes," and further, that it has long been settled by our Court that where the labor or money of a person has been expended in the permanent improvement and enrichment of the property of another by parol contract or agreement, which cannot be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed to take and hold the property thus improved and enriched without compensation for the additional value which his improvements have conferred upon the property and this equity rests upon the broad principle that it is against conscience for one man to be enriched to the injury and cost of another, which was induced by his own acts. *Luton v. Badham*, 127 N.C. 96; *Ford v. Stroud*, 150 N.C. 365; *Ballard v. Boyette*, 171 N.C. 26.

The jury found the facts to be as proven by the plaintiff, and the law has been settled by this Court in a number of well considered cases that the defendants cannot take advantage of the
(588) plaintiff's labor and services, under such an agreement as that set up and proved in this case, and defeat his claim for compensation for the same by pleading the statute of frauds. *Luton v. Badham,* and other cases, *supra.* In *Albea v. Griffin,* 22 N.C. 9, the bill was for specific performance of the contract. The defendants relied upon the statute of frauds, the contract being in parol, and Judge Gaston said that the Court admitted this objection to be well founded, and held, as a consequence from it, that, the contract being void, not only its specific performance cannot be enforced, but that no action will lie, in law or equity, for damages because of nonperformance. But we are, nevertheless, of the opinion that plaintiff has an equity which entitles him to relief, and that parol evidence is admissible for the purpose of showing that equity. The plaintiff's labor and money have been expended on improving property which the ancestor of the defendants encouraged him to expect should become his own, and, by the act of God or the caprice of the defendants, this expectation has been frustrated. The consequence is a loss to him and a gain to them. It is against conscience that they should be enriched by gains thus acquired, to his injury. *Baker v. Carson,* 21 N.C. 381. In *Dunn v. Moore,* 38 N.C. 364, relief was denied because the contract set up in the bill was denied. Nash, J., said that if the defendant had admitted the contract the court would not have permitted him to put plaintiff out "without returning the money he had received, and compensating him for his improvements." Of this Connor, J., said, in *Ford v. Stroud,* 150 N.C., at p. 365, that while in the case at bar the contract is not denied, if it had been, we should not hesitate to follow the decision in *Luton v. Badham, supra,* in which Mr. Justice Furches reviews this and all the other cases, and shows conclusively that the right to relief cannot be defeated by a mere denial of the contract. See the very able and, the writer thinks, conclusive opinion of Smith, C.J., in *McCracken v. McCracken,* 88 N.C. 272. Certainly this cannot be done where the action is for the recovery of the purchase money, as upon an implied assumpsit for money had and received or for money paid for a consideration which has failed.

In *Daniel v. Crumpler,* 75 N.C. 184, Rodman, J., says that the right to recover the purchase money and compensation for improvements against one who had repudiated his parol contract to convey land "stands on general principles of equity." As said by Judge Furches in *Luton v. Badham, supra,* all the cases are based upon this theory. It is doubtful whether, prior to the abolition of the dis-

tinction between actions at law and suits in equity, an action could have been maintained at law for compensation for improvements put upon land by the vendee. The court of equity had granted relief by enjoining the eviction of the vendee by the vendor, who had repudiated his contract, until he had made compensa- (589) tion for improvements. Whatever difficulty was encountered because of technical rules of pleading disappear when forms of action are abolished and a plaintiff recovers upon the facts stated in his complaint and proven upon the trial.

2. As to the defendants' second exception, which is that the court erred in rendering the judgment in favor of the plaintiff and against the defendants for the interest on $1,700 from October, 1917, until paid. Under the contract between the parties, plaintiff's right to compensation for the loss of the house and lot accrued when the defendants sold their plantation in October, 1917, and at the same time sold the house and lot that the plaintiff had labored to acquire for four years. The defendants had received the services for which compensation was due, and the plaintiff had, in addition to these services, expended his money in building fences and a barn on the defendants' lot, which they had contracted to convey to him prior to October, 1917, and the jury "ascertained from the terms and relevant evidence" the amount of the plaintiff's claim, and, under decisions of this Court, the trial judge rendered judgment for interest from the time the plaintiff's right to compensation accrued, to wit, from October, 1917. In this the trial judge simply followed the law as established by the decisions of this Court. *Chatham v. Realty Co.*, 174 N.C. 671. In the case before the Court, there has been more than an adequate default on the part of the defendants in withholding the money belonging to the plaintiff for the value of his services — they have tried to defeat his claim altogether for a period of four years, and still, in the prosecution of this appeal, endeavor to prevent him from reaping the reward of his toil. The statute says that all sums of money due by contract of any kind, excepting money due on penal bonds, shall bear interest, etc., (C.S. 2309). From this it would seem to follow in this State that whenever a recovery is had for a breach of contract and "the amount is ascertained from the terms of the contract itself or for evidence relevant to the inquiry," that interest should be added. *Kester v. Miller*, 119 N.C. 475; *Bond v. Cotton Mills*, 166 N.C. 20.

But this question of interest has been settled by this Court at the present term in *Croom v. Lumber Co., ante*, 217, opinion by Adams, J., where the authorities are collected, which decision also bears somewhat upon the equitable principle we have applied to another

branch of this case. It was argued by the defendants that as the court did not instruct as to giving interest in the verdict, the jury may have done so, and defendants would thereby pay double interest, but we think this cannot be assumed, but that the presumption is the other way, that the jury did not allow interest, nothing having been said by counsel or the court with respect to it. In add-
(590) ing interest, the court was merely complying with the statute and following the precedents in this Court.

It will be noted that in this case the defendants got the benefit of both the labor and money of the plaintiff — his labor in the service of the defendants for four years, and his money in the improvement of the house and lot that they agreed should be deeded to him, but which they conveyed to another in the wholesale conveyance of their large estate.

The defendants' counsel argued strenuously and at some length that the contract alleged and proved was unreasonable and improbable, when, as a matter of fact, the contention of the plaintiff is much more reasonable than to suppose that he would stay with the defendants in 1913, after being offered much higher wages, and then continue to stay on during the three years following, when labor of the commonest sort increased very much in value, and yet, with all this change in opportunities he remained "on the job" until the end, at the same old pay, unless there was some other compelling motive keeping him there, which was his desire honestly to perform the contract, for the breach of which by defendants, and as compensation for his services, the jury found that he was entitled to $1,700, and for this sum the court gave judgment with interest from October, 1917.

We are of the opinion that the learned judge who presided at the trial was right on both points. The first ground upon which rests the verdict, and his judgment, has been settled and established, for many years without much question, and the second is equally as clear, and, moreover, has for its support the authority of a statute, the construction of which cannot now be questioned.

No error.

ADAMS, J., not sitting.

Cited: Sears, Roebuck v. Banking Co., 191 N.C. 506; *Bryant v. Lumber Co.*, 192 N.C. 611; *Knowles v. Wallace*, 210 N.C. 607; *Yancey v. Hwy. Com.*, 221 N.C. 189; *Construction Co. v. Crain & Denbo Co.*, 256 N.C. 127; *General Metals v. Mfg. Co.*, 259 N.C. 713.

D. E. ROBINSON ET AL., V. BOARD OF COMMISSIONERS OF BRUNSWICK COUNTY.

(Filed 14 December, 1921.)

1. Constitutional Law—School Districts—Bonds—Taxation—Burdens and Benefits.

In order to the validity of the laying off of a school district by statute and the issuance of bonds for school purposes it is necessary that the burden of taxation should rest upon the whole district equally, and when some portions thereof are exempt from taxation and receive the benefits, and other portions are taxed without benefit, the act is unconstitutional and void.

2. Constitutional Law—School Districts — General Legislation — Special Acts.

A statute which creates a public school district and allows a bond issue, upon the approval of voters, for its equipment and maintenance, is a local or special act, prohibited by the Constitution, Art. II, sec. 29, requiring that legislation of this character must be by general provision of law.

APPEAL by defendants from *Connor, J.*, at October Term, 1921, of BRUNSWICK. (591)

The plaintiffs are residents and taxpayers of Brunswick, and the defendants are the board of county commissioners of said county.

Ch. 251, Private Laws 1921, entitled "An act to establish a high school district and issue bonds with which to build and equip high school buildings, and to provide for the payment of said bonds and the maintenance and government of said school," was ratified 8 March, 1921.

The court found as facts that at a special meeting of the board of education of that county held prior to 26 February, 1921, said board, by resolutions, established the "Supply High School District," and lines and boundaries thereof, being identical with the boundaries of the high school district established in the above act of the General Assembly; that said high school district was established by said board of education in expectation of the passage of said bill, and it was expressly provided in said resolutions of the board that said district was established upon condition that said bill was passed, and that the bonds and taxes provided there should be authorized by the voters in said district at the election to be provided in said bill; and that in pursuance of said act an election was held in said district, and a majority of voters therein voted for the bond issue and for the tax authorized by said act. It is further found by the court that the board of county commissioners of Brunswick are now about to issue the bonds and levy the taxes provided for in the

aforesaid act, and will do so unless restrained and enjoined in this action.

It is provided in aforesaid act: "Said bonds shall be prepared and issued by order of the board of county commissioners of Brunswick for and in behalf of Supply High School District." It is also found as a fact by the court that said Supply High School District, as established by the resolutions of the board of education and by the aforesaid act of the General Assembly, includes a portion of two townships — Lockwood's Folly and Smithville, in said county. It is also provided in said act: "If at said election a majority of the qualified electors shall vote for high school bonds, the said board of county commissioners of Brunswick shall levy annually thereafter a special tax upon all taxable property in said township for the special purpose of paying the principal and interest of all bonds issued under this act." And it is further provided therein: "In addition to the tax levied to meet the payment of the principal and interest of said bonds, the board of county commissioners of
(592) Brunswick are hereby authorized to levy a special tax upon the taxable property in said high school district for the purpose of defraying the expenses of said high school provided by this act." It is also found by the court that the high school buildings to be erected with the proceeds of said bonds are to be erected "in Lockwood's Folly Township," and all the taxable property in said township is made subject to the tax to be levied for the payment of said bonds and interest on the same; that the district for which said bonds are to be issued does not include all of said township, so much of said township as lies within the corporate limits of the town of Shallotte being expressly excluded from the said district, which further includes a portion of Smithville Township, the taxable property of which is not made subject to a tax to be levied for the payment of said bonds.

Upon the foregoing facts, the court held that the bonds the defendants are about to issue and to levy the tax for should be enjoined and the defendants appealed.

Robert W. Davis for plaintiffs.
Smith & Ruark for defendants.

CLARK, C.J. The proceeds of the bonds in question are to be used for the purpose of erecting a high school building in Lockwood's Folly Township, but the act provides that said bonds shall be issued "for and in behalf of Supply High School District," and said district, as defined in the act and in the resolutions of the board of education of Brunswick County, does not include all of said Lock-

wood's Folly Township, and does include a portion of Smithville Township, while it is provided that the tax is to be levied for the payment of said bonds "on all the taxable property in said township," thus making the property within the corporate limits of the town of Shallotte subject to the tax, though it is expressly excepted from said district, for which said bonds are to be issued, whereas the act expressly excepts from said district so much of said township as lies in said corporate limits, and further provides that said bonds shall be issued for and in behalf of so much of Smithville Township as is included in said district, whereas the property situated in Smithville Township is not made subject to the tax to be levied for the payment of said bonds.

His Honor, upon the above facts, properly enjoined the defendants from issuing, selling, or disposing of the bonds, and from levying any tax or taxes for the payment thereof. *Comrs. v. State Treasurer,* 174 N.C. 141.

Further, the act is objectionable and invalid because it undertakes to establish a school district, and, being a local or special act, it is prohibited under the express provisions of Art. II, sec. 29, of the Constitution. *Trustees v. Trust Co.,* 181 N.C. 306, in
which Hoke, J., speaking for a unanimous Court, construing a somewhat similar act (but without the discrepancies pointed out in this statute) wherein the Legislature attempted to create a graded school district in Robeson County, defining its limits by metes and bounds and authorizing a vote to issue bonds for buildings and equipments held that "A statute which lays off or defines by boundary a certain territory as a graded school district within a county, and provides for an issue of bonds upon the approval of the voters therein, for the necessary buildings and maintenance, comes within the recent amendment to our Constitution forbidding the General Assembly from enacting any local or special act to establish or change the lines of school districts, making them void, and requiring that legislation of this character must be by general provisions of law, Const., Art. II, sec. 29." (593)

The opinion in that case was filed 4 May, 1921, receiving the approval of a unanimous court, and invalidates the act now before us. The discrepancies in this act pointed out in the early part of this opinion may have been due to the fact that it was ratified on the eve of the adjournment of the General Assembly, 8 March, 1921, one of the very last private acts ratified by the General Assembly at that session, and doubtless it did not receive the close scrutiny it should have had.

Affirmed.

Cited: *Galloway v. Bd. of Ed.*, 184 N.C. 247; *Coble v. Comrs.*, 184 N.C. 351; *Armstrong v. Comrs.*, 185 N.C. 407; *S. v. Kelly*, 186 N.C. 375; *Day v. Comrs.*, 191 N.C. 784; *Sanitary District v. Prudden*, 195 N.C. 727; *Glenn v. Bd. of Ed.*, 210 N.C. 528; *Fletcher v. Comrs. of Buncombe*, 218 N.C. 5.

G. C. LAPISH v. DIRECTOR GENERAL OF RAILROADS ET AL.

(Filed 14 December, 1921.)

1. Evidence—Negligence—Contributory Negligence—Nonsuit—Trials.

Where defendant's negligence is the ground alleged for plaintiff's damage to recover for a personal injury, contributory negligence being a matter of defense, cannot be considered upon a motion as of nonsuit upon the evidence.

2. Same—Railroads—Signals—Warnings—Public Crossings.

Evidence that the defendant's train came around a sharp curve without signal or warning while plaintiff was attempting to go around defendant's other train on a different track at a public crossing, and that plaintiff had looked and listened for the train that injured him, but was prevented from hearing its approach by the negligence of the defendant's employee on the train, to give proper warnings, is sufficient to take the case to the jury upon a motion as of nonsuit upon the evidence.

WALKER, J., concurring.

APPEAL by defendants from *Bryson, J.*, at the May Term, 1921, of IREDELL.

This is an action for personal injuries sustained by the
(594) plaintiff when struck by the engine of the Southern Railroad Company, 24 December, 1919, while that company was being operated by the Director General of Railroads.

The plaintiff had left the plant of the Statesville Furniture Company in Statesville about 4:30 p.m. that day on his way to his home in the city, and was going along a path which crossed the railroad track near the station. This path was used by the public generally, there being evidence that about 200 people crossed the track at that point on that afternoon. The railroad track from Charlotte at that point makes a very short curve. The plaintiff, 66 years of age, stepped on the track and walked along the same for a short distance to go around the train which obstructed his crossing, when he was struck from behind by the engine, knocking him from the path, and received serious bodily injury.

There was motion for judgment as of nonsuit, which was overruled, and at the close of the defendant's evidence this motion was renewed and again refused. This is the sole exception presented by the appeal.

John A. Scott, Jr., and Dorman Thompson for plaintiff.
L. C. Caldwell for defendants.

CLARK, C.J. On a motion of nonsuit in an action for negligence, contributory negligence, being a matter of defense, is not to be considered. *Whitesides v. R. R.*, 128 N.C. 229, which has been cited as authority that on evidence such as in this the case should be submitted to the jury. *Holman v. R. R.*, 159 N.C. 46; *Shepherd v. R. R.*, 163 N.C. 521.

According to the plaintiff's testimony, he was seeking to cross the railroad track on his way home from his place of work. He turned up the track to get around a work train on the main or Asheville track, which was blocking his passage. He says he looked around and saw no train on the other or Charlotte track, and stepped upon that, as he saw no train on it and heard no signal or blow; that while on the track for the purpose of going around the standing train he was struck from behind by an approaching train on the other track from Charlotte, which came around a sharp curve, without blowing the whistle or giving other warning, and which was 20 minutes late, and was knocked unconscious. His legs were crippled, and one leg cut half in two; his collar bone was broken, his head was injured, and he was in the hospital several weeks. Witness further stated that he helped build the Statesville Furniture Factory 20 years ago, and has worked there ever since it was built; these railroad tracks were there then, and there was a street across the track, but vehicles do not cross it now, it being used only by pedestrians. He says further, that in going around the train upon the other track he looked back in the direction from (595) which this Charlotte train came and stepped up near the track; that if the train had blown he would have heard it.

The above, in brief, is the substance of the testimony. The plaintiff says there was no signal given or whistle blown. The engineer says there was, and the jury found in accordance with the plaintiff's testimony. The court, at the close of all the evidence, denied the motion for a nonsuit. This was simply a question of fact, and as the evidence on such a state of facts tending to show contributory negligence cannot be considered on such motion, the judgment refusing the motion to nonsuit must be

Affirmed.

WALKER, J., concurring: This case does not present the question so often decided by this Court as to the liability of a railroad company for an injury to a trespasser walking on its tracks, when its engineer has the right to suppose that he will leave the track even up to the last moment when it is too late to save him from injury, the latter, if it occurs, being imputed to his own negligence. Here the plaintiff was walking along the public road and was diverted from his course because his way was blocked by one of defendant's trains. He, therefore, went around the train to get into the street or road again, and had to use the track of defendant in doing so, having looked and listened for trains before entering upon the track and seeing none. The defendant's engine approached him suddenly and without warning, and under circumstances and surroundings requiring notice of its approach to be given. He was not, therefore, a mere trespasser or licensee, but was acting in the exercise of his legal right, and his conduct being induced by the wrongful act of the defendant. The doctrine as to trespassers or licensees on railroad tracks is too well settled to be disturbed, and this decision, as I understand, is not intended to do so, as appears from the Court's opinion. See *Neal v. R. R.*, 126 N.C. 634 (*S. c.*, 128 N.C. 143); *McAdoo v. R. R.*, 105 N.C. 140; *High v. R. R.*, 112 N.C. 385; *Ward v. R. R.*, 161 N.C. 179. These and many other cases have established this doctrine firmly, and placed it beyond any possibility of controversy.

The case was virtually resolved into an issue of fact, both as to negligence and contributory negligence, there being evidence as to both questions. The charge of the court was free from any substantial error, and there is no ground for a reversal. The jury found both issues in favor of the plaintiff, and his right to the judgment has not been successfully assailed.

Cited: *Davis v. R. R.*, 187 N.C. 149.

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(596)

W. F. ROGERS v. CITY OF ASHEVILLE.

(Filed 14 December, 1921.)

1. Appeal and Error—Case—Agreement of Counsel—Writing—Rules of Court.

Where a case on appeal to the Supreme Court has not been settled in conformity with the procedure in such matters, any agreement for extension of time claimed by the appellant must be in writing and signed, as required by Rule 39, 174 N.C. 838.

2. Same—Laches—Stenographer's Notes—Certiorari—Motions.

Where the appellant has failed to file his case on appeal within the time allowed, and files his motion for *certiorari* on the ground that the stenographer at the trial could not transcribe her notes in time owing to her other duties as court stenographer, the reason given is no excuse in law, for the stenographic notes are not indispensable to the settlement of the case.

3. Appeal and Error — Docketing Case — Motion to Dismiss — Record Proper.

Where the case has been docketed in the Supreme Court within the time required, and appellant has moved for a *certiorari*, to which he is not entitled, the case will not be dismissed, but the judgment below will be affirmed if there is no error appearing upon the face of the record as docketed.

PETITION by appellant (defendant) for *certiorari* and motion by plaintiff to dismiss appeal, or affirm the judgment.

Jones, Williams & Jones and Wells & Swain for plaintiff.
George Pennell and J. W. Haynes for defendant.

CLARK, C.J. This is a petition for *certiorari* by the defendant, appellant, upon the following state of facts: The case was tried at April Term, 1921, of BUNCOMBE. Verdict on the issues against the defendant, and judgment. By consent, 45 days were allowed the defendant in which to state and serve case on appeal, and plaintiff 45 days thereafter to serve countercase or exceptions. Subsequently, the plaintiff extended the time for the defendant to serve his case 30 days, making 75 days in all on the expiration of which time the appellant did not have his case ready for service, and the appellee, plaintiff, not agreeing to extend the time further, the appellant docketed the record proper here on 7 November, and when the case was reached asked for a *certiorari*. The appellee, on the other hand, moved to dismiss the appeal or to affirm the judgment upon the record proper.

It is very desirable that cases on appeal should be made up as promptly as possible after the case is tried, while the facts are fresh in the minds of the parties, and there is less probability of a difference in recollection as to what occurred. Under the (597) former practice, before the adoption of the C.C.P., every case on appeal was settled by the trial judge, but the framers of the Code of Civil Procedure, mindful that Magna Carta had placed a "delay of justice" in the same category with "a denial of justice" against which litigants should be equally guaranteed, provided that "cases on appeal" should be settled by the parties or counsel, and

the judge called in only in case of disagreement, thus materially expediting the hearing of appeals by relieving the judge of settling them in many cases, and also fixed 5 days after the adjournment of court as the time in which the appellant must serve his case, and 3 days later for service of countercase or exceptions.

The statute later extended this to 10 days, and still more recently the appellant has been given 15 days to serve the case on appeal, and the appellee 10 days to serve the countercase. It is more than doubtful if this concession to delay was desirable, and has not been productive of much abuse. This Court, recognizing that there might be instances in which a longer time might be necessary, has held valid written agreements of counsel for an extension of time and a more recent statute has permitted the judge, for the first time, to intervene by giving an extension of time to settle the case on appeal when counsel cannot agree on this. This would seem to be the limit to which it would be advisable to extend indulgence in the time for settling cases on appeal.

In this case, by consent, 75 days were allowed, and the only excuse given for the case not being served within that time is that the stenographer was busy in court and could not transcribe her notes within the 75 days. The appellee shows, on the contrary, that for more than half of that 75 days there was no term of court in session during which the stenographer was required in court at all, and further, that even during the time in which court was in session there were many days during which the stenographer's services were not required. But, however that might be, the stenographer's notes are not the compelling and supreme authority as to what transpired during the trial. The judge in charging the jury, always tells them that their recollection, and not that of the court itself, must govern them as to what was the testimony of the witnesses. And in settling the cases on appeal the first authority is that of counsel themselves in agreeing as to what occurred at the trial as to the evidence, as to the charge, and otherwise, and when they do not agree the judge must settle what really occurred.

Efforts have been made heretofore to make the stenographer's notes of higher authority than the agreement of counsel, or even the statement of facts as settled by the judge. But on the very first occasion when this view was advanced the Court held, in *Cressler v. Asheville,* 138 N.C. 485, that when the parties cannot
(598) agree the judge must settle it, saying: "The stenographic notes will be of great weight with the judge, but are not conclusive, if he has reason to believe there was error or mistake. The stenographer cannot take the place of the judge who is alone authorized and empowered by the Constitution to try the cause, and

who alone (if counsel disagree) can settle for this Court what occurred during the trial. . . . Of course, if such notes were conclusive as to the evidence, they should be equally so as to what exceptions were taken and rulings made, and all other matters occurring in the progress of the trial. This would simply depose the judge and place the stenographer in his place for all the purposes of an appeal. All the care taken to secure men of high integrity and impartiality to discharge the functions of the important office of judge of the Superior Court . . . becomes of secondary importance if a stenographer appointed by the clerk of the court, and not the judge elected by the people of the State, is to decide what were the exceptions, rulings, evidence, and other incidents of a trial. Now, as always, these matters must be settled by the judge when counsel disagree. The stenographer's notes will be of valuable aid to refresh his memory, but the stenographer does not displace the judge in any of his functions."

In that case we were guarding against the threatened unnecessary expense of voluminous transcripts of cases on appeal by dumping into them the stenographer's notes. Now we are threatened with, if possible, a greater evil by the opportunity, and indeed the inducement to great delays in appeals by making the settlement of cases for this Court depend upon the convenience or disposition of the stenographers who may or may not have other calls upon their time. If we were to yield to this, then, to paraphrase the language of Johnson in regard to Charles XII, of Sweden, litigants would be

> "Condemned weary suppliants to wait
> While ladies interpose and counsel debate."

This is the fourth time at this term that blame for delays to bring up cases in the time prescribed by statute has been sought to be charged upon the stenographers, to the exoneration of counsel, by alleging the heavy business requirements of stenographers.

We must repeat again that stenographers are a helpful aid, but are not indispensable. They have not been indispensable heretofore, and are not absolutely indispensable now. The calls upon their time cannot be used to increase the expense of appeals by dumping their notes into the transcript, which we refused to permit in *Cressler v. Asheville, supra,* nor to excuse, as has been attempted at this term, delays beyond the statutory time or the time agreed upon by consent, to settle cases on appeal. If the stenographer or stenographers employed, on any given case, cannot reduce the (599) notes so as to state the evidence in a narrative form or within the prescribed time, they must be dispensed with, or a suffi-

cient number of stenographers employed to accomplish the duty of aiding the court, whose records must not be padded, nor delays in appeals inflicted upon litigants, by a plea that the stenographers employed could not do the work in apt time. *Cressler v. Asheville, supra,* has been often cited and approved. *Bucken v. R. R.,* 157 N.C. 444; *Brazille v. Barytes Co., ib.,* 460; *Overman v. Lanier, ib.,* 551; *Skipper v. Lumber Co.,* 158 N.C. 323; *Brewer v. Mfg. Co.,* 161 N.C. 212; *Bank v. Fries,* 162 N.C. 516; *S. v. Shemwell,* 180 N.C. 722; and more immediately upon this point are *S. v. Harris,* 181 N.C. 613, and *Hotel Co. v. Griffin, ante,* 539, and other cases at this term.

Counsel for the plaintiff were liberal in the agreement to extend the time to 75 days, which was two months beyond the statutory time. They deny that they extended it beyond that time, and this Court has uniformly held that when an agreement between counsel is denied it will not be recognized by us unless in writing and filed in the cause, which is the express requirement of our Rule 39, 174 N.C. 838. As stated by us in *Graham v. Edwards,* 114 N.C. 229, and in the cases there quoted, and in the citations to that case, in the Anno. Ed., we must strictly adhere to that rule for the very sufficient reason that we have no means and no disposition to pass upon the relative accuracy of the memory of counsel who can so readily avoid such controversies by complying with the rule.

The motion for *certiorari* must, therefore, be denied. The appeal having been docketed here before the call of the district at this the first term after the trial below, the motion to dismiss must also be denied, but there being no error upon the face of the record as docketed, the judgment below must be

Affirmed.

Cited: S. v. Johnson, 183 N.C. 732; *S. v. Ward,* 184 N.C. 619; *S. v. Palmore,* 189 N.C. 540; *S. v. Westcott,* 220 N.C. 441; *Russos v. Bailey,* 228 N.C. 784.

(600)

I. R. ELAM v. SMITHDEAL REALTY AND INSURANCE COMPANY.

(Filed 7 December, 1921.)

1. Principal and Agent — Negligence — Insurance—Contract—Breach—Damages.

Where an insurance agent or broker undertakes to procure a policy of insurance for another to afford him protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the agreement he has assumed, and he may be held liable for the loss attributable to his negligent default within the amount of the proposed policy he has thus failed to secure.

2. Same—Parol Evidence.

The principle upon which a written contract precludes evidence of prior or contemporaneous parol inducements in contravention of the writing has no application to an action against an insurance agent or broker who has undertaken to procure a policy covering a designated risk, and whose negligence therein has caused the loss complained of.

3. Same—Consideration.

Where the want of the exercise of reasonable care on the part of the insurance agent or broker in procuring a policy of a designated kind has caused loss to the applicant, the undertaking of such agent or broker to procure this class of policy, and the promise of the applicant to take it, is a sufficient consideration to support a binding contract between them.

4. Principal and Agent—Negligence—Insurance—Contracts — Misrepresentation of Agent.

Where a person of mature years of sound mind, or who can read or write signs or accepts a written contract affecting his pecuniary interest, it is his duty to read it, and knowledge of its contents will be imputed to him if he has not negligently failed to do so, these principles, however, are subject to the qualification that he, as a man of reasonable business prudence and in the exercise thereof, has not been misled or put off his guard by the other party to the contract.

5. Same.

Where an application for a policy of insurance on an automobile is for indemnity from loss against accident or collisions, etc., and has been accepted by an insurance agency, and the applicant has been informed by the agent, while presently engaged at his place of business, that he had delivered the policy of the designated kind to the keeper of a garage for him, where he kept his machine; and by his subsequent acts and misrepresentations made to the applicant and others in his hearing, has reasonably induced the applicant to think that the policy was of the kind agreed upon, the failure of the applicant to have read his policy and find that it did not cover the contemplated loss, which occurred within about a week, will not of itself bar his recovery on the contract, the question being for the jury to determine whether he had reasonably acted as a man of ordinary business judgment and prudence under the circumstances.

6. Actions—Principal and Agent—Contracts—Breach—Torts—Contributory Negligence.

The action of the principal against his agent to recover upon the latter's negligently causing loss to the former, within the scope of his duties, may be for breach of contract for faithfulness or in tort for the breach of duty imposed; and if brought in tort, the plaintiff's negligence contributing to the injury will defeat his recovery, but if on contract, for its breach, it will not do so *in toto*, but the plaintiff's contributory negligence will be considered only on the issue as to damages recoverable in the action.

7. Same—Laches of Principal—Principal Misled—Rule of Prudent Man—Evidence—Questions for Jury—Trials.

A party to a contract who has been injured by the breach of the other thereto is ordinarily required to do what a prudent man would do to minimize the loss thereafter accruing and incident to his own breach of duty.

8. Same—Nominal Damages.

The plaintiff sued the defendant, as an agent or broker of insurance, for the latter's breach of contract in his negligent failure to provide him a policy indemnifying him against loss through accident to his automobile, and in procuring a policy which afforded him no protection for the designated loss, which had occurred: *Held*, upon the establishment of the negligence of the plaintiff as the cause of the actual damages sought, only nominal damages will be awarded him for the defendant's failure to perform the duty required of him.

APPEAL by plaintiff from *Webb, J.*, at May Term, 1921,
(601) of FORSYTH.

Civil action to recover damages for failure to procure a policy of insurance protecting plaintiff's automobile in case of collision, etc. At the close of plaintiff's evidence, on motion, there was judgment of nonsuit, and plaintiff excepted and appealed.

Parrish & Deal for plaintiff.

Holton & Holton, Swink & Hutchins, and O. O. Efird for defendant.

HOKE, J. There was evidence on the part of plaintiff tending to show that on or about 31 March, 1919, the plaintiff entered into a contract with defendant company, doing business, among other things, as insurance agents and brokers, to procure a policy of $5,000 on the car of defendant, affording protection against damage by fire or collision or other kind of accident. That shortly thereafter the said agent come to plaintiff, who was at the time presently engaged at his business in a tobacco warehouse, and told witness he had obtained the policy desired, and had left same for plaintiff at the garage with the proprietor, who had put the policy in the latter's

safe. Plaintiff, with a view of then paying the premium, asked for the amount, and was told by the agent, an officer and one of the owners of the defendant company, that plaintiff had 60 days in which to pay the premium, and it appeared that the premium was paid after the accident and after suit was instituted against defendant. That within a week from this time, or near that, plaintiff's car, in a collision, sustained damages to the amount of $1,000, and on application or preparation through the same agent for adjustment with the insurance company which had issued the policy, it was ascertained that the policy did not extend to or cover such damages. There was evidence to the effect further that during the time the policy remained in the safe, and before the injury, when plaintiff's car had a near accident but sustained no pecuniary damage, the agent had assured plaintiff that in any event plaintiff was protected, as the policy he had procured covered risks of that kind, and that on another occasion when the owner of another car was about to procure insurance against accident and collision, through defendant, plaintiff being present, the agent referring to plaintiff said he had a policy of the kind on the car owned by him; and, (602) also, that when plaintiff reported the loss, and it was found on examination that the risk was not covered, the same agent, Mr. Smithdeal, expressed his regret, saying, "Mr. Elam, I misrepresented this to you, and I am just as sorry as you are; I thought you were insured." Upon this, a statement of the facts chiefly pertinent to the inquiry, we are of opinion that the judgment of nonsuit should be set aside and the cause submitted to the jury. It is very generally held that where an insurance agent or broker undertakes to procure a policy of insurance for another, affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the duty he has assumed, and within the amount of the proposed policy he may be held liable for the loss properly attributable to his negligent default. *Rezac v. Zima et al.*, 96 Kan. 752; reported, also, in Ann. Cas., 1918 B, p. 1035; *Thomas v. Funkhouser*, 91 Ga. 478; *Backers v. Ames*, 79 Minn. 145; *Lindsay v. Pettigrew*, 5 S.D. 500; *Criswell v. Riley*, 5 Ind. App. 496; *Reed Mfg. Co. v. Wurt*, 187 Ind. App. 379; *Fellows & Co. v. Gordon & Barnett*, 47 Ky. 415; Mechem on Agency, sec. 1258. In resistance to the application of the principle to the facts of the present record, we are cited to a number of authorities to the effect that a policy of insurance, when issued, is considered as expressing the contract between the parties, and has the effect of shutting off prior or contemporaneous parol inducements and assurances in contravention of the written policy. The position, in proper instances, is very generally recognized, and has been approved in many cases in this

jurisdiction. *Clements v. Ins. Co.*, 155 N.C. 61-62; *Floars v. Ins. Co.*, 144 N.C. 232. But in the instant case the action is not one against the insurance company in which plaintiff is seeking to hold it liable for an obligation not contained in the written policy, but plaintiff sues the agent and broker for negligent failure to perform a duty he had undertaken and assumed as agent, by which plaintiff has suffered the loss complained of, and in our opinion the authorities cited are not apposite to the question presented on the record. It is further insisted for defendant that no cause of action is disclosed because there is no consideration given for defendant's promise, but the better considered decisions on the subject are to the effect that while the agent or broker in question was not obligated to assume the duty of procuring the policy, when he did so, the law imposed upon him the duty of performance in the exercise of ordinary care, and, as a matter of contract, it is said in some of the cases on the subject that the trust and confidence imposed on him as agent afforded a sufficient consideration for the undertaking and carrying out the instructions given. *Crisswell v. Riley, supra,* and in *Reed v. Wurts, supra,* presiding Justice Baume, delivering the opinion, quotes
(603) with approval from 1 Joyce on Insurance, sec. 687, as follows: "If a person voluntarily, without consideration and without expectation of remuneration or reward, agrees to procure an insurance, and actually takes steps in the matter, he is responsible for misfeasance, and if he proceeds to effect a policy, and is so negligent and unskilled that no benefit is derived therefrom, he is liable, although he was not bound to undertake the performance." And it would seem that the promise to take the policy would suffice as a consideration. Again, it is contended that defendant may not be held liable for this loss because of his own negligent default in not ascertaining the contents of the policy and having taken out a policy which would have afforded him the protection he desired. It is an established principle with us, subject to some qualifications not pertinent to this inquiry, that in case of breach of contract, which is definite and entire, or tort committed, it is incumbent upon the injured party to do what reasonable care and business prudence requires to minimize the loss, and for damages thereafter occurring and incident to his own breach of duty no recovery should be allowed the same being regarded as too remote. *Yowman v. Hendersonville*, 175 N.C. 574-579; *Hocutt v. Tel. Co.*, 147 N.C. 193; *Bowen v. King*, 146 N.C. 385; *R. R. v. Hardware Co.*, 143 N.C. 54; 8 R.C.L., p. 442, and it is also held with us, in accord with principles very generally prevailing, that where a person of mature years, of sound mind, who can read or write, signs or accepts a deed or formal contract affecting his pecuniary interest, it is his duty to read it, and

knowledge of the contents will be imputed to him in case he has negligently failed to do so. But this is subject to the qualification that nothing has been said or done to mislead him or to put a man of reasonable business prudence off his guard in the matter. *Clements v. Ins. Co.*, 155 N.C. 61-62; *Floars v. Ins. Co.*, 144 N.C. 233. The latter citing, among the authorities, *Bostwick v. Ins. Co.*, 116 Wis. 392.

In the present case, as it now appears, there are facts in evidence tending to show that plaintiff had the policy in his possession for some little time before the collision, and from reading it he could have ascertained that it did not afford any protection in case of collision. There are facts further to the effect that the policy was not delivered to him personally, but at a time when he was busily engaged in a tobacco warehouse, and same was left for him with the proprietor of the garage where his car was kept, and that several times while the policy was so placed and before the collision things were said and done by the agent giving assurance that the policy gave the protection contracted for, and, on application of the principles stated, we are of opinion that the cause should be submitted to the jury on the question whether the failure to hold an adequate policy is due to plaintiff's own negligence in not reading his policy and taking out one sufficient to protect him. It (604) is ordinarily true that for breaches of duty involved in the contract of agency the principal may sue either for breach of contract for faithfulness or in tort for a breach of duty imposed by the same. 31 Cyc. 1609.

Where, in a case of this kind, the action is for tort, and there is a negligent default on the part of plaintiff contributing to the injury, this would have the effect of defeating the action. But where the action is brought for breach of contract, and that is established, contributory negligence is not allowed to defeat the action *in toto*, but the negligence of the claimant contributing to the injury is not to be properly considered on the issue as to damages. Hale on Damages, p. 68.

In the present case plaintiff has elected to sue for breach of contract of agency causing the damages complained of, and, if this should be established, the cause will be further considered on the question of damages, and if it is made to appear on the facts, as they may be accepted by the jury, that the failure to have an adequate policy affording protection is due to plaintiff's own negligent default in not ascertaining the defect in the policy held by him, and procuring another, in that event the damages would be nominal.

This will be certified that the judgment of nonsuit be set aside and the cause tried by the jury on appropriate issues.

Reversed.

Cited: *Fox v. Ins. Co.*, 185 N.C. 125; *R. R. v. Lumber Co.*, 185 N.C. 234; *Case v. Ewbanks*, 194 N.C. 779; *Burton v. Ins. Co.*, 198 N.C. 501; *Pierce v. Bierman*, 202 N.C. 279; *Boney, Comr. v. Ins. Co.*, 213 N.C. 566; *Meiselman v. Wicker*, 224 N.C. 418; *Bank v. Bryan*, 240 N.C. 612; *Equipment Co. v. Swimmer*, 259 N.C. 74; *Hildreth v. Casualty Co.*, 265 N.C. 569; *Wiles v. Mullinax*, 267 N.C. 395.

C. C. WEESNER v. DAVIDSON COUNTY AND BOARD OF EDUCATION.

(Filed 14 December, 1921.)

1. School Districts—Taxation — Statutes — Elections — Less Than Two Years.

C.S. 5533, requiring that "no election for revoking a special tax in any special tax district shall be ordered and held," within less than two years from the date at which the tax was voted and the district established, "nor at any time within less than two years after the date of the last election on the question in the district," invalidates any election on the question of taxation held within two years after the last election, the second proposition being independent from the first as to "revoking" a special tax in the district, otherwise the second provision would be identical with the first, and meaningless.

2. Statutes—Interpretation—Captions.

The caption of an act may be called in to aid its interpretation only in case of doubt, and not when the legislative meaning or intent is clearly expressed in the body of the act; especially so when the caption has been prepared by compilers and not voted on by the legislative body as a part of the act.

3. School Districts—Taxation — Statutes — Elections — Computation of Time.

Computing the two years period in which an election may be had with regard to taxation in a special school district under the provisions of C.S. 5533, the time should be computed from the last valid election on the subject.

APPEAL by plaintiff from *Webb, J.*, at chambers, 8 August, 1921, from DAVIDSON.

(605)

Civil action to enjoin the levy and collection of a spe-

cial tax in Arcadia School District, Davidson County, upon the ground that the election authorizing said levy was without warrant of law, and therefore void.

Two reasons are assigned for the invalidity of the election: (1) It is alleged that seven persons who voted "For Special Tax" were not legal voters, and therefore ineligible to vote; and (2) that the election was held within two years after a former, unsuccessful election had been held on the same question in the same district.

From a judgment sustaining the validity of the election and establishing the legality of the tax, the plaintiff appealed.

Walser & Walser for plaintiff.
Raper & Raper and J. R. McCrary for defendant.

STACY, J. We will omit any consideration of the first exception, as it involves only a question of fact and, indeed, we consider it immaterial, as will presently appear.

The second exception calls for a construction of C.S. 5533. The plaintiff contends that under this section the election in question is void, because, within two years prior thereto, a similar election was held for the same territory and defeated. It appears from the record that a special tax election was held for Arcadia Township, with the exception of Hill's District, on 9 September, 1919, at which said election a majority of the registered voters did not vote "For Special Tax." Thereafter, on 12 April, 1921, the present election was held for the five districts comprising all the territory of Arcadia Township, with the exception of Hill's District and one family. At this election it is alleged that a majority of the qualified voters cast ballots in favor of the special tax.

It will be observed that both elections were held within a space of less than two years apart. This would seem to be contrary to the statute, which provides: "No election for revoking a special tax in any special-tax district shall be ordered and held in the district within less than two years from the date of the election at which the tax was voted and the district established." And then there is added: "Nor at any time within less than two years af- (606)
ter the date of the last election on the question in the district."

To hold in accordance with the defendant's contention that the prohibition refers only to an election held for the purpose of *revoking* a special tax already authorized, and not to an election, successful or otherwise, held for the purpose of submitting to the qualified voters of the district the question as to whether or not a special tax should be levied, would render meaningless the second clause in the

statute. Again, under this construction, the statute would contain two prohibitions against an election for revoking the tax, and none against an election within two years after it is defeated. It should be noted that the "election" referred to in the second clause is not limited to an election for revoking or abolishing an existing tax; but, by the express terms of the act, it applies to any "election on the question."

The qualifying phrase, "for revoking a special tax," is not brought forward in the second clause; and the use of the word "nor," a disjunctive conjunction or negative connective, would seem to repel the idea of its intended repetition. The second clause is not a duplication of the first, but rather added in contradistinction to it. Obviously it was intended to modify the word "election," and not the words "election for revoking a special tax." In its entirety it would read: "nor shall any election be ordered and held at any time within less than two years after the date of the last election on the question in the district."

His Honor was doubtless misled by the caption, which reads as follows: "Election for abolition not oftener than once in two years." Where the meaning of a statute is doubtful, its title may be called in aid of construction (*Freight Discrimination Cases,* 95 N.C. 434); but the caption cannot control when the meaning of the text is clear. *In re Chisholm's Will,* 176 N.C. 211, and cases there cited. Especially is this true where the headings of sections have been prepared by compilers and not by the Legislature itself. *Cram v. Cram,* 116 N.C. 288. See, also, chapter 73 of the Consolidated Statutes on the subject of "Statutory Construction."

There was an election *on the question,* 9 September, 1919, and the present election was held 12 April, 1921, "within less than two years after the date of the last election on the question in the district." The clear intent of the Legislature was to avoid the multiplicity and frequency of these elections; and we must give effect to each and every part of the statute.

In the instant case, however, it may not be amiss to add that as two years have now elapsed since the election in September, 1919, we see no reason why another election could not be held at the present time, if such be desirable. In computing the two
(607) years, the election held in April, 1921, being within the prohibited period, should be disregarded.

Upon the record and as now presented, we think the plaintiff's application for a restraining order should have been granted.

Error.

Cited: *Barnes v. Comrs.*, 184 N.C. 327; *Story v. Comrs.*, 184 N.C. 342; *Corporation v. Motor Co.*, 190 N.C. 159; *Adcock v. Fuquay Springs*, 194 N.C. 426.

P. C. RUCKER v. W. M. SANDERS.

(Filed 14 December, 1921.)

1. **Contracts—Offer of Sale—Acceptance—Correspondence—Mail — Reasonable Time.**

Where one desiring to purchase shares of stock of the other writes for an offer at the lowest price, a reply, by letter, making the offer implies that an acceptance by letter will be in time.

2. **Same—Acceptance of Terms of Offer—Method of Delivery and Payment.**

An unconditional acceptance of an offer for the sale of stock at a certain price and in accordance with its terms, by correspondence of the parties living at different towns, without stating the method of delivery and payment, does not relieve the owner of his liability for failing to deliver the stock, by a suggestion in the acceptance that the delivery and payment be made by draft on him with the shares attached.

3. **Same—Mutuality of Contract—Remedy.**

Where an offer to sell shares of stock is unconditionally accepted, leaving open the method by which the shares should be delivered to and paid for by the acceptor, the contract thus made is an executory one with mutuality of obligation and remedy.

4. **Same—Duty of Acceptor.**

A prompt acceptance by mail of an offer by mail to sell certain shares of stock at a certain price, without provision for the method of delivery and payment requires of the purchaser only that he act within a reasonable time in finally closing the transaction.

5. **Same—Intention—Agreement of Minds of Contracting Parties.**

The intention of the parties will control in determining whether an acceptance of an offer to sell shares of stock was identical with the terms of the offer, or created a condition not contemplated by the offerer, or upon which the minds of the contracting parties had not agreed; or was merely a suggestion as to how the stock should be delivered by the offerer and paid for by the acceptor.

CLARK, C.J., dissenting.

APPEAL by plaintiff from *Webb, J.*, at September Term, 1921, of GUILFORD.

RUCKER *v.* SANDERS.

Civil action to recover damages for an alleged breach
(608) of contract, growing out of the following negotiations:

On Wednesday, 24 March, 1920, the plaintiff, who resides in Greensboro, N. C., addressed a letter of inquiry to the defendant, who lives at Smithfield, N. C., asking what was the lowest price he would take for his stock in the Jefferson Standard Life Insurance Company. On Friday, the 26th, the defendant answered by mail, saying that he owned 50 shares of said stock, which he would sell for $10,000. On Saturday, 27 March, the plaintiff wrote the defendant as follows:

"Regarding your fifty shares of Jefferson Standard stock that you offer at $10,000, while this is the highest price I have heard of, I will accept it. Just draw on me here at Greensboro with your Jefferson Standard stock attached to the draft, and I will honor same. Please advise me that you have drawn so I will be looking out for the draft."

The following Monday, 29 March, the defendant replied, saying that he had disposed of his stock; whereupon, on 30 March, the plaintiff wired the defendant insisting that the stock be delivered in accordance with his offer.

There was a judgment of nonsuit upon the ground that no enforceable contract had been shown, and, from this ruling, the plaintiff appealed.

Alfred S. Wylie and J. S. Duncan for plaintiff.
King, Sapp & King for defendant.

STACY, J. We think the defendant's motion for judgment as of nonsuit should have been denied. The offer to sell the fifty shares of stock in question for $10,000 was made by mail, which carried with it an implied invitation, nothing else appearing, to accept or reject the offer in like manner, that is, by mail. *Patrick v. Bowman,* 149 U.S. 411; 13 C.J. 300; 6 R.C.L. 611. Where no time limit is fixed, it is generally understood that the offeree must accept within a reasonable time; and we think this necessarily means that he should have a reasonable time within which to accept, in the absence of any revocation by the offerer. *Minn. & St. L. R. Co. v. Columbus Rolling Mill Co.,* 119 U.S. 149; *Lucas v. Western Union Tel. Co.,* 6 L.R.A. (N.S.) 1016, and note; *Litz v. Goosling,* 21 L.R.A. 127, and note. However, this is not one of the mooted questions before us, as the plaintiff's letter of acceptance was forwarded by return mail, and defendant admits that he received it before selling his stock to another.

There is no controversy or difference of opinion between the

parties as to the general rules of law governing the subject of contracts by correspondence; but the defendant contends that the plaintiff's letter of 27 March was not an unconditional and unqualified acceptance of his offer. He says the terms were varied by the direction to draw draft with stock attached; and (609) that such was a condition precedent to plaintiff's acceptance. We think this construction is rather too technical, and might properly be characterized as "sticking in the bark." It is quite certain that if the plaintiff were seeking to avoid his agreement on this ground we would be disposed to hold against him. And if the contract be binding as to one of the parties, it is binding as to both. The defendant's offer was accepted absolutely, without condition, and this resulted in an executory contract, with mutuality of obligation and remedy. *Howell v. Pate,* 181 N.C. 117, and cases there cited.

The difficulty in the instant case arises out of the failure of the parties to distinguish between a condition which goes to the making of the contract and a suggestion relating only to its ultimate performance or execution. Of course, to consummate any kind of a contract there must be a meeting of the minds upon a given subject. An unaccepted offer is not a contract; and, as stated in a number of cases, an acceptance to be effectual must be identical with the offer and unconditional. 13 C.J. 281. But in order for this subsequently intended direction or suggestion to invalidate the acceptance, it should amount to a qualification or condition imposed as a part of the acceptance itself. In other words, it must be construed in the case at bar as a qualified acceptance to the effect that "I will accept your offer; provided you attach stock to draft and draw on me here in Greensboro and advise me so that I can be looking out for same." It will be readily conceded, without debate, that if this latter meaning be the reasonable and natural interpretation of plaintiff's letter dated 27 March, then there was no contract, and the defendant's contention, based upon this assumption, is entirely correct. But, on the other hand, if a contrary purpose were intended, as apparently and evidently it was, and the parties so understood it, we must give effect to the most essential and controlling element of all executory contracts, to wit, the real understanding and intention of the parties. The suggestion or direction made by plaintiff to draw draft with stock attached was not an unusual or unexpected method by which the parties might reasonably have contemplated carrying out the contract; and this lends color to the conclusion that a compliance with the plaintiff's wish, hope, or expressed request, "just draw on me here with stock attached," was not intended as a condition precedent to his acceptance of the defendant's offer. It is

further conceded that the result would have been otherwise had this suggestion not been accompanied by a declaration of unqualified and unconditional acceptance. 39 Cyc. 1199, and cases cited in note.

There is no effort to circumvent or deny the well settled principle that an offer must be accepted in its exact terms in order that a contract should arise therefrom, and any attempt to im-
(610) pose new conditions or terms in the acceptance, however slight, will ordinarily deprive it of any efficacy. *Krentzer v. Lynch,* 122 Wis. 474. But where the letter of acceptance contains a mere suggestion, or request, that payment be made in a certain way, and such request is not in form of a condition attached to the acceptance, it does not amount to an attempt to vary the terms of the offer to sell, and will not defeat an action in proper instances for specific performance, or one for a breach of the contract. *Curtis Land Co. v. Interior Land Co.,* 137 Wis. 341; *Turner v. McCormick,* 56 W. Va. 151.

In the last cited case, the Supreme Court of West Virginia makes the following general observations pertinent to the subject now in hand: "If a man says, 'I accept your offer,' that makes a contract. It assents to all the terms of the offer. What more is necessary? There is a complete *aggregatio mentium.* The acceptance conforms to the offer in every particular. How can a mere request relating not to the making of the contract but to its performance be deemed to change it? Would the acceptor be permitted to excuse himself from performance on the ground of such request? No precedent of that kind has been found. They are all cases in which the proposer, desiring to escape from the consequences of his offer, because somebody else has proposed a higher price than the first asked, seeks to repudiate the transaction and sell to the other party. Property rights are sacred, and should be well guarded by the law; but, when a man has deliberately made a fair contract of sale, he ought not to be permitted to avoid it on some flimsy pretext in order to avail himself of a better bargain. Time and place of payment, when not mentioned in an accepted offer, are fixed by law, and are matters of performance, carrying out the contract, a thing wholly distinct and separate from the making of the agreement. If, contemporaneously with or subsequent to the making of the contract, either party suggest, request, or propose a time, place, or mode of performance different from that agreed upon, that does not of itself effect such change, nor does it cause a breach, giving right of action or rescission to the other party. *Swinger v. Hayman,* 48 S.E. 839."

In *Skinner v. Stone,* 222 S.W. 360, a case practically on all-fours with the one at bar, the Supreme Court of Arkansas holds (as condensed and stated in the syllabus): "A suggestion in the acceptance

of an offer to sell real estate that the purchaser will take care of draft attached to deed sent to a specified bank does not make that method of payment a condition which will avoid the contract if not accepted, but the purchaser must be given the opportunity to pay in money if the seller require it."

In the note following this case, published in 11 A.L.R. 811, the reporter cites two of our own decisions in support (611) of the same position, to wit, *Hughes v. Knott,* 138 N.C. 105, and *Blalock v. Clark,* 137 N.C. 140.

The defendant relies on the case of *Hall v. Jones,* 164 N.C. 199, but we think there is a marked distinction between the facts of that case and those here presented. There the plaintiff Hall annexed to his acceptance the condition that the trade be consummated in fifteen or twenty days thereafter, and asked for a ratification of this change by the defendant Jones. This was not an acceptance in the terms of the offer; and, therefore, amounted to a rejection of it. *Minn. & St. L. R. Co. v. Columbus Roller Mill Co., supra; National Bank v. Hall,* 101 U.S. 43.

Our attention has been called to a number of cases in other jurisdictions, seemingly in support of a different position, but we think the conclusions we have reached, and stated above, is more in keeping with the real purpose and intention of the parties; and it is universally conceded that this should be the guiding star of construction in every case. See 39 Cyc. 1197, and cases collected in note.

Defendant further contends that the plaintiff should not be permitted to maintain this suit because, at the time in question, he was a stockholder and director in the Jefferson Standard Life Insurance Company, and, therefore, under the duty of disclosing to the defendant whatever information he may have had regarding the value of this stock.

There is a sharp conflict in the authorities elsewhere over the question as to whether the relations between a director or officer of a corporation, on the one hand, and the shareholders, on the other, are not of such a fiduciary relation as to make it the duty of the former to disclose the knowledge which he possesses affecting the value of the stock before purchasing same from a shareholder. An interesting and valuable discussion of this subject will be found in 14 A.C.J. 128; *Shaw v. Cole Mfg. Co.,* 132 Tenn. 210; L.R.A., 1916 B, 706, and note; *Dawson v. Nat. Life Ins. Co.,* 157 N.W. 929; L.R.A. 1916 E, 878; *Strong v. Repide,* 213 U.S. 419; 53 L. Ed. 853. And in our own reports, see *Besseliew v. Brown,* 177 N.C. 65, and cases there cited, especially *McIver v. Hardware Co.,* 144 N.C. 478. But we do not think the facts in the instant case call for a decision of this question at the present time. There is no evidence on the

record tending to show that the defendant had any less knowledge of the company's business, or the value of the stock, than the plaintiff. Hence, it does not now appear that any harm has resulted from this alleged circumstance, even if it be open to the defendant.

The judgment of nonsuit will be set aside, and the cause remanded for a new trial.

Reversed.

CLARK, C.J., dissenting: On Wednesday, 24 March, 1920,
(612) the plaintiff, who resided at Greensboro, N. C., inquired by letter of the defendant, who resided at Smithfield, N. C., if he had any Jefferson Standard Life Insurance Company stock for sale, and if so, to name his lowest price. On Friday, 26th, defendant replied by letter that he had 50 shares of said stock, for which he would take $10,000. On Saturday, 27 March, the plaintiff wrote the defendant that he accepted his offer, adding, "Just draw on me here at Greensboro with your Jefferson Standard stock attached to the draft, and I will honor the same. Please advise me that you have drawn, so I will be looking out for the draft."

On Monday, 29 March, the defendant replied that he had disposed of the stock, whereupon, on 30 March, the plaintiff wired the defendant insisting on the delivery of the stock. This constitutes the entire correspondence between the parties with respect to the sale of the stock except the subsequent letter from the defendant of 21 April, 1920, which the defendant wrote explaining why he did not accept the plaintiff's offer to draw on him, and had sold the stock in Smithfield for cash.

21 APRIL, 1920.

MR. P. C. RUCKER, Greensboro, N. C.

DEAR SIR: — Of course you understand that I offered you the stock at $10,000 cash in Smithfield. You have never offered me any cash for my stock, but proposed that I draw on you through some Greensboro bank. You also stated that I might notify you a few days ahead of draft, so that you could arrange with the bank to pay draft in case of your absence. In your first letter you referred to my stock as insignificant in quantity. In your second letter you stated that my price was above the market and rather more than you had ever known any to bring. You might have wired or called me over the telephone. Your attitude and expressions led me to believe that you were indifferent. I had the opportunity on Saturday, and again on Monday following our correspondence, to sell the stock for cash, which I did.

I am very sorry that you are disappointed, but I think that you slept upon your opportunity. You should have called me over phone or wired.

Yours truly,
W. M. SANDERS.

The court held that the letter of the plaintiff of 27 March was not an unconditional acceptance of the defendant's offer in his letter of 26 March, and directed a nonsuit.

The alleged contract being entirely in writing, it was a matter of law for the court to determine whether the correspondence constituted a contract or not. *Spragins v. White,* 108 N.C. 449; *Festerman v. Parker,* 32 N.C. 474; *Young v. Jeffreys,* 20 N.C. 357.

"It is familiar learning that to make a valid sale the acceptance must be in the terms of the offer. 7 A. & E. 125. (613) No special formalities are required, but the offer and acceptance must agree. The buyer has no right to attach any conditions if he proposes to hold the seller upon the original offer." *Hall v. Jones,* 164 N.C. 199.

The offer of the defendant, in letter of 26 March, acknowledges the receipt of the plaintiff's offer to purchase his Jefferson Standard Life Insurance Company stock, says: "I will take $10,000 for it." The plaintiff's answer, on 27 March, to this offer says: "Regarding your fifty shares of Jefferson Standard stock that you offer at $10,000, while this is the highest price I have heard of, I accept it." If the reply had stopped with these words the two minds would have met and the plaintiff would have become the debtor of the defendant, and should by the earliest opportunity have paid his creditor for the $10,000 at his home in Smithfield. But the plaintiff added a material condition to his acceptance by saying: "Just draw on me here at Greensboro with your Jefferson Standard Company stock attached to the draft, and I will honor the same. Please advise me that you have drawn, so I will be looking out for the draft."

This was not an unconditional acceptance, but a material variance. It is true the seller might have complied with this variance, but it is also true that his terms not having been accepted, which clearly contemplated the payment in cash to him, in the prompt and regular course of dealings, at Smithfield, he could disregard it and accept payment of cash at his home from another party which was made him after the receipt of said conditional acceptance of the plaintiff.

This matter of offer and acceptance in dealings of this kind are of hourly occurrence throughout the country, and it is of the great-

est importance that the settled law that the acceptance of an offer must be unconditional shall be kept unchanged. In 13 C.J. 281, the law is thus fully and admirably stated with copious citations in the notes, "An acceptance to be effectual must be *identical with the offer and unconditional.* Where a person offers to do a definite thing and another accepts conditionally or introduces a new term into the acceptance, his answer is either a mere expression of willingness to treat or it is a counter proposal, and in neither case is there an agreement. This is true, for example, where an acceptance varies from the offer as to time of performance, *place of performance,* price, quantity, quality, and other like cases. A promise to give an offer consideration cannot be regarded as an acceptance, nor can a statement that the offeree is *prepared to make arrangements on the terms named.*" If an offer is accepted as made, the acceptance is not conditional.

(614) It is clear from this correspondence that the offer of the defendant meant that he would take $10,000 cash, payable forthwith in Smithfield. The reply of the plaintiff varied this by proposing to make payment to the seller in Greensboro, which was not according to the terms of his offer, but a material variance.

If the seller had complied with the proposed condition, he would have made the bank in Greensboro his agent to collect. There would, of course, have been the risk of the check sent by said bank to the seller being protested, or lost in the mails, or if remitted in cash there would have been danger of theft by the employees of the express company or loss by collision or by train robbers. It is true that these risks might be slight, but they were risks which under the terms of the defendant's offer should have been borne by the plaintiff, whose duty it was to safely convey the $10,000 and pay it over to the seller at his home in Smithfield within the prompt and ordinary course of transmission and payment.

Among the many notes to the above citation from 13 C.J. 281, are the following: "Note 32: When the offer is to buy a horse and the offeree accepts (if he will come for it) there is no agreement." *Fenno v. Weston,* 31 Vermont 345; *Baker v. Holt,* 56 Wisconsin 100. Also, "Where the offer of property for sale says nothing about the place of payment and the acceptor specifies that it shall be made at his residence, there is no agreement, for the offer entitles the seller to payment at his place of residence." See 39 Cyc. 1197, with other citations.

That is exactly the case here. The place of payment not being named, it was, of course, to be made at the residence of the seller in

Smithfield, and the condition annexed by the buyer that he would make payment in Greensboro, and that notice should be given him so that he might be prepared to make payment was a material difference as to which the two minds did not meet, and his Honor properly nonsuited the plaintiff upon that ground. There are occasions when the parties are farther apart than Greensboro and Smithfield. For instance, where the offerer might be in New York and the offeree in San Francisco or New Orleans or London. In such cases the variation by reason of the greater distance and delay would emphasize the variation from the proposal of the defendant and the acceptance of the buyer, but the principle of law involved is the same. It is so important and so universally settled that it should not be made uncertain.

In 6 R.C.L. 608, the same uniform ruling of the Court is thus summed up: "There must be no variance between the acceptance and the offer. Accordingly, a proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation unless the party who made the original offer renews it or assents to the modification suggested. The other party having once rejected the offer, cannot afterwards revive it by attempting an acceptance of it. The (615) acceptance must be unequivocal and unconditional. If to the acceptance of a proposal any condition be affixed by the party to whom the offer is made, or any modification or change in the offer be made or requested, there is a rejection of the offer. Having in effect rejected the offer by its conditional acceptance, the offeree cannot subsequently bind the offerer by an unconditional acceptance. The offerer may, of course, assent to the terms imposed by the offeree, and such assent may be inferred from the fact that the parties conducted business under the conditional acceptance," citing many cases. In this instance the defendant, upon a fair construction of the correspondence, offered to take $10,000 cash for his stock, payable to him in Smithfield. The offeree, the plaintiff, varied this by offering to pay in Greensboro to the agent of the offerer. If the seller had assented to this variation the contract would have been closed, but the seller was not required to take notice of an acceptance which was conditional. Being offered by another payment in cash to himself in Smithfield, he chose to accept, and this he had a right to do.

In 39 Cyc. 1197, the same principle is laid down as in the above quotations from C.J. and R.C.L., with numerous citations of authorities. In note 98 thereto it is said: "If no place is specified for payment, it is implied that it is to be made at the residence of the

vendor or his agent, and an acceptance fixing a different place is bad as a variance from the offer," citing a very long list of cases as a statement of the uniform ruling of the courts. The acceptance of the offeree in this case in effect proposing to pay in Greensboro, at the risk of the seller for the transmission of the payment to the vendor, was not the unconditional acceptance which the law requires in such transactions.

Benjamin on Sales (7 ed.), sec. 39, says: "The assent must, in order to constitute a valid contract, be mutual, and intended to bind both sides. It must also coexist at the same moment of time. A mere proposal by one man obviously constitutes no bargain of itself. It must be accepted by another, and this acceptance must be *unconditional*. If a condition be affixed by the party to whom the offer is made, or any modification or change in the offer be requested, this constitutes in law a rejection of the offer and a new proposal, equally ineffectual to complete the contract until assented to by the first proposer."

While in this case the offer of the defendant does not use the word "cash," it is apparent from the correspondence and the course of dealing that this was the intent of the parties. In 1 Page on Contracts, 77, sec. 46, the author says: "If the offer of sale does not state the terms of payment, cash payment is implied. Hence, an acceptance which attempts to secure even a short period of credit, does not make a contract." Under the ruling in *Hall v. Jones*,
(616) *supra*, the defendant was not required, under the terms of his offer, to incur the expense and risks and delay in sending his stock to some bank at Greensboro to be paid at the pleasure and convenience of the plaintiff. It was incumbent upon the plaintiff to accept or reject the offer unconditionally, and if he accepted he should have sent the cash, or what would be accepted as cash, by the earliest conveyance to the seller at his home in Smithfield. This proposition is held the settled law as stated in the above and other citations. Among other cases in point fully supporting these contentions of the defendant in this case are *Sawyer v. Brossart*, 67 Iowa 678; 56 American Reports 372; *Iron Co. v. Meade*, 21 Wisconsin 474; 94 American Decisions 557; *Baker v. Holt*, 56 Wisconsin 100; 1 Parsons on Contracts (6 ed.) 475; 1 Page on Contracts, 75, citing many cases, among them, *Gilbert v. Baxter*, 71 Iowa 327. It is believed there are none to the contrary.

In *Iron Co. v. Meade*, 21 Wisconsin 474; *S. c.*, 94 Am. Dec. 557, it is said: "Acceptance of an offer to sell land, but fixing a different place for the delivery of the deed is invalid. If the plaintiff had simply said: 'I accept your proposition,' then there would have

been an agreement to sell the land for cash. The payment of the money and the delivery of the deed in such cases are concurrent acts."

The defendant's offer was to accept $10,000 cash in Smithfield. The plaintiff accepted it upon condition that he was to pay to defendant's agent in Greensboro, thus throwing upon the defendant the expense and risk of transmitting the stock, $10,000 worth to Greensboro and the expense and risk of the transmission back to him of the $10,000 in cash or by check to be turned into cash upon presentation by him to the bank in Smithfield and payment thereof. This was not the offer that was made by the defendant, but a very material variation. It is, on its face, neither an inquiry nor a mere suggestion of the mode of payment, but the statement of the conditions upon which the plaintiff would accept the defendant's offer.

We are not inadvertent that the defense was also set up that the plaintiff was an officer of the company and informed as to the value of its stock, whereas, the defendant was not, but this question does not arise upon the nonsuit, and we think the principle of commercial law involved is of sufficient importance to justify the above citation of authorities, which should be conclusive of the correctness of the nonsuit.

Cited: *Golding v. Foster,* 188 N.C. 218; *Crawford v. Allen,* 189 N.C. 438; *Bldg. Co. v. Greensboro,* 190 N.C. 504; *Gravel Co. v. Casualty,* 191 N.C. 316; *Dodds v. Trust Co.,* 205 N.C. 156; *Cobb v. Dibbrell Bros.,* 207 N.C. 576; *Bd. of Ed. v. Bd. of Ed.,* 217 N.C. 94; *McAden v. Craig,* 222 N.C. 499; *Richardson v. Storage Co.,* 223 N.C. 347; *Carver v. Britt,* 241 N.C. 540.

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(617)

BOARD OF COMMISSIONERS OF MECKLENBURG COUNTY v. MECKLENBURG HIGHWAY COMMISSION.

(Filed 14 December, 1921.)

Highways—Counties—Roads— Statutes — Contracts — County Funds — State Highway Commission.

Where the commissioners of a county having control of the public roads and the funds available for that purpose, have agreed with the State Highway Commission to pay half of the cost of construction of a certain highway of the county, and before its completion are superseded by a county highway commission created by an act of the Legislature, to which the control of the highways and of the available funds for the purpose

are to be paid, etc.: *Held*, the county highway commission should assume the balance of the obligation to the State Highway Commission on the public road in question, and relieve the commissioners of the county thereof.

APPEAL by plaintiff from *Shaw, J.*, at the October Term, 1921, of MECKLENBURG.

Controversy without action, submitted on an agreed statement of facts.

There was a judgment in favor of the defendant, from which the plaintiff appealed.

Cansler & Cansler for plaintiff.
J. L. DeLaney for defendant.

STACY, J. The following statement of the controversy, as taken from the facts agreed, will suffice for our present decision:

1. The Legislature of 1921 established the Mecklenburg Highway Commission, ch. 383, Public-Local Laws, and provided in section 4 of said act as follows:

"The Mecklenburg Highway Commission shall be invested with all the road powers, and shall perform all the road duties which have heretofore been performed and exercised by the board of county commissioners of Mecklenburg County or by the road officials of the several townships within said county, or by any other body or person now or heretofore acting under authority of existing law in relation to the public roads of said county (other than the power to borrow money, issue evidences of indebtedness and levy taxes), whether under general law or a special law; and the management and control of all the public roads in said county shall be vested absolutely and entirely in the Mecklenburg Highway Commission, except roads under the exclusive control and management of the authorities of an incorporated city or town or the authorities of the State of North Carolina."

And again, in section 12: "All moneys on hand when
(618) this act takes effect or taxes received which were or shall be raised by Mecklenburg County, or by or on behalf of any township therein, for road purposes (other than money raised to pay the principal and interest of bonds or other outstanding indebtedness), whether raised by taxation, bond issues, or otherwise, shall, upon taking effect of this act, or when they are collected, be deposited with the county treasurer and kept by him in a separate fund or funds, and paid out only upon written orders of the highway commission, signed by the chairman and secretary, and coun-

tersigned by one other member of the commission. All road machinery, stock, implements, and other property owned or used by Mecklenburg County, or by any township therein, shall, upon the taking effect of this act, be turned over to the highway commission."

2. On 4 April, 1921, the Mecklenburg Highway Commission assumed jurisdiction and control of all road work in Mecklenburg County which had theretofore been exercised by the county board of commissioners and the trustees of the various townships in said county.

3. In 1919 the commissioners of Mecklenburg County entered into a contract with the State Highway Commission whereby they agreed to pay one-half the cost of laying out and constructing about fourteen miles of road in Mecklenburg County, known as project No. 55, which work the State Highway Commission was undertaking on its part with moneys derived from State and Federal aid.

4. On 4 April, 1921, the date that the Mecklenburg Highway Commission assumed jurisdiction and control over the public roads and highways of Mecklenburg County, under the act creating said commission, there remained uncompleted, under project No. 55, work amounting to $42,703.64, which was thereafter completed by the contractor, to whom the contract for said project had been previously let by the State Highway Commission, the board of commissioners of Mecklenburg County having paid the said highway commission one-half the cost of work done under said project, prior to the said 4 April, 1921.

5. Under the provisions of ch. 2, Public Laws of 1921, the highway of which project No. 55 is a part was designated and laid out as a State highway, and the control and jurisdiction over said road was vested by said act in the State Highway Commission.

Upon these, the facts chiefly relevant, the question submitted for decision is whether the $42,703.64 now due the State Highway Commission by the county of Mecklenburg for work done on project No. 55, since 4 April, 1921, shall be paid by the Mecklenburg Highway Commission or by the board of commissioners of said county.

It will be observed that the Mecklenburg Highway Commission has succeeded to all the powers and duties heretofore performed by the board of commissioners or other officials of Mecklenburg County, with respect to any and all kinds of work (619) connected with the public roads of the county. It is also provided that all moneys of the county available for road purposes, "whether raised by taxation, bond issues, or otherwise," shall be placed to the credit of the Mecklenburg Highway Commission. And in section 14 of the act above mentioned it is further provided: "The board of county commissioners shall also turn over to the county

treasurer, to be applied to road improvement and construction, as much of the general county funds as may not be needed for other purposes."

From the foregoing it would seem that the clear intent of the Legislature was to vest all local authority over the roads of the county in the Mecklenburg Highway Commission, and to require the county commissioners to place all funds available for such purpose to the credit of said commission. Hence, we think it is but meet and in keeping with the true intent and spirit of the law to declare that the Mecklenburg Highway Commission should assume the balance of the obligation accruing for work done on project No. 55, after 4 April, 1921.

We are also asked to say out of what particular fund this item should be paid. As now advised, we think this is a matter of indifference; but, there being no funds in hand except those derived from the sale of bonds, we see no reason why it should not be paid from these funds.

Reversed.

A. C. HOUSE v. J. H. ABELL AND H. G. GRAY.

(Filed 14 December, 1921.)

1. **Principal and Agent—Brokers—Contracts—Commissions—Voluntary Abandonment of Contract—Vendor and Purchaser—Timber.**

Where the owner of standing timber enters into a written contract with another that upon the sale of the timber to an acceptable purchaser upon specified terms, and at a certain price, the agent or broker should receive an agreed compensation for his service to be rendered, the broker's right of compensation arises upon the procurement of such purchaser according to the terms agreed; and this is not affected afterwards by the owner's voluntarily abandoning this contract, or not insisting upon its performance by the said purchaser.

2. **Same—Modification of Contract—Arbitration and Award.**

Where the owner of standing timber has agreed with a broker that if he procured a purchaser upon specified terms and price he should receive a fixed sum for the services thus rendered; and the broker has complied with his contract according to its terms, the owner may not avoid paying his broker by agreeing with the purchaser to submit to arbitration the question of the quantity of timber sold, and abandon his contract upon the disagreement between the arbitrators as to the rule of admeasurement of the timber.

3. Same—Deferred Payment of Purchase Price.

Where the broker has procured a purchaser for the owner for his standing timber upon a large body of land for $135,000, to be paid $45,000 in cash, and the balance to be due yearly over a period of five years, the consideration to the broker being $3,000, the contract for the payment of the commissions to the broker, nothing else appearing, does not contemplate that he should await therefor during the period extended for the deferred payments to be made by the purchaser; but he is entitled to his compensation, at the time he has performed his obligations according to the contract.

4. Principal and Agent—Brokers—Contracts—Commissions—Conditions Precedent.

Where a contract for the sale of the owner's timber through a broker sets forth the terms of the sale at length with which the purchaser shall comply, and the broker's commission is predicated and made dependent upon the conditions that "the deal will go through," these words refer to the "deal" going through upon the terms agreed upon with the broker, and not to such terms as the owner may have thereafter agreed upon with the purchaser whom the broker had procured.

APPEAL by defendant from *Kerr, J.*, at the January Term, 1921, of HALIFAX. (620)

Civil action to recover $3,000, with interest, as an amount alleged to be due plaintiff for commission in affecting a sale of the timber on a certain tract belonging to defendants. The court being of opinion that plaintiff was entitled to recover on the facts admitted in the pleadings, judgment was so entered, and defendants excepted and appealed.

George C. Green and W. E. Daniel for plaintiff.

F. H. Brooks, Travis & Travis, and Butler & Herring for defendants.

HOKE, J. Plaintiff filed his complaint, duly verified, in terms as follows:

COMPLAINT.

The plaintiff, complaining of the defendant, alleges:

1. That the plaintiff is a resident of the county of Halifax, State of North Carolina, and the defendants are residents of the county of Johnston, State of North Carolina.

2. That on 9 April, 1920, the defendants wrote plaintiff the following letter:

SMITHFIELD, N. C., 9 April, 1920.

MR. A. C. HOUSE, Weldon, N. C. (621)

DEAR SIR: — We agree to pay you the sum of three

thousand dollars ($3,000) to make sale for us of our tract of timber near Clinton, N. C., at the price and on the terms outlined in our letter to you of this date.

Yours very truly,
R. G. GILLETT,
ABELL & GRAY,
By J. H. ABELL.

3. On 9 April the defendants wrote the plaintiff the following letter, which is the letter referred to in the preceding paragraph:

SMITHFIELD, N. C., 9 April, 1920.

MR. A. C. HOUSE, Weldon, N. C.

DEAR SIR: — We hereby authorize you to make sale for us on or before 12 April, 1920, of our tract of timber near Clinton, N. C., at the price of $135,000, on the following terms: $45,000 cash, and the balance in five equal annual payments.

We agree to sell an option on the timber at the price and on the terms mentioned for a period of sixty (60) days for the sum of $10,000, this amount to apply on the purchase price in case the option is exercised.

Yours very truly,
R. C. GILLETT,
ABELL & GRAY,
By J. H. ABELL.

4. On 13 April, 1920, the defendants wrote the plaintiff the following letter, to wit:

SMITHFIELD, N. C., 13 April, 1920.

MR. A. C. HOUSE, Weldon, N. C.

DEAR SIR: — Following up our conversation with reference to sale of the A. T. Griffin Manufacturing Company timber in Sampson County, beg to say that if the deal with Camp Manufacturing Company shall go through, and the final timber estimate shall fall below twenty-two and one-half (22½) million feet, and the purchase price be thereby reduced below $135,000, we still agree to pay you the sum of three thousand dollars ($3,000) for your services.

R. C. GILLETT,
H. G. GRAY,
J. H. ABELL.

5. On 12 April, 1920, the Camp Manufacturing Com-
(622) pany wrote plaintiff the following letter, to wit:

FRANKLIN, VA., 12 April, 1920.

MR. A. C. HOUSE, Weldon, N. C.

DEAR SIR: —*In re* A. T. Griffin Manufacturing Co.'s timber holdings in Sampson County, N. C.:

Confirming the conversation with you today in regard to timber in Sampson County, N. C., known as the A. T. Griffin Mfg. Company's holdings, consisting of about 77 tracts and covered by 51 deeds, which tracts you estimate at about 25,000,000 feet; time to cut 5 years, with 5 years further time by paying 6 per cent interest on the original purchase price.

If there is 23,000,000 feet of timber on these tracts, which tracts are covered by the various deeds to the Griffin Manufacturing Company, we will give you, or the now owners of the timber (Abel & Gray), $135,000 for this timber, payable as follows: $45,000 cash, and the balance in 1, 2, 3, and 4 years, with 6 per cent interest from date of papers. Should you and your associates accept this proposition, we are to pay $5,000 on acceptance, and the balance of the cash payment, to wit: $40,000, when estimate is completed and satisfactory deed delivered to us; all papers to be dated 1 June, 1920.

To arrive at the estimate of the quantity of timber on this land, we are willing to follow the following procedure, that is to say, we put in a man and you a man, and we together to select the third man, the third man to be a man who has never estimated timber for either of us, or at least the third man is to be satisfactory to us; our man and your man to go in and estimate the timber and on any tract or tracts that our men cannot agree upon, then we are to call in the third man, as stated above, and he is to send us report of every tract of timber he estimates, and he is not to estimate to exceed four tracts before we get the estimate, and if the third man, or umpire, is not satisfactory to either party, then either party has a right to call him off and put in another third man to estimate not to exceed four tracts of timber (the selection of this third man to be in the same manner as referred to above) before we receive the estimate, and if this estimate is not satisfactory, then we could call him off and continue the selection of a third man in the manner referred to above until all the timber is estimated and terms and conditions of estimating as above outlined complied with.

If you give us an option, we would start our man in there just as soon as we could and continue estimating until we complete the whole transaction, and all of it should be closed up within sixty days, unless extended by agreement between all parties concerned.

If, however, there is not 23,000,000 feet of timber on the

(623) various tracts referred to, constituting the A. T. Griffin Manufacturing Company's holdings, and the actual amount of timber, by estimate agreed upon, does not come to $135,000, we would take the quantity of timber shown by estimate at $6 per thousand feet. If there is not 23,000,000 feet, and we should buy the timber at the rate of $6 per thousand feet, we will pay $45,000 cash, and the balance in 1, 2, 3, and 4 years, with 6 per cent interest from date of papers; the cash payment, however, to be less $5,000, which amount is to be paid in case our proposition is accepted.

Yours very truly,

CAMP MANUFACTURING COMPANY,

pdc/b By ....., *President.*

6. That the letter referred to in the preceding paragraph was delivered to the defendants, and on 13 April, 1920, the defendants wrote the Camp Manufacturing Company, Franklin, Va., the following letter, to wit:

SMITHFIELD, N. C., 13 April, 1920.

CAMP MANUFACTURING CO.,
Franklin, Va.

GENTLEMEN: — We have noted your letter of the 12th inst., addressed to Mr. A. C. House, with reference to the timber holdings of A. T. Griffin Manufacturing Company in Sampson County, consisting of about 77 tracts, covered by 51 deeds, and beg to say that we have decided to accept your proposition to pay $135,000 for the same, $5,000 to be paid cash, and $40,000 to be paid when estimate is completed and contract made, but it is understood that we are selling you all the timber owned by A. T. Griffin Manufacturing Company in Sampson County, covered by the 51 deeds, with time for cutting and removing same as therein specified, which is approximately five years, with five years extension by paying 6 per cent interest on original purchase price of same. Estimate of timber to be made according to method set out in your letter to Mr. House, and should estimate not amount to 22,500,000 feet, then said timber to be paid for according to estimate at price of $6 per thousand feet.

After the payment of the $45,000, the balance of the purchase price of said timber is to be divided into four equal payments to be made annually, with interest at 6 per cent from 1 May, 1920, with provisions that in case you wish to cut any of said timber, same shall be paid for in advance at the rate of $6 per thousand feet, which payment shall be applied to the next annual installment falling due.

Upon receipt of this letter (which is sent by Mr. House), we will thank you to send us your check for $5,000 according to your proposition contained in letter of the 12th inst., to Mr. House. If you desire more formal contract before paying the $5,000, we shall be glad to meet you or your attorney in Smithfield and enter into any reasonable arrangement with you respecting the matter. (624)

We are holding Mr. Ashley at Clinton to meet your estimator and go over these several tracts of timber and make joint estimate of this timber, which, of course, is at considerable expense, and we trust you will proceed at your earliest convenience to send your man to Clinton to enter upon this work.

Thanking you in advance for your early reply, we are,

Yours very truly,

.....

That the above letter was given to the plaintiff to be by him delivered to the Camp Manufacturing Company, and on 14 April, 1920, he wrote the Camp Manufacturing Company the following letter, to wit:

FRANKLIN, VA., 14 April, 1920.

MR. P. D. CAMP, *President*,
CAMP MFG. CO.,
Franklin, Va.

DEAR SIR: — I herewith hand you letter of acceptance from Messrs. Abell, Gray & Gillett in which they agree to sell you the holdings of A. T. Griffin Manufacturing Company as per your offer in your letter to me of the 12th inst.

You will note that the amount of timber as mentioned in your letter of 23,000,000 feet has been changed in their acceptance to 22,500,000 feet, which was done at my request, because if there had been more than 22,500,000 feet and less than 23,000,000 feet you would have paid more than $135,000 for it.

Messrs. Gillett, Abell & Gray requested me to say to you that Mr. Griffin, of the A. T. Griffin Manufacturing Company, wishes to make bond-of-title, securing from you contract to carry out the terms of payment, and not taking your notes for the deferred payments, he believes if he takes your notes that he will have to give it in as income received during this year, and it is his desire to distribute this income over a period of four years, during which time the actual payments are to be. I think he is so advised by his attorney. I do not know just what a bond-of-title is, but your attorney can advise you

along this line, and if you can do so, I believe it would be good policy to accommodate Mr. Griffin. However, if this cannot be worked out satisfactorily to yourself and Messrs. Gillett, Abell & Gray,
(625) it is their desire to satisfy you in the matter, even to the extent of their paying Mr. Griffin cash for the timber and giving you a straight deed secured by a deed of trust. You will note that there is a provision in the letter of acceptance, providing that you might cut timber prior to the payment of the deferred payments by paying in advance at the rate of $6 per thousand feet. There was nothing in your letter which mentioned this, and this provision was put in to cover any case in which you might wish to cut the timber before all the payments had been made. Messrs. Gillett, Abell & Gray also requested me to say to you that they were willing to meet your attorney or representative and enter into any reasonable agreement as regards details to carry out the terms and spirit of your offer to them in their letter of acceptance to you.

If I can be of any further service to you in this transaction, kindly advise me. I will be away from Weldon a few days the first of next week, but after that time I see no reason why I cannot act for you on short notice.

I have left the deeds to all the Griffin holdings in your office, and wish to call your attention to the fact, as I mentioned when here on the 12th, that there are two deeds to small tracts of timber in this lot carrying five years to cut and five years extension, and one carrying seven years to cut and five years extension.

All of the other deeds, as I have read them, carry ten years to cut with five years extension. All the deeds, I think, are dated in the latter part of 1914, and early part of 1915.

Yours very truly,

.....

7. That on 17 April, 1920, the Camp Manufacturing Company wrote the defendant the following, to wit:

17 APRIL, 1920.

MESSRS. R. C. GILLETT, H. G. GRAY, and J. H. ABELL,
Smithfield, N. C.

GENTLEMEN: — *In re* purchase of A. T. Griffin Manufacturing Company's timber holdings in Sampson County, N. C.:

We are in receipt of your letter of the 13th accepting our offer of the 12th.

We have written to try to get estimators, and will get estimators to go in the timber just as soon as we can, and we thought it would

be well for us to try to agree upon the third party. Do you know of any good man to act as umpire? Check for $5,000 has been made up and turned over to Mr. T. D. Savage, our attorney, Norfolk, Va., for delivery to you as soon as some little details concerning the contract have been satisfactorily worked out between your attorney and Mr. Savage. We would thank you to kindly advise Mr. Savage who your attorney is, so that he can get in communication with him. (626)

Yours very truly,
CAMP MANUFACTURING COMPANY,
By....., *President.*

pdc/b
CC: to Mr. A. C. House, Weldon, N. C.

8. That the Griffin timber, the A. T. Griffin Manufacturing Company's timber is the same timber mentioned in the two letters of the defendants of 9 April and 13 April, and the letters of the Camp Manufacturing Company to A. C. House on 12 April, 1920, and the letter of the defendants to Camp Manufacturing Company, dated 13 April, 1920, above referred to, and also the letter of the plaintiff to Camp Manufacturing Company, dated 14 April, 1920, and above referred to, and also the letter of Camp Manufacturing Company to defendants, dated 17 April, 1920.

8½. The defendants wrote the plaintiff the following letter, to wit:

SMITHFIELD, N. C., 31 May, 1920.

MR. A. C. HOUSE, Weldon, N. C.

DEAR MR. HOUSE: — We beg to advise that we have been to see the Camp Manufacturing Company, and have returned to them the $5,000 paid on the contract, and have canceled the same because they insist on the Doyle rule in estimating the timber. We are, therefore, no longer under obligation to them.

Yours very truly,
R. C. GILLETT,
ABELL & GRAY,
By J. H. ABELL.

9. That the Camp Manufacturing Company, through the efforts of the plaintiff, actually contracted to purchase of the defendants the timber mentioned in the preceding paragraphs, and actually paid the defendants the sum of $5,000 called for in said contract.

10. That the plaintiff has performed his part of said contract in full, and has demanded payment of the sum of $3,000 of the defendants, which they have failed and refused and still refuse to pay.

11. That by reason of the matters and things above set out, the defendants are indebted to the plaintiff in the sum of $3,000, with interest from 13 April, 1920.

Wherefore, plaintiff demands judgment against the defendants for the sum of $3,000, with interest, and for cost.

Defendants filed answer to said complaint, duly veri-
(627) fied in terms as follows:

The defendants, answering the complaint of the plaintiff herein filed, allege:

1. That paragraph one of the complaint is admitted.
2. That paragraph two of the complaint is admitted.
3. That paragraph three of the complaint is admitted.
4. That paragraph four of the complaint is admitted.
5. That paragraph five of the complaint is admitted.
6. That paragraph six of the complaint is admitted, wherein it is alleged that the defendants wrote the Camp Manufacturing Company the letter set out in paragraph six of the complaint.

As to the remainder of said paragraph, these defendants have no knowledge, and therefore deny the same.

7. That paragraph seven of the complaint is admitted.
8. That paragraph eight of the complaint is admitted, except where it is stated that the plaintiff wrote the Camp Manufacturing Company on 14 April, 1920, of which these defendants have no knowledge, and therefore deny the same.
9. That paragraph nine of the complaint is denied.
10. That paragraph ten of the complaint is denied.
11. That paragraph eleven of the complaint is denied.

There was a further answer duly verified alleging in effect that defendants owed plaintiff nothing because by the terms of the agreement they were only liable in case the "deal with the Camp Manufacturing Company goes through" — and that no sale had ever been consummated, nor had defendants ever received anything thereon for the reason further stated that after the interchange of the letters and writings above set forth, and after defendants had received the $5,000 check given by the Camp Manufacturing Company as part payment on the alleged contract, when defendants met for the purpose of proceeding with the deal, the estimator selected by the Camp Manufacturing Company, one S. R. Flowers, insisted that the timber be estimated by the Doyle rule, and would consent to no other, and that ascertaining that under such rule the amount of defendants' timber would be reduced 25 to 33 per cent. Defendants were, therefore, forced to call off the proposition and returned to the

Camp Manufacturing Company the $5,000 it had paid on the transaction.

Upon this, a sufficient statement for a proper apprehension of the question presented, we concur in the ruling of the court below that on the admissions appearing in the pleadings the plaintiff is entitled to judgment. It is a well established principle that a real estate broker, employed by the owner to make sale of designated real estate, who, within the terms of the authority given, succeeds in bringing about a building contract of sale with (628) a responsible purchaser, is entitled to his stipulated commission, or to the reasonable worth of his services if no definite amount is specified, and his claim therefor is not affected because the principal has seen proper to voluntarily surrender his rights under the contract. *Aycock v. Bogue, ante,* 105; *Love v. Miller,* 53 Ind. 294; *Lunney v. Healey,* 56 Neb. 313, reported also in 44 L.R.A. 593; *Seabury v. Fidelity Insurance, Trust and Safe Deposit Company,* 205 Pa. St. 234; *Parker v. Walker,* 86 Tenn. 566; *Wilson v. Mason,* 158 Ill. 304; *Parmly v. Head,* 32 Ill. App. 134; *Swainwald v. Cady,* 92 Cal. 83; *Leets v. Norton,* 43 Conn. 219. *Love v. Miller, supra,* is reported also in 21 American Reports 192, where the principle is thus stated in the syllabus: "Where the owner of real estate agreed with the broker that if the latter would find a purchaser for designated real estate, he would give a certain sum as commission. The broker procured a person to enter into a valid and binding contract to purchase, which he afterwards refused to perform: *Held,* the broker was entitled to the sum agreed upon." In the second headnote to *Lunney v. Healey,* in 44 L.R.A., p. 593, it appears: "That where a real estate broker contracts to produce a purchaser who shall actually buy, he has performed his contract by the production of one financially able, with whom the owner actually makes an enforceable contract of sale. The failure to carry out the contract, even if the default be that of the purchaser, does not deprive the broker of his right to commissions." And in *Parker v. Walker,* 86 Tenn., *supra,* it is held: "A broker, who agrees for compensation 'to procure a purchaser' for lands, has earned his commissions when he effects a valid written contract for sale of the lands, upon terms and with a purchaser acceptable to the owner. Neither the purchaser's refusal to perform his contract upon grounds not imputable to the broker's fault, nor the voluntary failure of the vendor to compel him to do so, will defeat the broker's claim for commissions." From a proper consideration of the letters and correspondence, there was a binding contract of sale between the defendants and the owners and the Camp Manufacturing Company, of all the timber on 77

tracts of land contained in 51 deeds, and known as the holdings of the Griffin Manufacturing Company in Sampson County, at a designated price agreed and acted upon by the parties as within the authority conferred upon the broker. Even if the letter of defendants of 13 April, 1920, should be considered as modifying the terms contained in the definite offer of the purchaser, the Camp Manufacturing Company, of 12 April, these modifications, if they be such, were acquiesced in by the Camp Company, the other contracting party, and the company's check for $5,000 was given and received in part compliance with the contract. And as to the stipulation for the commission while the first agreement for
(629) $3,000 was based on a sale at $135,000 in defendant's letter of 9 April, 1920, pp. 1 and 2 of the record. In a subsequent letter, also on p. 2, of 13 April, defendants agreed to pay the $3,000 for effecting a sale though the price should fall below $135,000. It is insisted for defendants that no rule or standard of measurement for the timber having been specified in the agreement, the same was thereby rendered too indefinite to constitute a binding contract of purchase. As we have seen, the contract contained an agreement to sell all the timber on certain designated tracts of land at a stipulated price, and the agreement itself affords a means for determining the quantity, that is, that each of the parties should select a man as estimator, and the two parties together to select the third man. And if it were otherwise, if, as defendant contends, the contract failed to specify a rule by which the timber should be estimated, the approved position is, the agreement being otherwise definite and complete, that the timber shall be measured according to the standard ordinarily prevailing in such cases. 25 Cyc., p. 1560, citing *Sanderson v. Hagan,* **7 Fla. 318**; *McIntyre v. Rodgers*, 92 Wis. 5; *Heald v. Cooper,* 8 Me. 32. Again, it is contended that the subsequent agreement for $3,000 appearing in defendant's letter of 13 April, 1920, was predicated and made dependent upon the proposition that the "deal with the Camp Manufacturing Company should go through." The entire letter in reference to the proposed sale being "that if the deal with the Camp Manufacturing Company should go through and the final estimates should fall below 22½ million feet and the purchase price be reduced below $135,000, we still agree to pay you $3,000 for your services." It will be noted that when this letter was written no contract had been made, and the terms of the deal with the Camp Manufacturing Company should go through "clearly means if the negatiations in which you are now engaged should result in a binding contract of sale." In view of the terms used, this was the natural significance of the language, and afforded

the correct and reasonable interpretation of the agreement. In one aspect of the contract, as proposed by the Camp Manufacturing Company, the cutting of the timber and the partial payments therefor would extend over four years, and it would not be contended that the parties contemplated any such delay before plaintiff should receive his commissions. In our opinion on the facts presented, there was a binding agreement between the parties for sale of the timber effected by the plaintiff as broker, and in which defendants have voluntarily surrendered their rights, to plaintiff's prejudice, and that said plaintiff has been properly allowed to recover as per terms of the agreement.

Affirmed.

STACY, J., dissents.

Cited: *Olive v. Kearsley,* 183 N.C. 199; *Croom v. Bryant,* 194 N.C. 815; *Harrison v. Brown,* 222 N.C. 614; *Lindsey v. Speight,* 224 N.C. 455; *White v. Pleasants,* 225 N.C. 763; *Eller v. Fletcher,* 227 N.C. 347; *Bonn v. Summers,* 248 N.C. 359.

(630)

CHRISTINA SNODY v. WILLIAM ANDERSON, ADMINISTRATOR OF W. A. SNODY.

(Filed 14 December, 1921.)

1. Verdict—Interpretation—Instructions—Evidence—Appeal and Error.

A verdict of the jury will be interpreted by reference to the pleadings, the facts in evidence, and the charge of the court.

2. Same—Limitation of Actions—Quantum Valebat.

In an action against an administrator to recover the value of services rendered to decedent for thirty-five years prior to and up to the time of his death, and the issue is answered in a certain amount under a charge restricting the recovery to within a period of three years, objection of the defendant, based on the running of the statute of limitations, is untenable.

3. Verdict—Consistency—Contract—Quantum Valebat.

Where the plaintiff alleges in an action against the administrator that the deceased had agreed to pay her for services rendered him, and a separate cause is alleged as to a recovery for the value of her services, a recovery upon the latter issue, with adverse verdict to her on the first, are not inconsistent and will not preclude her recovery or affect the verdict giving damages for the value of her services.

SNODY *v.* ANDERSON.

APPEAL by defendant from *Long, J.*, at the August Term, 1921, of SURRY.

Civil action to recover for value of services rendered by plaintiff to intestate for thirty-five years or more prior to latter's death, of the alleged value of $4,000. The first cause of action is on the allegation that these services were under a promise and assurance given to plaintiff that the intestate would provide compensation for plaintiff in his last will and testament. Second cause of action alleging services, and that intestate would compensate plaintiff therefor by devise of a certain piece of land. Third cause of action was for value of services.

Plaintiff offered evidence tending to prove extent of services and their value, and under an assurance of compensation, and that intestate had died a short time before suit brought and failed to make any provision by will or otherwise for compensation. There was denial of liability on part of administrator, and plea of statute of limitations with evidence tending to show that said services were not given or received in expectation of pay, and were not worth anything over and above plaintiff's support. The cause was submitted and verdict rendered on the following issues:

"1. Did the plaintiff, at the request of W. A. Snody, defendant's intestate, go to intestate's home and render services, as alleged in the complaint in plaintiff's cause of action, with the mutual understanding between plaintiff and defendant's intestate that
(631) the intestate would provide compensation for such services in his last will and testament? Answer: 'No.'

"2. If so, what were such services reasonably worth?

"3. Did plaintiff render to the defendant's intestate services as alleged in plaintiff's third cause of action? Answer: 'Yes.'

"4. If so, what were such services reasonably worth? Answer: '$1,200.'

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

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

E. C. Bivens and Carter & Carter for plaintiff.
Folger, Jackson & Folger for defendant.

HOKE, J. On perusal and proper consideration of the case on appeal, it appears that the charge of the court is comprehensive, clear, and in accord with our decisions on the questions presented; that the jury, in the third cause of action, have rendered a verdict for the value of the services within the statutory period of three

years, and we find nothing in the record that would justify the Court in disturbing the results of the trial. The Court is not impressed with the position that the finding in the first cause of action is inconsistent with the verdict in the third. It is true that in stating the third cause of action the pleader reaffirmed the allegations of the first as to the assurance of a provision by the last will and testament, but this was evidently only by way of averment that the services were given and received in expectation of pay, and it is clear that the third cause of action was intended as a demand for services and their value, disconnected with the averment of compensation by last will and testament. The court so interpreted the pleadings, and accordingly charged the jury that in considering the issues in the third cause of action, they would only allow for services rendered within the statutory limitation of three years. It is recognized that a verdict will be interpreted by reference to the pleadings, the facts in evidence and the charge of the court, *Reynolds v. Express Co.*, 172 N.C. 487, and applying the principle it is clear that by their verdict on the third cause of action the defendant has only been charged with the reasonable value of services rendered within the statutory period, and not otherwise. The other exceptions also are without merit.

There is no error, and the judgment on the verdict is affirmed.

No error.

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(632)

MRS. ANNIE McGLAMMERY FOSTER v. E. V. WILLIAMS AND BRANSON BENTON.

(Filed 14 December, 1921.)

1. Married Women—Deeds and Conveyances—Probate—Statutes—Certificate—Husband and Wife.

In order for a married woman to make a valid conveyance of her separate real property to another than her husband, it is required by our statute that it must be with the written assent of her husband, and when the conveyance thereof is direct to her husband, it is further required that the probate officer certify that it is not unreasonable or injurious to her (C.S. 2515); and when this statutory requisite has been omitted, the deed of the married woman to her separate realty is void.

2. Same—Remedial Statutes.

It is not within the meaning or intent of C.S. 3351, purporting to cure defective execution of deeds of married women, free traders, that it should apply to deeds made directly to the husband, or annul the requirement

that the probate officer certify that it was not unreasonable or injurious to her; but this should only apply to such conveyances made to third persons in respect to the husband's assent, etc., coming within the provisions of the section referred to, when the grantor is a free trader; whether section 3351 would be constitutional otherwise, *Quœre?*

3. Deeds and Conveyances—Married Women—Husband and Wife—Void Deeds—Purchaser Without Notice—Descent—Partition.

Where, under a void deed from his wife of her separate realty, the husband has conveyed the lands to a third person, the purchaser cannot acquire any right under his deed as a purchaser without notice against the child or heir at law of the deceased wife, but only as against the life estate of his grantor as tenant by the curtesy in his wife's lands; and the heirs at law of the wife, after the expiration of the husband's life estate, are entitled to actual division of the lands as tenants in common or a sale for division, as the case may be, in proceedings for partition.

4. Same—Infants—Ratification—Consideration Restored.

Where the infant is entitled to the separate realty of his mother by descent, which the father has attempted to convey to another under a void deed and received and still holds the full consideration, the principle that the infant is put to his election to restore the consideration, etc., has no application, and he may avoid the deed of his father within three years after coming of age.

APPEAL by defendant from *Shaw, J.*, at the June Term, 1921, of WILKES.

Civil action, tried and determined on case agreed. From the facts and admissions properly presented, it appears that on 9 December, 1907, Mrs. Nancy C. McGlammery, then wife of L. M. McGlammery, owner of the land in controversy, and who had been properly constituted a free trader, pursuant to the statute, undertook to convey said land, by written deed, to her husband. Said deed was
(633) in due form to convey real estate, containing the usual covenants, and with acknowledgment and privy examination taken in ordinary form, but without certificate as required by C.S. 2515, Rev. 2109, to the effect that the conveyance was not "unreasonable or injurious to her." That on 27 December, 1907, said Nancy C. McGlammery died leaving five children of the marriage, her heirs at law, and subsequently one of the children, Vernon McGlammery, died without issue. That on 10 February, 1915, L. M. McGlammery and his second wife, Hettie, and the four surviving children, including Annie Lizzie McGlammery, since intermarried with one Foster, conveyed the land by deed, with full covenants to defendant E. V. Williams for the purchase price of $8,000, the consideration being paid to the father, L. M. McGlammery, except $1,000, evidenced by note to L. M. McGlammery, and as to payment of said note, there is now a dispute pending between the administrator of

L. M. McGlammery and E. V. Williams. That on 31 August, 1918, said E. V. Williams, by written deed with full covenant, conveyed the property in dispute to defendant Branson Benton for $10,000, of which $3,000 was paid, and the balance secured by deed of trust on the property in favor of the vendor, E. V. Williams, and that at the time of the purchase of said land by said Benton, and the payment of the $3,000 thereon, the taking of the deed referred to vendee, Benton, was without notice or knowledge of any infirmity in the title by reason of the claims of plaintiff. On the hearing it was further admitted that plaintiff Annie Lizzie McGlammery, now Foster, at the time of signing the deed to E. V. Williams, was living on the lands in the house with her father, L. M. McGlammery. That the delivery of the deed was by said L. M. McGlammery, and the settlement was made with him, and that no part of the purchase money was paid her; that the day after the execution of the deed to Mr. Williams, said Annie L. McGlammery, then aged 19, was married to her present husband, C. M. Foster, and since that time has resided in West Virginia. It further appeared that plaintiff, said Annie McGlammery, within three years after arriving at the age of 21, instituted the present suit, seeking a partition of the property in accord with her interest in the tract presented, to wit, one-fourth of all the lands contained in the deed of her mother, Nancy C. McGlammery, except 95 acres in which said mother owned only an undivided half interest, and as to the plaintiff, a one-eighth interest; and it is admitted by the parties that if plaintiff has any interest in the land it is one-fourth of all the lands embraced in the deed from her mother, except the 95-acre tract, and in this plaintiff has a one-eighth interest. Upon these facts the court declared his conclusions of law as follows: "That Annie Lizzie McGlammery Foster is the owner of a one-fourth interest in and to all the lands described in the complaint, and the defendant Branson Benton is the owner of the other three-fourths, except Annie McGlammery Foster (634) owns only a one-eighth interest in 95 acres of said land, which boundary is described as the fourth tract in the deed from Nancy C. McGlammery to L. M. McGlammery, and referred to as the Jesse McGlammery home place, and the said Branson Benton is the owner of the other seven-eighths interest therein. E. V. Williams having conveyed said land to Branson Benton before the commencement of this action, and the said Branson Benton having purchased said land without notice that Annie McGlammery Foster was under age at the time she executed the deed to E. V. Williams, and having paid $3,000 and still owes $7,000 of the purchase price, the court is of the opinion, and so holds, that the said lands cannot be actually partitioned by reason of the conveyance as aforesaid to Branson

Benton. The defendant having agreed that Branson Benton is still due E. V. Williams $7,000 on the original purchase price of said land, the court is of the opinion, and so holds, that the plaintiff is entitled to recover of the defendants the present market value of her undivided interest in and to the lands described in the complaint, together with her pro rata of the annual rental value of said land from 26 August, 1917, to 30 May, 1921, with interest on said annual sum, less her pro rata part of the annual taxes on said land during said period, and that said sum should be paid to her out of the remainder of the purchase price due by Branson Benton to E. V. Williams. That the defendants are not liable for rents on the said lands up to 26 August, 1917, the date of the death of L. M. McGlammery, for that the said L. M. McGlammery was entitled to the possession of his wife's land during his life as tenant by the curtesy. The defendant Branson Benton having purchased the lands as described in the complaint for the price of $10,000, and having paid $3,000 of the purchase price before notice that plaintiff was a minor at the execution of the deed to E. V. Williams, the court is of the opinion, and so holds, that the defendant Branson Benton was to that extent an innocent purchaser for value and without notice of the plaintiff's right, and that the land cannot, therefore, be actually partitioned. As to the remaining $7,000 of the purchase price, the defendant Branson Benton is not an innocent purchaser for value and without notice of the plaintiff's rights." And thereupon adjudged that the plaintiff was the owner of the one-fourth and one-eighth interests respectively. That she was not entitled to actual partition by reason of the fact that defendant Branson Benton had bought the land and paid $3,000 thereon before action commenced, and before notice that plaintiff was a minor at the time of the execution of the deed. That plaintiff be awarded the present market value of her interest, together with her proportion of the rents from the time of her
(635) father's death, less a proper deduction for taxes, etc. That the amount awarded her be declared a lien on the balance dues for purchase money, etc.

Hayes & Jones for plaintiff.
R. N. Hackett and Charles G. Gilreath for defendant Williams.
F. B. Hendren for defendant Benton.

HOKE, J. Our decisions have very insistently and uniformly held that in order to a valid conveyance of a married woman's real estate there must be the written assent of her husband and her privy examination had pursuant to the law, appertaining to the question. 1 C.S.997; *Stallings v. Walker*, 176 N.C. 321; *Warren v. Dail*, 170

N.C. 406; *Smith v. Bruton,* 137 N.C. 79; *Scott v. Battle,* 85 N.C. 185. And when the conveyance is from the wife directly to the husband it is essential that, in addition to her private examination in ordinary form, there shall appear the certificate of the officer taking the probate that the conveyance is not unreasonable or injurious to her, as required by C.S. 2515. *Butler v. Butler,* 169 N.C. 584; *Wallin v. Rice,* 170 N.C. 417; *Kearney v. Vann,* 154 N.C. 311. And in the interpretation of the regulations appertaining to the subject, it is further held that the requirements of the law are in nowise affected by the fact that the wife is, at the time of the conveyance, a properly constituted free trader. *Council v. Pridgen,* 153 N.C. 443. It is urged for the defendant that while these and other like decisions may express the rule ordinarily applicable, the same should not prevail in the present case by reason of a statute appearing in C.S. 3351, purporting to cure defective executions of deeds of married women free traders at the time and prior to 24 September, 1913. Our decisions on the subject being to the effect that an attempted conveyance by female covert without the private examination and certificate, as required, are absolutely void, there is doubt if same could be rendered valid by statutes subsequently passed, but if it be conceded that the defect comes only from a lack of proper probate, and same is subject to curative legislation as against heirs at law, etc., the grantor and others holding only as trustees. Under the principle applied and approved in the recent case of *Sluder v. Lumber Co.,* 181 N.C. 69, the question is not presented on the present record, as, in our opinion, the statute referred to affects, and is only intended to affect, the deeds of married women to third persons, and not those she has attempted to make directly to her husband. That statute provides that deeds by a married woman, free trader, from 24 September, 1913, "taken without privy examination and without written assent of the husband," shall be valid and effectual to convey her land, thus showing clearly that only deeds of third persons were contemplated and provided for. This being the law appertain- (636)
ing to the question, the alleged deed of Mrs. McGlammery to her husband is void for a lack of proper examination and certificate, and on her death the land descends to her children and heirs at law subject to an estate by the curtesy in her husband. And he having died, and it appearing from the admitted facts that the present plaintiff was only 19 years of age at the time of the conveyance of the husband and children to defendant Williams, and the present action having been instituted within three years from her arrival at maturity, we are of opinion that on the facts presented the plaintiff is entitled to maintain the action in the assertion of her interest and

ownership in all of the lands in possession and control of defendants contained in the alleged deed from Mrs. McGlammery to her husband, to wit, one-fourth thereof, except the 95-acre tract, in which she is entitled to one-eighth undivided interest. *Hogan v. Utter,* 175 N.C. 332; *Chandler v. Jones,* 172 N.C. 574; *Baggett v. Jackson,* 160 N.C. 31; *Gaskins v. Allen,* 137 N.C. 430; *Weeks v. Wilkins,* 134 N.C. 522.

The question sometimes presented as to whether, in actions of this kind, based on avoidance of his deed, an infant is required to restore the consideration is not raised in this record, as it appears by admission of the parties that no part of the consideration was paid to the present claimant, but all of it was received by the father except $1,000, and that was evidenced by note to him. And the authorities are to the effect, also, that the right of an infant to avoid his deed within three years after his becoming of age is not affected by reason of the adverse interest of one purchasing without notice, but the claimant is entitled to the land, or his interest in it that the facts may disclose. *Jackson v. Beard,* 162 N.C. 105-110; *Searcy v. Hunter,* 81 Texas 644; *Richardson v. Pate,* 93 Ind. 423; *Sims v. Smith,* 86 Ind. 577; 22 Cyc. 551.

Plaintiff, then, being a tenant in common to the extent of her established interest, is entitled to a division of the property as of right, either by sale or actual partition, as the facts may appear, and the portion of the decree by which this right has been denied her will be reversed. *Holmes v. Holmes,* 55 N.C. 334; *Purvis v. Wilson,* 50 N.C. 22; Freeman on Cotenancy, 424. This will be certified that the cause may be proceeded with in accordance with this opinion.

Plaintiff's appeal reversed.

Defendant's appeal affirmed.

Cited: Best v. Utley, 189 N.C. 361; *Hardy v. Abdallah,* 192 N.C. 47; *Caldwell v. Blount,* 193 N.C. 562; *Barber v. Barber,* 195 N.C. 712; *Talley v. Murchison,* 212 N.C. 206; *Martin v. Bundy,* 212 N.C. 443; *Trust Co. v. Watkins,* 215 N.C. 294; *Rostan v. Huggins,* 216 N.C. 389; *Fisher v. Fisher,* 217 N.C. 75; *Hyman v. Edwards,* 217 N.C. 344; *Mineral Co. v. Young,* 220 N.C. 290; *McCullen v. Durham,* 229 N.C. 425; *Seawell v. Seawell,* 233 N.C. 738; *Godwin v. Trust Co.,* 259 N.C. 526.

(637)

W. C. WILCOX v. G. McLEOD ET AL.

(Filed 14 December, 1921.)

1. Deeds and Conveyances—Contracts—Timber—Extension Period—Condition.

Where a deed to standing timber grants a further extension of time for cutting and removing the timber in case of death or fire, neither the grantee nor his assigns can claim any right under the extension clause without showing that a delay in cutting and removing the timber has been caused under the conditions stated in the deed.

2. Statute of Frauds—Deeds and Conveyances—Timber.

A contract for the sale of timber standing upon the lands concerns such an interest therein as is required by the statute of frauds to be in writing.

3. Deeds and Conveyances—Contracts — Timber — Assignments — Parol Contract—Powers—Revocation.

Where the vendee under a deed to standing timber has assigned his rights thereunder by a parol agreement, his assignee, at most, can only cut and remove the timber from the owner's land until stopped by his assignor, the grantee in the deed; and where he has done so within the life of the original contract, and after his death, his right under his deed has expired, his assignee cannot claim any extension right under the original contract to continue to cut and remove the timber that is conditioned upon the death of his grantor, the grantee in the original deed, or any one else.

4. Same—Executors and Administrators—Wills—Heirs at Law—Powers of Attorney.

The executor cannot exercise a power for the sale of lands not conferred by the will, except for the payment of debts in accordance with the method prescribed by law; and a power of attorney executed by the devisees respecting other lands than the *locus in quo* cannot have the effect of restoring a right to cut and remove timber from it which had expired in the lifetime of their ancestor.

ADAMS, J., not sitting.

APPEAL by plaintiff from *Ray, J.*, at the May Term, 1921, of MOORE.

On 15 January, 1906, defendants McLeod and wife conveyed by deed to one M. K. Gray the timber on a tract of land in Moore County, giving Gray three years in which to cut and remove the same, with a modification of the time in these words: "Unless he or they should be providentially hindered in the cutting, manufacturing, and removing the same by reason of death, or fire, and then, in that event, he or they are to have the period of five years from the date of this indenture and agreement to cut, manufacture, and remove the same.

The plaintiff Wilcox claims to be the assignee of Gray, or of his

heirs, and alleges that he was providentially hindered by death from cutting and removing the timber within the three years, and that consequently he had five years to cut and remove the same,
(638) under the exception in the contract, and asks for a recovery of the timber and damages.

Plaintiff submitted to a nonsuit in deference to an intimation of the court as to his right of recovery, and appealed.

H. F. Seawell for plaintiff.
U. L. Spence for defendants.

WALKER, J., after stating the case: The plaintiff says that he was hindered by two deaths, first, that of M. K. Gray, and second, that of James Baxter, plaintiff's sawyer.

It is clear that no recovery can be had simply because either Gray or Baxter, or any one else, died, but it must appear that Gray has been, or perhaps his heirs or assigns have been, providentially hindered by death. There is no special statement in the complaint of any facts constituting a cause of action on account of any hindrance by death, but only the general allegation that the work of cutting and removing the timber were hindered by the death of Gray and Baxter. Defendants, therefore, claim that the action should have been dismissed in the beginning, and that the court committed no error in its subsequent rulings. And that but for the nonsuit voluntarily taken the Court should dismiss the action here *ex mero motu*, citing *Moore v. Hobbs*, 79 N.C. 535; *Garrison v. Williams*, 150 N.C. 674. It is further contended by the defendants that there is no evidence in the record to show that either Gray was, or his heirs were, hindered in the least from removing the timber within the three years, either by the death of Gray or any other death, the sole testimony offered with respect to any hinderance being that of the plaintiff Wilcox. We need not consider this claim of the defendants, because, as will appear later on, we are of the opinion that the plaintiff acquired, if anything, only a precarious right of possession, which could be determined at any time by M. K. Gray, by himself or his duly authorized agent acting in his behalf, the plaintiff W. C. Wilcox having only the oral permission, or contract, if it may be so called, to enter upon the land and to cut and remove the timber thereon. But more of this hereinafter.

Was Wilcox hindered by Gray's death? He himself says that he was not so hindered, but that Hodgin, the agent of Gray, who put him in possession of the timber, stopped him from cutting under some sort of an oral contract, and this was before the death of Gray; and that he was not hindered from cutting and removing the timber

by any of Gray's heirs, or his executor, after the death of Gray. There is no evidence that Gray's heirs, or executors, or devisees, were hindered by Gray's death. Indeed, the evidence shows that the plaintiff did not even have the pretense of a legal title, (639) which he claims, until after the death of Gray, and until after the three years had expired, and nothing except the oral contract of purchase with Hodgin, the agent of Gray. M. K. Gray, through Hodgin, his agent, stopped the work of plaintiff, as he had the right to do (the contract not being in writing). This, of course, was done in the lifetime of M. K. Gray, the owner of the land, and put an end to all rights of plaintiff in the timber, according to his own showing, until after the death of Gray.

That the death of James Baxter, the sawyer of plaintiff, while plaintiff was cutting this timber, under the oral contract with Hodgin or his oral permission, during the life of Gray, can be construed as one of the hindrances within the reasonable contemplation of the parties, under the terms of the contract, can hardly be made the subject of serious contention. If neither Gray was, nor his heirs were, providentially hindered from cutting and removing the timber within the three years by death, how can the plaintiff, whose record title, on which he must depend, which is dated after the expiration of the three years, claim any rights which are superior to those of defendants? In fact, the plaintiff, as will appear, has shown no title to the timber.

1. It is further contended by the defendants that the will of M. K. Gray is not probated according to law, as the subscribing witnesses do not testify that Gray was of sound mind and disposing memory, except by the inference that the testator is the one referred to, and they do not testify that they signed as witnesses in the presence of each other, but laying this suggestion out of the case, we proceed to consider the remaining questions.

2. The will does not confer authority on the executor to sell this timber, if the ownership of the timber can be determined until after the death of the widow, and the power of attorney to the executor from the alleged heirs at law of Gray (which only purports to authorize a sale of Guilford County property) is without effective validity.

3. The deed of the timber to plaintiff is void, and conveys nothing. It purports to be a deed from the heirs at law of M. K. Gray, without naming any of them, and none of the heirs at law executes it; it is signed by R. W. Gray, in his capacity as the executor of M. K. Gray, deceased, and it does not even purport to be his individual deed. It is most truly a "scrap of paper," say the defendants. *Gray v. Mathis*, 52 N.C. 502; *King v. Rhew*, 108 N.C. 696; 13 Cyc. 540

(cited by defendants' counsel), to which we add *Lefflin v. Curtis,* 13 Mass. 233; *Gatlin v. Weare,* 9 *ib.,* 217; Cruise's Digest of Real Property 260, note 2; and see, also, *Kearns v. Peeler,* 49 N.C. (4 Jones Law) 226.

(640) The case is simply this, that the original right to cut the timber on and remove the same from the land, which was given to M. K. Gray by the defendants, contained the provision as to cutting and removing within three years, or within five years if providentially hindered by death, there having been no fire to impede or prolong the cutting and removal of the timber. The right to cut was then passed to the plaintiff W. C. Wilcox, by oral agreement between him and John A. Hodgin, agent of M. K. Gray for the purpose, and M. K. Gray, by his said agent, subsequently revoked this permission, or license, to cut and remove the timber, which he clearly had the right to do, it not being evidenced by any memorandum in writing, as required by the statute of frauds. The right acquired under the oral transaction, even if it amounted to a valid license for the time being, or until withdrawn by some act of the owner, is necessarily revocable, and, when revoked, left the plaintiff without any right of recovery against the defendants. 20 Cyc. 212, says that it is generally held that trees and growing grass are so far realty that title to them will not pass without writing, but that crops raised by yearly labor are chattels and will pass by parol. See, also, pages 215 (4), 216, 217, and 218. We find the following in Reed on the Statute of Frauds (a very excellent treatise on that important subject), sec. 685, which is, that "An oral invalid contract anywhere in the line of title vitiates the latter; and in an action brought to recover a chattel, if the evidence introduced by the plaintiff to establish his title showed that the title depended upon a verbal contract within the statute of frauds, the courts ought to instruct the jury to disregard such evidence. If a writing is necessary to pass the right to the thing in demand, etc., a submission and award must be in writing. That a defendant has conveyed to a *bona fide* purchaser without notice does not avail, as he had no title to convey." We have held that an agreement for the cutting upon and removal of trees from land passes the title to the trees *sub modo,* and is within the statute of frauds. *Bunch v. Lumber Co.,* 134 N.C. 116; *Hawkins v. Lumber Co.,* 139 N.C. 162, 165; *Lumber Co. v. Corey,* 140 N.C. 462, and other cases cited in the annotated edition of 134 N.C., at p. 124, and *Moring v. Ward,* 50 N.C. 272. The oral agreement between M. K. Gray (acting through his agent Hodgin) and the plaintiff purported to pass an interest in land, the trees being regarded as a part thereof, was void under our statute of frauds, and

plaintiff acquired no interest therein, and certainly none, except at the will of M. K. Gray, which he exercised against a further continuance of the right to cut and remove the timber. His right, if any existed, was thus terminated.

This being so, he now claims that it was restored by the power of attorney of M. K. Gray's heirs to R. W. Gray, his executor. But the power, at most, applied only to the lands in the county of Guilford, and the lands in controversy lie in the county (641) of Moore, so that plaintiff cannot improve his position by a reliance upon the power. Besides, the power, even as to the Guilford lands, was never exercised, as no valid deed was ever made by the executor as to those lands, for under the power the instrument claimed to be the executor's deed describes only the lands in Moore County; the timber on which was conveyed by the defendants to M. K. Gray. It would seem to be useless to further consider the question as to whether that deed was properly framed and executed by the executor. There is no reference in it to the power, the names of the heirs were never inserted in it, and while it contains a blank presumably for their names, it is still there, and it thus appears in the deed: "....., heirs at law of M. K. Gray," and signed by "R. W. Gray, as executor of M. K. Gray, deceased (seal)," though that name and title nowhere appears in the body of the deed. See cases *supra* on this point, and *Bateman v. Lumber Co.*, 154 N.C. 248. But even if the deed were properly drawn and executed, and sufficient in form to pass the title, the executor had no power under the will to convey the Moore County lands, until other designated lands had been first sold, and then only to pay his testator's debts, and he had no right to make the deed under the power, as it did not embrace these lands, and only described the lands in Guilford, nor did he profess, as executor, to be acting either under the power contained in the letter of attorney or under any power to be found in the will. The plaintiff, therefore, so far as this paper-writing is concerned, is hedged in by many, if not insurmountable, difficulties.

Upon a careful review of the entire case, as shown even by the plaintiff himself, the intimation of the judge was correct.

If by any chance the court committed technical error in the exclusion of any evidence offered, the whole case shows that the plaintiff can in no event recover, and the voluntary nonsuit was properly taken by the plaintiff, and leaves him out of court. *Bateman v. Lumber Co.*, 154 N.C., at p. 249, fifth headnote.

The ruling of the court is free from reversible error. Affirmed.

ADAMS, J., did not sit.

Cited: *Casey v. Grantham,* 239 N.C. 131.

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(642)

J. F. ALEXANDER ET AL., V. L. C. LOWRANCE, MAYOR, ET AL.

(Filed 7 December, 1921.)

1. Public Officials—Officials—Officers de Facto — Quo Warranto — Mandamus—Pleadings—Admissions—Actions.

The exercise of official duties of an officer *de facto* can be impeached only by a proceeding properly instituted for that purpose; and when the defendants admit in proceedings for *mandamus* that the plaintiffs were acting in the exercise of the powers and performing the duties of officials for a special school district created by statute, it precludes the defendant from insisting upon their want of authority to maintain the proceedings.

2. Statutes—Interpretation—In Pari Materia.

All statutes relating to the same subject will be compared and construed by the courts with reference to each other, so as to effectuate all of the provisions of each, if it can be reasonably and fairly done, so that effect will be given to the legislative intent.

3. Same—Municipal Corporations — Cities and Towns — Bonds — School Districts.

C.S. 5684, 5686, giving authority to the governing bodies of incorporated cities and towns to issue bonds for school purposes upon the submission of the question to, and the approval of their voters, and section 5690, construing these powers to be in addition to or coördinate with those given or which may thereafter be given by statute to such corporation, do not deprive a school district created under a special act from exercising control over the schools in the district under authority specially conferred, or the trustees of such district of their right to the funds received by the city or town from the sale of the bonds issued for the schools of the district, in disregard to the directions of a prior act creating the special school district.

4. Public Officials—Officials—Trusts—Passive Trusts—Mandamus — Statutes—School Districts.

Where the treasurer of an incorporated city or town refuses to turn over to the proper officials funds received from the sale of bonds for school purposes, contrary to the provisions of statute, such treasurer is not acting under an authorized judicial or discretionary power, but he is merely a simple or passive trustee against whom *mandamus* will lie.

ALEXANDER *v.* LOWRANCE.

APPEAL by defendant from *Shaw, J.,* 20 September, 1921, from RUTHERFORD.

Peremptory *mandamus,* granted on 20 September, 1921, to compel the defendants to deliver to the treasurer of the graded school committee of Forest City the proceeds of bonds issued to provide a fund for the erection of a school building in the Forest City Graded School District.

The defendants admitted that the plaintiffs, Alexander, Reinhardt, Hemphill, Reid, and Biggerstaff were acting as the graded school committee, performing the duties of such committee, and conducting the public schools of the town, and that the plaintiff Biggerstaff is the treasurer of the committee. The defendants, however, denied that the plaintiffs were lawfully constituted officers.

By virtue of Public Laws 1915, ch. 81, now C.S., ch. 95, art. 40, the board of aldermen of Forest City ordered an (643) election and submitted to the qualified voters of the town the question of issuing bonds in the sum of $50,000 for the purpose of erecting a building for the city graded school; and a majority of the qualified voters having voted for the bonds, the board of aldermen caused bonds to be issued and sold, and, after paying commissions and expenses, turned over to the treasurer of the town $45,000 arising from the sale. The plaintiffs made demand upon the defendants for this money, and upon the defendants' refusal to deliver it, applied to Ray, J., for an alternative *mandamus,* and afterward to Shaw, J., for a peremptory *mandamus.* Judge Shaw rendered judgment granting the peremptory *mandamus,* and from this judgment the defendants appealed.

R. R. Blanton and Ryburn & Hoey for plaintiffs.
Solomon Gallert for defendants.

ADAMS, J. The defendants admit that the graded school committee are conducting the public schools in Forest City, and are otherwise performing the duties and functions of their office. In view of this admission, it is unnecessary to enter upon a discussion of the refinements that characterize the difference between an officer *de facto* and an officer *de jure,* because it is familiar learning that the exercise of official duties by an officer *de facto* can be impeached only by a proceeding properly instituted for that purpose. The admission of the defendants is fatal to their contention that the plaintiffs are not lawfully constituted officers and for this reason are without authority to maintain their action. *Navigation Co. v. Neal,* 10 N.C. 520; *Burke v. Elliott,* 26 N.C. 355; *Comrs. v. McDaniel,* 52 N.C. 107; *Rogers v. Powell,* 174 N.C. 388.

The principal argument of the defendants was addressed to the proposition that the board of aldermen of Forest City have exclusive control of the fund in question, that the plaintiffs have no legal claim upon it, and that the writ of *mandamus* was improvidently issued. On the other hand the committee of the graded school contended that their right to the fund is absolute and unassailable. The arguments advanced require an examination of the laws on which the respective parties base their claims.

The defendants rely chiefly upon the act of 1915, which is now C.S., ch. 95, art. 40. Section 5684 is as follows: "Whenever the board of aldermen or other duly constituted authority of any incorporated town or city in the State, which is in charge of the finances, shall deem it necessary to purchase lands or buildings, or to erect additional buildings for school purposes, the said board of aldermen or other authority is authorized and empowered to issue for
(644) said purposes, in the name of the town or city, bonds of such amount as the board of aldermen or other authority shall deem necessary, in such denominations and forms as the board of aldermen or other authority may determine." Section 5688 authorizes the board of aldermen of each city or town, after ascertaining in the manner provided that a majority of the qualified voters favor the issuance of school bonds, to cause the bonds to be prepared and issued for the approved purpose, and to be sold at public or private sale. Section 5690 is in these words: "This article shall apply to towns or cities which have powers under special acts or charters as well as to those who derive their powers from the general law. This article shall not be deemed or construed to repeal or abridge any powers, rights, or privileges heretofore or hereafter granted by any special acts to any town or city, but shall be construed to grant additional powers where no such powers have been granted, or coördinate powers where such powers have already been or shall be granted."

If article 40 shall not be construed to repeal or abridge any powers, rights, or privileges granted by special acts, it becomes material to inquire whether such powers, rights, or privileges have been granted to the plaintiffs.

At the session of 1903, the General Assembly passed an act to establish a graded school for the town of Forest City. This act provides that Forest City shall constitute a public school district; that after the graded school committee shall have determined the amount to be levied, the board of aldermen shall levy an annual tax for the support and maintenance of this school; and that the moneys apportioned to the school district shall be turned over by the treasurer of the county to the treasurer of the school committee for the benefit

of the school. Section 3 provides that the school committee shall have exclusive control of the public school interests, funds, and property in the graded school district; and section 9 that the committee shall have the right to control site, lands, buildings, and other property belonging to the trustees of the Forest City Academy or high school, title to which is vested in them and their successors.

It is a fundamental rule of statutory construction that for the purpose of learning and giving effect to the legislative intention, all statutes relating to the same subject are to be compared and so construed in reference to each other that effect may be given to all the provisions of each, if it can be done by any fair and reasonable construction. 25 R.C.L. 1061; *S. v. Melton,* 44 N.C. 49; *Cecil v. High Point,* 165 N.C. 431; *Mfg. Co. v. Andrews, ib.,* 285. Applying this principle to the act of 1903 and to the act of 1915, we regard it clearly the intention of the General Assembly to confer upon the school committee power and authority to take charge of and control the funds, moneys, lands, buildings, property (645) and general interests of the graded school district. We are convinced, also, that the act of 1915 was not intended to deprive the committee of the rights and privileges conferred by the act of 1903. The statutes embraced in article 40, *supra,* were intended to confer upon the board of aldermen of any incorporated city or town, or other governing body in charge of its finances, power and authority, if not otherwise conferred, by conforming to the procedure therein prescribed to issue and sell bonds for the purchase of lands or buildings, or for the erection of buildings for school purposes; and if such authority has been conferred on any other body, to grant to the board of aldermen or other duly constituted authority, such coördinate powers as may be necessary to effect the contemplated purpose. But evidently these statutes cannot be construed as depriving the school committee of their exclusive right to control the funds and other property appertaining solely to the graded school district.

In the next place, the defendants contend that neither of the acts referred to imposes upon the school committee any specific right or duty, and that they are not entitled to the writ of *mandamus.* The cases cited by counsel for the defendants sustain the principle that ordinarily the writ will be granted to enforce only a ministerial act or duty which is imposed by law; but we cannot concur with the counsel in his application of the principle. When the bonds were sold and the treasurer of the town received the proceeds, he occupied the position of a passive or simple trustee, who held the money for the benefit of the school committee; for with respect to the fund he had no judicial or discretionary duty to perform. It was incumbent upon him immediately to transfer the fund to the treasurer of

the school committee; and upon his refusal or failure to perform a duty which was ministerial, and not judicial or discretionary, the plaintiffs properly applied for, and his Honor properly granted, the peremptory writ of *mandamus*.

It was suggested in the brief of counsel for the defendants that the pleadings raised disputed questions of fact which should have been submitted to a jury for determination. The pleadings raise, not issues of fact, but questions of fact and of law, which were determinable by the court; but even if otherwise, the defendants having agreed that the cause should be heard without the intervention of a jury, cannot now renounce the jurisdiction of his Honor and invoke such renunciation as a valid cause for reversing the judgment. Due consideration of the record and of the briefs discloses no error, and accordingly the judgment is

Affirmed.

Cited: Felmet v. Comrs., 186 N.C. 252; *Bd. of Ed. v. Comrs.*, 189 N.C. 652; *S. v. Baldwin*, 205 N.C. 176; *Rogers v. Davis*, 212 N.C. 36; *Charlotte v. Kavanaugh*, 221 N.C. 263; *Power Co. v. Bowles*, 229 N.C. 150; *In re Blalock*, 233 N.C. 508; *In re Miller*, 243 N.C. 514.

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(646)

J. F. ALEXANDER ET AL., v. J. C. LOWRANCE ET AL.

(Filed 7 December, 1921.)

Schools—Bonds—School Committees—County Treasurer—Injunction.

Where it has been judicially determined that the treasurer of an incorporated city or town has unlawfully retained and refuses to pay over to a school district funds in his hands, received from the sale of bonds for school purposes, the city or town will be restrained from proceeding to use the funds in the construction of schoolhouses, at the suit of the members of the board of school districts having the right thereto.

APPEAL by defendant from *Shaw, J.*, 15 September, 1921, from RUTHERFORD.

Appeal by the defendants from a judgment restraining the defendants from erecting a school building in the town of Forest City. The plaintiffs alleged that the proceeds of the bonds were in the hands of the town treasurer; that the treasurer of the graded school committee was entitled to the fund as the lawful depositary; that the defendants had prepared plans and specifications for the erection of the building, and were ready to proceed with its construc-

tion; and that the defendants' attempted expenditure of the fund was wrongful and unlawful. The answer of the defendants was practically the same as the answer filed by them denying the right of the plaintiffs to the *mandamus*.

R. R. Blanton and Ryburn & Hoey for plaintiffs.
Solomon Gallert for defendants.

ADAMS, J. The disposition of this case is governed by the decision adjudging the plaintiffs entitled to the writ of *mandamus*. We have held that the plaintiffs are entitled to the proceeds arising from the sale of the bonds, and it follows as a corollary that the plaintiffs are entitled to have the fund protected from expenditure by the defendants. The judgment continuing the restraining order is therefore

Affirmed.

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(647)

IRVIN & MONTGOMERY, ADMINISTRATORS C. T. A. OF H. C. HARRIS, v. W. C. HARRIS ET AL.

(Filed 14 December, 1921.)

1. Actions—Parties—Administration—Proceedings to Sell Lands—Creditors—Equity—Appeal and Error—Statutes.

Where issue has been joined before the clerk in proceedings by the administrator to sell lands of deceased to pay debts due by the estate, and upon transferring the cause to the trial court, the judge has ordered claimants to file original evidence of their indebtedness and then referred the matter, the proceedings assume the character of a creditor's bill in which a creditor, whose claim has been disallowed, may appeal to the Supreme Court, under the express provisions of C.S. 632, as a party aggrieved.

2. Bills and Notes—Notes—Negotiable Instruments—Delivery.

The legal delivery of a note does not alone depend upon giving it to the payee in person, but it may be evidenced by its delivery to another for the payee showing the maker's intent to part with control over it, and that it was for the payee's benefit in accordance with the terms of the instrument.

3. Same—Partnership—Husband and Wife.

Where a partnership consists of the husband of the payee of the note, and others, and there is evidence that the wife became insane before the note was delivered to her and in consequence it was delivered to the husband by the partnership, and he had assumed to endorse the check given in payment, in his wife's name, and received the money thereon: *Held*,

sufficient of a valid delivery; but not of payment of the note, it being only lawful that the money should be paid to the guardian of the wife, or the check in payment endorsed by him, in order to cancel it.

4. Partnership—Retiring Partners—New Firm—Creditors.

Where a new partnership is formed upon the retirement of some of the members of the old, who agree among themselves to assume the debts of the old without the concurrence of the creditors, the agreement does not relieve the retiring partners from liability to creditors of the old concern.

5. Equity—Election—Remedies.

The doctrine of election between existing remedies arises either in the course of the litigation or from matter *in pais*, upon contract or from the operation of the law, only when these remedies are inconsistent or repugnant to each other, and in such instances a choice of one will preclude a recovery upon the other.

6. Same — Partnership — Retiring Partners — New Firm — Creditors — Waiver.

Where a new firm has succeeded the old upon the retirement of one or more of its members and under agreement between themselves, but not concurred in by the creditors, the new concern has assumed liability for the debts of the old, the liability of the retiring partners continues, and when a creditor files his proof of claim in bankruptcy proceedings of the new concern, it does not alone amount to an election of remedies, or a waiver of right to proceed in the State court, against the retiring partner, for whatever sum that remains due on the old firm's note, each of these remedies being consistent with the other.

7. Limitation of Actions—Statutes—Writing—New Promise—Continuing Liability.

A new note embracing an old indebtedness of the maker is a sufficient writing signed by the parties to be charged to bring the old indebtedness within the operation of C.S. 416, and repel the bar of the statute of limitations.

8. Same—Administration—Insane Persons—Guardian and Ward.

C.S. 412, prescribing a time limit within which actions may be commenced against administrators or executors of the decedent's estate, commences to run against an insane claimant only from the time of the qualification of his guardian. C.S. 407.

APPEAL by Robert Harris, Jr., guardian of Mrs. Nettie
(648) Harris, from *Webb, J.*, at the February Term, 1921, of ROCKINGHAM.

Civil action, heard on exceptions to the report of a referee.

H. C. Harris died 11 April, 1911, leaving a last will and testament, which is as follows:

"Being in my wright mind I make this my last will having destroyed all others. I will my dear wife Lou F. Harris my Home and all Furniture and table ware & all the House hold things I will her my carriage and Black horses & carriage Harness I will her my new

top buggy & harness I will my daughter my Home just as it is at my Dear Wife's death just as I gave it to my wife I will Eva my Clark plantation just as it is I will my son W. C. Harris my Wells plantation just as it is I will my son W. C. Harris my entire interest in Our Factory I mean with my Bro. Robt. Harris I will that my son take good care of his mother during her life time and support her out of the factory I will W. C. Harris one pare of the best mules I have & wagon and harness I will Eva one pare of the next best pare and wagon & harness I will that W. C. Harris sell all other personally Property at Private sail & divide equally with his mother and Eva that I may have I will all money that I may have on hand equal between W. C. Harris & Eva Harris.

"I mean for W. C. Harris to have my entire interest in my one half of the factory I will my granddaughter Lou Harris my Crafton lot this 8th day of March, 1899. H. C. HARRIS.

"P. S. I will that if Eva should die without heirs all I have willed to her I will it to the heirs of W. C. Harris. H. C. HARRIS."

"Probated 20 June, 1911, by the oath and examination of Scott Fillman, Robt. Harris, B. L. Hurdle, W. C. Harris."

For many years prior to his death W. C. Harris and his brother Robert Harris had conducted the business of manufacturing and selling tobacco in the city of Reidsville under the firm name and style of Robert Harris & Brother. In 1904, after this (649) partnership had been formed, Mrs. Nettie Harris, wife of H. C. Harris, loaned it an amount of money, which was credited to her on the books of the firm. This amount was increased from time to time until it reached $8,400, and on 9 January, 1909, Robert Harris & Brother executed to Mrs. Nettie Harris a promissory note, which was as follows: "$8,400. One day after date we promise to pay to Mrs. Nettie R. Harris eighty-four hundred dollars. Value received, with interest at 6 per cent per annum from date. 9 January, 1909. (Signed) Robert Harris & Bro." This note, which was executed in the lifetime of H. C. Harris, went into the possession of Robert Harris, Sr., husband of the payee. On 2 October, 1908, Mrs. Nettie Harris was adjudged insane and committed to the western hospital at Morganton, where she has since remained without lucid intervals. The note, it seems, remained among the papers of her husband until 29 March, 1913, when Robert Harris & Brother (at that time composed of Robert Harris, Sr., and W. C. Harris, son of H. C. Harris) drew two checks on the Bank of America aggregating $10,756 (the amount of the principal and interest of the note of $8,400), payable to the order of Mrs. Nettie Harris. These checks were delivered to Robert Harris and by him endorsed in the name of Mrs. Nettie Harris and delivered to J. H. Walker & Company. The checks were

endorsed by Walker & Company, and paid by the Bank of America. After the death of H. C. Harris, the firm composed of Robert Harris and W. C. Harris conducted the business of the partnership until 9 June, 1913, when the firm and the individual members were duly adjudged bankrupt by the district court of the United States for the Western District of North Carolina. The claim of Mrs. Nettie Harris was proved by her guardian in the bankruptcy court against the new firm of Robert Harris & Brother, and credited with a dividend duly paid from the bankrupt estate.

At the time of his death (11 April, 1911), H. C. Harris was seized and possessed of several tracts of land. Although the will of H. C. Harris was probated 20 June, 1911, no one qualified as his personal representative until 30 June, 1913, when letters of administration with the will annexed were granted to Eugene Irvin and R. S. Montgomery. On 28 August, 1915, the administrators instituted a proceeding against the devisees and beneficiaries to sell the testator's land for assets. The defendants, answering and pleading various defenses, particularly denied the alleged debts, pleaded the statute of limitations, and alleged that the claimants, or some of them, had released the old firm by accepting the new firm of Robert Harris & Brother as their debtor. By an order of the court all claimants were directed to file with the administrators the original evidence
(650) of their claims for inspection by the defendants. When the case was called the court ordered that all matters in controversy be referred to Lindsay Patterson, Esq., with directions to report upon his findings of fact and conclusions of law. On 28 July, 1914, Robert Harris, Jr., as guardian of Mrs. Nettie Harris, brought suit on her claim in the Superior Court of Rockingham County, but the claim was not reduced to judgment. It was presented to the referee, who, in disallowing it, made the following report:

"That exhibit 71 is a note executed by Robert Harris & Brother to Mrs. Nettie R. Harris for $8,400, of date 9 January, 1909. That no payments were ever made on this note until 29 March, 1913, when the same was paid off. That the same was presented to the administrators of H. C. Harris, but was not admitted by them, and that prior to said presentment the note had been paid. That on 28 July, 1914, Robert Harris, Jr., guardian of Nettie R. Harris, brought suit on said note in the Superior Court of Rockingham County against the administrators of H. C. Harris. I therefore find that the note was paid prior to said presentment and suit, and if not paid, but in existence, it was at the time of the suit barred by the statute of limitations. Therefore, I find that Robert Harris, Jr., guardian of Nettie R. Harris, is entitled to recover nothing from the estate of H. C. Harris. I further find that at the time of the last transaction,

Nettie R. Harris was insane, and was confined in the State Hospital at Morganton."

His Honor overruled all exceptions and confirmed the referee's report. The claimant, Robert Harris, Jr., excepted and appealed.

H. R. Scott and King, Sapp & King for plaintiff.

Thomas C. Hoyle for appellant, Robert Harris, Jr.

J. I. Scales, J. M. Sharp, H. W. Cobb, Jr., and Fentress & Jerome for defendants.

ADAMS, J. The administrators with the will annexed of H. C. Harris filed a petition before the clerk for an order to sell land to make assets. The devisees and beneficiaries under the will, who were parties defendant, filed several answers, and the cause was thereupon transferred to the civil-issue docket for trial in the Superior Court. The court directed all claimants to file with the administrators the original evidence of their claims for the purpose of inspection by the defendants. Thereafter, his Honor referred all matters in controversy, with instruction to the referee to embody his finding of facts and conclusions of law in a report to be made at an ensuing term, and authorized those holding claims to make proof thereof before the referee. To the disallowance by the referee of the appellant's claim, exception was taken, and duly renewed (651) before the judge upon confirmation of the referee's report.

When the case was called for argument in this Court, the defendants moved to dismiss the appeal on the ground that the appellant, Robert Harris, Jr., is not a party to the suit. They rely upon *Dickey v. Dickey,* 118 N.C. 956, and *Strickland v. Strickland,* 129 N.C. 84. These cases are authority for the position that in a proceeding to sell land for assets the creditors of a decedent may not be made parties plaintiff with the personal representative. There is no order in the record which makes claimants against the decedent's estate coplaintiffs with the administrators. The order permitting them to prove their claims before the referee necessarily implied the right to introduce evidence pertinent to the issue joined as to all claims not admitted. On the hearing the creditors became actors, and their claims were subject to contest by the administrators and by the beneficiaries under the will. The proceeding, therefore, was analogous to a creditors' bill brought to prevent undue preference and to marshal the assets of the estate. It necessarily follows that the creditor, upon rejection of his claim by the referee, became for the purpose of the suit such party aggrieved as is given the right of appeal by the express terms of the statute. C.S. 632.

The defendants contend that the note in question had never been delivered by the makers to the payee, Mrs. Nettie Harris. On 2 October, 1908, Mrs. Harris was adjudged insane, and on 9 January, 1909, the note, which was executed by the old firm of Robert Harris & Brother, passed into the possession of Robert Harris, the payee's husband. Robert Harris, Jr., testified that he had no reason to believe that Mrs. Harris had ever seen the note. On 29 March, 1913, the new firm of Robert Harris & Brother paid the note by checks which were endorsed by Robert Harris in the name of the payee. The situation, then, was this: the old firm executed the note to Mrs. Harris and delivered it to her husband; afterwards the new firm paid the note by checks, which were endorsed by her husband in the name of the payee. Did these transactions constitute a delivery of the note to Mrs. Harris? Delivery means transfer of possession, actual or constructive, from one person to another. C.S. 2976. In *Purviance v. Jones,* 16 Am. St. Rep. 320, it is said: "While it is not indispensable that there should have been an actual manual transfer of the instrument from the maker to the payee, yet, to constitute a delivery, it must appear that the maker in some way evinced an intention to make it an enforceable obligation against himself, according to its terms, by surrendering control over it, and intentionally placing it under the power of the payee, or of some third person for his use. The acts which consummate the delivery of a promissory note are not essentially different from those required to complete the
(652) execution of a deed. Act and intention are the two elements essential to the delivery of a deed, which is ordinarily effected by the simple manual transfer of possession from the grantor to the grantee, with the intention of passing the title and relinquishing all power and control over the instrument itself. The final test is, Did the maker do such acts in reference to the deed or other instrument as evince an unmistakable intention to give it effect and operation, according to its terms, and to relinquish all power and control over it in favor of the grantee or obligee? *Weber v. Christen,* 121 Ill. 91; 2 Am. St. Rep. 68; *Stone v. French,* 37 Kan. 145; 1 Am. St. Rep. 237." Section 2997 of Consolidated Statutes provides that where the instrument is no longer in possession of a party whose signature appears thereon, a valid and intentional delivery by him is presumed until the contrary is proved. It is true that Robert Harris was a member of each of the two partnerships, and that the note was signed by him in the name of the old firm, but his acceptance and subsequent endorsement of the checks in his wife's name and his collection of the money thereon indicate that the old firm by delivering the note to him intended to make it an enforceable obligation for the benefit of Mrs. Harris. Indeed, the question of non-

delivery seems not to have been raised at the hearing, for the referee held that the note had been paid.

In the next place, the defendants insist that the new firm acquired the assets and assumed the liabilities of the old firm with the knowledge and acquiescence of the claimant, evidenced by his filing proof of the note before the trustee of the new firm after the adjudication in bankruptcy, and that the claimant thereby exercised such right of election as released the estate of the retired partner from all liability. Conceding that the two partnerships were distinct entities, and that the new firm assumed the liabilities of the old, it becomes material to inquire into the relation that existed between the partnerships *inter se,* as well as between them and the creditors of the old firm.

It has been held that the rule is probably without exception that an agreement on dissolution of a partnership by which one or more of the partners take the interest of their copartners, agreeing to pay all partnership liabilities, does not relieve the retiring partners from liability to firm creditors. *Smith v. Shelden,* 25 Am. Rep. 529; *Skinner v. Hitt,* 32 Mo. App. 402. Likewise, it has been held in most jurisdictions that where a firm is dissolved and one of the partners takes the assets and assumes the liabilities, as between themselves with respect to existing debts, the members of the new firm become the principal debtors, and the retiring partner a surety. But the decisions are by no means unanimous as to the relation existing between the two partnerships and the creditors of the old firm. The weight of authority in England, sustained by authorities in America which command great respect, is to the effect (653) that the relation of principal and surety as between the partnerships must be observed by those who have notice of the agreement and thereafter deal with the new firm. Other authorities hold that the creditors of the old firm are not affected unless they consent to the change, and that in the absence of such consent all the members of the old firm remain principals and joint debtors. *Dean v. Collins,* 9 L.R.A. (U.S.) 4, and notes. We do not understand the defendants' counsel as contending that the claimant cannot maintain his suit on the ground that his ward was not in privity with the new firm. *Withers v. Poe,* 167 N.C. 372. But they argue that if the new firm was principal and the old firm surety, the claimant released the old firm by electing to proceed in bankruptcy against the later partnership. If it be conceded that between the two firms there existed the relation of principal and surety, and that the claimant had knowledge of such relation, did filing proof of his claim with the trustee in bankruptcy constitute such an election as precluded him from prosecuting his claim before the referee? The doctrine of elec-

tion is founded on the principle that where by law or by contract there is a choice of two remedies which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other. A party cannot, either in the course of litigation or in dealing *in pais*, occupy inconsistent positions. In the language of the Scotch law, "A man shall not be allowed to approbate and reprobate." 9 R.C.L. 957; *Crossman v. Universal Rubber Co.*, 13 L.R.A. 91, and note. But the doctrine of election applies only where two or more existing remedies are alternative and inconsistent. If the remedies are not inconsistent, there is no ground for election. Illustrations of this doctrine, in its application to consistent and to inconsistent remedies, appear in numerous decisions of this Court. *Rounsaville v. Ins. Co.*, 138 N.C. 195; *Parker v. Ins. Co.*, 143 N.C. 339; *Huggins v. Waters*, 154 N.C. 444; *Fields v. Brown*, 160 N.C. 295; *Machine Co. v. Owings*, 140 N.C. 503.

Both the old firm and the new became liable to the claimant's ward — the former by virtue of the note, and the latter by assuming the debts of the old firm *Voorhees v. Porter*, 134 N.C. 594; *Withers v. Poe*, 167 N.C. 373. The liability of each firm arose out of contract. The mere proof of claim in bankruptcy did not necessarily waive the claimant's right to enforce his contractual demand by any other appropriate legal remedy. In *McFadgen v. Council*, 88 N.C. 220, this Court held that where a discharge in bankruptcy had been refused, or the proceedings determined without a discharge, a creditor who had proved his claim in bankruptcy did not thereby waive his right of action against the bankrupt in the State court. This de-
(654) cision was based on the act of 1874; but Collier, discussing the question, says:

"The effect of proof of a debt on a right of action was much debated under the former law, which in terms provided that he who proved his debt in bankruptcy waived his right to enforce it by any other legal remedy. But the better opinion was that the waiver endured only until a discharge was granted or refused. The amendatory act of 1874 made this view also the written law. That the same is the law today, with the exception that a suit may probably be begun and, unless stayed, prosecuted to judgment, is undoubtedly true. So, also, is the old-time rule that the remedy thus suspended comes into being the moment the discharge is granted or denied. But the State court does not lose jurisdiction. The stay is directed to the suitor, not the court, and the latter may go on if the cause is moved by the person enjoined, and a judgment resulting will be valid. The remedy of a party thus aggrieved is in contempt proceedings. It is important, however, to note that if a stay is not granted and the suit proceeds and judgment is entered *after* the discharge, the latter can-

not be set up as a release to the judgment. A stay of a suit pending in the State courts effected by an injunction issued by a court in bankruptcy is not a dismissal of the suit. It does not defeat the cause of action pending in the State court; it merely suspends the proceedings as long as the injunction is in force."

If, notwithstanding proof of claim, a creditor, in the absence of a stay of proceedings, may prosecute his suit to judgment against the bankrupt, *a fortiori* may such creditor maintain his action against the original debtor, who became surety on a contract which was made without the creditor's consent. Certainly the claimant's remedies, even if alternative, were not so inconsistent as to estop him from prosecuting the present demand by the mere filing of his proof of claim against the bankrupt's estate. We therefore hold that the doctrine of election may not be invoked in bar of the present action. We have examined the authorities relied on by the defendants, and have concluded that they are not controlling upon the record in this case.

The referee held that the note had been paid, or, if not paid, that it was barred by the statute of limitations.

Mrs. Harris made her first loan of money to Robert Harris & Brother in 1904, and thereafter made other loans from time to time. These different loans were included in the note of $8,400, dated 9 January, 1909. It is not necessary to decide whether the execution of the note should be considered as a conditional payment, or as collateral security, or as a mere acknowledgment of the amount due. *Bank v. Hollingsworth,* 135 N.C. 571. The statute of limitations may be determined by reference to C.S. 416: "No acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained (655) in some writing signed by the party to be charged thereby; but this section does not alter the effect of any payment of principal or interest."

The note, when executed, became evidence of a contract, new or continuing, from which the statute of limitations, except for the ward's disability, would have begun to run. *Phillips v. Giles,* 175 N.C. 412; *Shoe Store Co. v. Wiseman,* 174 N.C. 716. Mrs. Harris was adjudged insane on 2 October, 1908. C.S. 407, provides that if a person entitled to commence an action be insane at the time the cause of action accrues, he may bring his action within the time limited, after the disability is removed. The note was executed on 9 January, 1909. The personal representatives of H. C. Harris were appointed 13 July, 1913, and the guardian of Mrs. Harris on 15 July, 1913. If it be granted that the statute of limitations commenced running against Mrs. Harris at the time her guardian qualified, the action

would not be barred until the expiration of three years from that date. The guardian was not required to bring suit within one year after the administrators of H. C. Harris qualified; C.S. 412, enables a party to bring suit after the time limited has expired and within one year after the issuing of letters testamentary or of administration on the estate of the party against whom the cause of action accrued. Suit was instituted by the guardian within three years after his qualification, and it is therefore not barred by the statute of limitations.

It is equally clear that the note has not been paid. We have said that when it went into the hands of the payee's husband, the makers intended that it should be a contract enforceable for the benefit of Mrs. Harris, and that the transaction, as to the makers, constituted a delivery. But the delivery of the note to the husband of the insane payee did not signify that he was empowered to collect it. The right of collection was vested exclusively in the guardian. The endorsement of the checks and the collection of the money by Robert Harris were without authority of law, and therefore did not exonerate the old firm from liability on the note. The claimant is entitled to recover whatever amount may be found to be due on the note sued on after deducting all proper credits.

On the appeal of Robert Harris, Jr., as guardian of Mrs. Nettie Harris, the judgment is

Reversed.

WALKER, J., did not sit.

Cited: Humphrey v. Stephens, 191 N.C. 103; *Reel v. Boyd,* 198 N.C. 215; *Lykes v. Grove,* 201 N.C. 256; *Smith v. Gordon,* 204 N.C. 698; *Walker v. Packing Co.,* 220 N.C. 160; *Adams v. Ins. Co.,* 223 N.C. 502; *Canestrino v. Powell,* 231 N.C. 196; *Jenkins v. Trantham,* 244 N.C. 426; *Carrow v. Weston,* 246 N.C. 737; *Hodge v. Perry,* 255 N.C. 699.

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IRVIN & MONTGOMERY, ADMINISTRATORS C. T. A. OF H. C. HARRIS, v. WILLIAM C. HARRIS ET AL.

(Filed 14 December, 1921.)

1. Limitation of Actions—Partnership—Dissolution—New Partnership—Continuing Obligations—Deceased Partner.

Where a new partnership is formed after the death of a partner under a partnership arrangement between the survivors and the devisee of the deceased, assuming to pay the debts and obligations of the old concern, a payment made by the surviving partner on a debt of the old concern will not have the effect of repelling the bar of the statute of limitations which would otherwise run against the partnership assets and the separate property of the deceased member of the firm, for upon the dissolution of the partnership by death, this authority ordinarily ceases in the surviving partner, and becomes vested in the personal representative of the deceased one. C.S. 417.

2. Same—Administration—Executors and Administrators.

Where a member of the firm has died and the surviving partners take in his devise and form a new concern assuming the debts of the old, claims against the deceased as a member of the old concern which have been barred by the statute of limitations since the decedent's death, are suspended by the express provision of the statute until an additional period of one year from the qualification of his administrator if within the period of ten years from the decedent's death, and until the expiration of this further time of one year, the bar of the statute will be repelled. C.S. 412.

APPEAL by defendants from a judgment of *Webb, J.*, confirming the referee's report, at February Term, 1921, of ROCKINGHAM.

Civil action, heard on exceptions to the report of a referee.

The plaintiff filed a petition before the clerk to sell land for assets. The defendants filed several answers, and Webb, J., referred the cause to Lindsay Patterson, Esq., to take and state an account and report his finding of facts and conclusions of law. The referee disallowed the claims of George E. Barber, executor of Mrs. Marion F. Redd (Exhibits 31, 32, 33), the claim of W. A. Kernodle (Exhibit 37), and that of Reidsville Fertilizer Company (Exhibit 69), and allowed the claims of the following persons: A. B. Troxler (Ex. 3), A. J. Whittemore (Ex. 4), D. W. Williams (Ex. 5), R. P. Thacker (Ex. 6), A. R. Troxler (Ex. 7), A. J. Whittemore (Ex. 8), Nannie B. Motley (Ex. 9), James W. Walker (Ex. 10), J. H. Duncan (Ex. 11), J. P. Matkins (Ex. 12), J. D. Matkins (Ex. 13), S. F. Holderby (Ex. 14), Robert Harris, Jr. (Ex. 72), George D. Williams (Ex. 73), Carrie Ervin (Ex. 74), C. J. Williams (Ex. 75), Robert Brown (Ex. 78), M. G. Watlington (Ex. 79), P. H. Williamson, trustee (Ex. 80), C. H. Overman (Ex. 81). The referee found that all the foregoing

claims which he allowed were presented to and admitted by
(657) the administrators of H. C. Harris. As to these claims the defendants do not insist on the bar of the statute of limitations, but contend that all the remaining claims which were allowed by the referee were barred by the statute.

The defendants further contend that all creditors whose claims have been allowed are precluded from collecting such claims from the estate of H. C. Harris for the reason that these creditors elected to file their claims against the successors of the old firm of Robert Harris & Brother. Reference is made to the statement of facts in the case of Robert Harris, guardian.

H. R. Scott and King, Sapp & King for plaintiffs.

J. I. Scales, J. M. Sharp, H. W. Cobb, Jr., and Fentress & Jerome for defendants.

Thomas C. Hoyle for Cora W. Best, A. E. Chandler, R. H. Scales, E. M. Redd, and Anna J. Redd.

Manly, Hendren & Womble for Robert Brown, M. C. Watlington, P. H. Williamson, trustee, and C. H. Overman.

ADAMS, J. Not only have the defendants pleaded the statute of limitations in bar of all claims allowed by the referee, except such as were presented to and admitted by the personal representatives of H. C. Harris, but they have invoked against the validity of all claims the doctrine of the claimants' election between inconsistent remedies. The latter proposition has been discussed in the appeal of Robert Harris, Jr., as guardian of Mrs. Nettie Harris, and what is there said resolves the question against the contention of the defendants. There remains for discussion the defendants' plea of the statute of limitations.

It is essential to a proper consideration of this plea that certain dates be kept in mind. H. C. Harris died on 11 April, 1911; his personal representatives qualified on 30 June, 1913, and on 3 July gave due notice to creditors to present their claims on or before 10 July, 1914. By virtue of the last will of H. C. Harris, and the subsequent agreement between his devisee, W. C. Harris and the surviving partner, the new firm, continuing business, retained the old firm name of Robert Harris & Brother. The new firm and the individual partners were adjudged bankrupt on 9 June, 1913; the Reidsville Fertilizer Company on 30 June, 1913; and J. H. Walker & Company on 30 June, 1912. On many, if not all, the claims under consideration payments were made both before and after the death of H. C. Harris. On the claims as to which the statute of limitations was pleaded, the referee held that the statute ran against the creditors from the

date of the last payment, which in practically all instances was made after the death of H. C. Harris by the surviving partner, or by the other members of the new firm, and that, as suit (658) had been instituted within the statutory period next succeeding the last payment, the claims were not barred. This proceeding was commenced on 28 August, 1915, and answers were filed by the several defendants in September, October, and December, 1915, and in January, 1916. The order of reference was made at the February Term, 1916, and creditors filed their claims before the referee. The referee found as a fact from the evidence and from the admissions of the defendants' counsel that suits were brought by the several creditors of the old firm of Robert Harris & Brother against the administrators of H. C. Harris in the Superior Court of Rockingham County. The time at which these respective actions were instituted will be referred to hereafter as occasion may require.

Counsel for the defendants admit that their contention as to the application of the statute of limitations depends upon the proper answer to two questions: (1) Could Robert Harris, surviving partner of the old firm of Robert Harris & Brother, by making payments after the death of his former copartner, renew or keep alive the firm notes and thereby prevent the administrators or the heirs of the deceased partner from interposing the bar of the statute? (2) Was the statute of limitations suspended from the death of H. C. Harris until the appointment of his administrators?

Now, as to the first question. It is true that after the death of H. C. Harris his devisee was accepted as a member of the new firm; but the organization of the new firm did not deprive creditors of the old firm of their right to require that the surviving partner pay the firm debts and perform the firm obligations.

Here, however, the creditors have undertaken to subject to the payment of their claims the individual estate of the deceased partner. What, then, was the legal effect of payments made by the surviving partner after the death of his copartner? Upon the dissolution of a firm by the death of a partner, the estate of the deceased partner and his share in the firm assets are absolved from any new contract or subsequent transactions of the surviving partner, which are not necessary to the joint business. *Martlett v. Jackman*, 85 Mass. 287. In *Copeland v. Collins*, 122 N.C. 624, it was held that a payment renews the obligation, and in *Bank v. Hollingsworth*, 135 N.C. 569, Justice Connor said: "It seems to be equally well settled that a surviving partner has no power, after dissolution, to renew or endorse a note in the name of the firm. The dissolution operates as a revocation of all authority for making new contracts. It does not

revoke the authority to arrange, liquidate, settle, and pay those before created. The implied power of the expartner does not extend to giving a note or to drawing a bill in the firm's name, nor (659) could he bind the firm by a check in its name. Renewals of outstanding bills or notes of the firm stand on the same footing; and as the expartner could not draw a bill or note for a firm debt, neither could he renew a bill or note of the firm given for their debt." Daniel Neg. Inst., sec. 370. "Where a note is issued by a partner after dissolution, it will not bind the other partners, even though given for a debt due by the firm." *Ib.*, 371. "Where the dissolution is by the death of one of the partners, the surviving partner may endorse a note payable to the firm *in his own name.*" *Bristol v. Sprague,* 8 Wend. 423; *Whitman v. Leonard,* 20 Mass. 177; *Charles v. Remick,* 156 Ill. 327; *Woodson v. Wood,* 84 Va. 478; *Lusk v. Smith,* 8 Barb. 570; *Myatt v. Bell,* 41 Ala. 222.

"In *Abell v. Sutton,* 3 East. 110, Lord Kenyon said, in regard to the liability of a partner for an endorsement made after the dissolution of the firm: 'To contend that this liability to be bound by the acts of his partner extends to times subsequent to the dissolution is, to my mind, a most monstrous proposition. A man in that case could never know when he is to be at peace and retired from all the concerns of a partnership.' " 22 A & E 214. "A note given by one partner, after dissolution of the partnership, does not bind the other partner, although given in the partnership name and in consideration or settlement of a subsisting partnership liability. *Haddock v. Crocheron,* 32 Tex. 277; 5 Am. Rep. 244; *White v. Tudor,* 24 Tex. 639; 76 Am. Dec. 126; *Fellows v. Wyman,* 33 N.H. 351."

"As a general rule, after the dissolution of a partnership the surviving partner has no right to enter into or make any contract which shall be binding on the firm or affect its assets or prejudice those entitled to a share of its property after the debts are paid. In the absence of some special grant of powers to the surviving partners, the only exception involves such contracts as are appropriate and necessary in settling the affairs of the partnership." 20 R.C.L. 998.

The words of the statute are still more comprehensive: "No act, admission, or acknowledgment by a partner after the dissolution of the copartnership, or by any of the makers of a promissory note or bond after the statute of limitations has barred the same, is evidence to repel the statute, except against the partner or maker of the promissory note or bond doing the act or making the admission or acknowledgment." C.S. 417. Here is a direct and explicit provision that neither the act, nor the admission, nor the acknowledgment of one partner occurring after the dissolution shall be evidence against the

other to repel the bar of the statute. Therefore, payments made on these notes by the surviving partner, after the copartnership was dissolved by the death of H. C. Harris, cannot operate to keep alive or renew against the estate of the deceased partner claims which, except for such payments, would be barred by the (660) statute of limitations. *Wood v. Barber,* 90 N.C. 79. The cases of *McIntire v. Oliver,* 9 N.C. 209; *Willis v. Hill,* 19 N.C. 231, and Walton v. Robinson, 27 N.C. 342, were decided prior to the enactment of C.S. 417.

As to the second of these two questions, the decisions apparently are not uniform. In *Copeland v. Collins,* 122 N.C. 621, it is said that "it would be difficult to reconcile our opinions upon this subject." The apparent lack of uniformity may be attributed in part at least to the difference in the phraseology of certain of the statutes which were under consideration; but the question presented by the defendants' exceptions seems definitely to have been settled.

C.S. 412, is as follows: "If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration, provided the letters are issued within ten years of the death of such person. If the claim upon which the cause of action is based is filed with the personal representative within the time above specified, and admitted by him, it it not necessary to bring an action upon such claim to prevent the bar, but no action shall be brought against the personal representative upon such claim after his final settlement."

In *Winslow v. Benton,* 130 N.C. 58, the present Chief Justice, in construing this statute, said: "The Code, sec. 164, is explicit that where the *'person entitled to bring an action* die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time and within *one year from his death.'* This is because the law does not encourage remissness on the part of the creditor. *Coppersmith v. Wilson,* 107 N.C. 31.

"But the same section 164 prescribes a different rule when the debtor dies: 'If a *person against whom* an action may be brought die before the expiration of the time limited for the commencement

thereof, and the cause of action survive, an action may be commenced against his personal representative *after the expiration of that time,* and *within one year after the issuing of letters testamentary or of administration.' Dunlap v. Hendley,* 92 N.C. 115; *Coppersmith v. Wilson, supra; Benson v. Bennett,* 112 N.C. 505.

"The general rule remains as formerly, that when the
(661) statute of limitations has once begun to run, nothing stops it, but The Code does not stop when the cause of action is one which must be brought by or against a personal representative. And for evident reasons it makes this distinction, that where the action must be brought *by* a personal representative, the limitation (if it would otherwise expire) is extended one year from the *death of the creditor,* but if the action must be *against* the personal representative, the limitation (if it would otherwise expire) is extended one year from the *issuing letters testamentary or of administration.*"

In *Geitner v. Jones,* 176 N.C. 544, the note in suit, which the record shows was not under seal, fell due 18 June, 1912; the debtor died 1 August, 1913; his personal representative was appointed 4 August, 1917. It was held that since the debtor had died before the expiration of the time limited for the commencement of the action, the plaintiffs were entitled to institute the action within one year after the issuing of letters testamentary or of administration, because the letters had been issued within ten years after the death of the debtor. C.S. 412.

If H. C. Harris died before the expiration of the time limited for the commencement of suit against him on the claims in controversy, and suit was brought within the statutory period, or if the claims were not barred at his death and suit was brought after the time limited and within one year after letters of administration were issued, the statute of limitations in either event would not be available to the defendants.

We have made a careful examination of each of the contested claims, and applying the principles herein stated we hold the following claims are barred by the statute of limitations and should be disallowed: Exhibits 26, S. E. King; 25, Pattie E. King; 39, D. F. Kernodle; 43, J. P. Somers; 45, Francis Womack; 47, R. H. Scales, and 52, marked, also, 63, T. E. Balsley.

The remaining claims are not barred, and must be allowed. As to the claims which were disallowed by the court (exhibits 31, 32, 33, 37, 69) there was no appeal.

The appellants' fourth assignment of error cannot be sustained. The judgment, as herein modified, is affirmed.

Modified and affirmed.

WALKER, J., did not sit.

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(662)

HATTIE HOWARD BOWMAN AND HUSBAND v. WEST HOWARD AND WIFE.

(Filed 14 December, 1921.)

1. Partition—Pleadings—Ejectment—Court's Discretion.

The plea of sole seizin in proceedings to partition lands converts them into an action of ejectment; and where the pleadings have become complicated and involved it is within the discretion of the trial judge to order the filing of new pleadings to present the clear-cut issue, as such does not change the cause of action.

2. Pleadings—Amendments—Court's Discretion—Exceptions—Appeal and Error.

Exceptions to the pleadings in partition proceedings as to sufficiency of allegations, etc., cannot be sustained on appeal when it appears that upon the plea of sole seizin the court has ordered new pleadings to be filed that have presented the clear-cut issue upon the evidence introduced at the trial.

3. Evidence—Declarations—Ante Litem Motam — Adverse Possession — Limitation of Actions—Appeal and Error—Harmless Error.

Where it is claimed that the former owner of lands, under whom a party claims by descent, has acquired title by adverse possession, it is competent to show, as substantive evidence, by a witness owning adjoining lands that *ante litem motam* his grantor staked out a corner therein for the purposes of a survey, which the ancestor of the party acknowledged to be the true line; and the further statement that the ancestor showed the witness the "common corner" is *held* too indefinite to be material, under the facts of this case.

4. Descent and Distribution—Illegitimates—Slaves—Marriage—Evidence —Hearsay Evidence—Traditions.

Where one claims lands of his father by descent by reason of the subsequent marriage of his parents, the child so born is recognized as legitimate for the purpose of inheriting, and this may be shown by evidence of the declarations of the parents, or by family traditions *ante litem motam*, this being an exception to the rule excluding hearsay evidence. C.S. 279, 2417.

5. Evidence — Adverse Possession — Boundaries — Declarations — Ante Litem Motam.

Where the title of a party to the action depends upon her legitimacy under a subsequent marriage of her parents, with evidence of family traditions to that effect, the words "reputed father," used in the statute, are construed to mean "considered, or generally supposed, or accepted by general or public opinion" to be such, and an exception claiming that they should be construed to mean "actual father" is without merit.

6. Constitutional Law—Statutes—Descent and Distribution—Illegitimates —Marriage.

Only those who would inherit, or have a vested right in the lands, may contest the constitutionality of C.S. 279, providing that a child born out of wedlock may inherit from her father who thereafter married the mother of the bastard.

7. Trials—Misconduct of Juror—Courts—Discretion—Appeal and Error.

Where, without the knowledge of either the court or the attorneys for the parties, a jury, after taking the case, views the land to which the title is in dispute, and the attorneys are informed of the fact about four hours before the verdict was rendered, and have not called the fact to the attention of the judge, it is in his discretion to set aside the verdict for the misconduct of the jurors, and his action in not so doing is not reviewable on appeal.

STACY, J., dissenting.

APPEAL by defendant from *Ray, J.*, at the March Term,
(663) 1921, of SCOTLAND.

The plaintiff, Hattie Bowman, instituted before the clerk two proceedings for a sale for partition of the lot in controversy. In February, 1916, Lizzie Howard London conveyed to West Howard a deed for said lot, and on the day following West Howard reconveyed a portion of said lot to his mother, Lizzie Howard London. In one of these proceedings West Howard was defendant, and in the other Lizzie Howard London was defendant. Lizzie died intestate in June, 1920, leaving West Howard as her only heir at law, and he was made party defendant in the proceeding originally instituted against her. Upon a plea of sole seizin, the cases were transferred to the civil docket, and when called for trial were consolidated. The issues and the answers thereto are as follows:

"1. Was Charlie Howard, at the time of his death, the owner and seized in fee simple and in possession of the lands described in paragraph one of the petition and amended complaint? Answer: 'Yes.'

"2. Is the plaintiff, Hattie Howard Bowman, the sole heir at law of Charlie Howard, deceased? Answer: 'Yes.'

"3. Is the plaintiff, Hattie Howard Bowman, the owner and en-

titled to the immediate possession of the lands described in paragraph one of the petition and amended complaint? Answer: 'Yes.'"

After judgment, the defendant having entered exceptions of record, appealed.

G. T. Goodwyn and Russell & Weatherspoon for plaintiff.
Cox & Dunn for defendant.

ADAMS, J. The plaintiff instituted two proceedings for a sale of land for partition. In each petition she alleged that Charlie Howard died intestate in January, 1916, seized and possessed of the lot in controversy, leaving surviving him as his only heirs at law two daughters, the plaintiff and Lizzie Howard London, the defendant's mother, and that the plaintiff and the defendant were tenants in common and entitled each to a one-half undivided interest. The defendant denied the material allegations, alleged that (664) at the time of her death Lizzie held the title in fee, and that the defendant was sole seized. The cases were thereupon transferred to the civil docket, and when they were called for trial the court granted the plaintiff leave to reply. In each case the plaintiff filed a replication, which, in effect, contradicted her former allegation that she and Lizzie were cotenants, and admitted, as the defendant alleged, that Lizzie was not an heir of Charlie Howard. When the replications were filed, the defendant asked leave to amend his answer so as to allege that he was, and the plaintiff was not, Charlie Howard's heir at law. The motion was disallowed, and the defendant excepted. The defendant then moved for leave "to reply to the replies," and excepted to the court's denial of the motion. The next recourse of the defendant — a demurrer *ore tenus* to the replies — the court held to be unavailing, and again exception was duly entered.

In "A treatise on the Principles of Pleading," page 135, Stephen says: "On the whole, therefore, the author conceives the chief objects of pleading to be these: that the parties be brought to an issue, and that the issue so produced be material, single, and certain in its quality. In addition to these, however, the system of pleading has always pursued those general objects also, which every enlightened plan of judicature professes to regard: the avoidance of obscurity and confusion, of prolixity, and delay." Regard for this familiar principle no doubt moved his Honor to strike out the replications, and to make an order allowing the plaintiff to file a complaint with the usual allegations in ejectment, and allowing the defendant to file an answer thereto. To this order, also, the defendant excepted;

but the court properly resolved to clear away the confusion produced by the inconsistent pleadings. The court, it will be noted, did not change the cause of action. The plea of sole seizin had already converted the proceeding into an action of ejectment (*Sipe v. Herman,* 161 N.C. 108), and the obvious purpose of the judge was "to bring the parties to an issue." The amended pleadings afforded ample opportunity to safeguard every right these exceptions were intended to preserve. For this reason exceptions 1, 2, 3, and 22 to 25, inclusive, are overruled.

The fourth exception was taken to his Honor's conclusion that in the defendant's original answers there was not sufficient allegation that Lizzie Howard London, mother of the defendant, was an heir at law of Charlie Howard. This ruling was made, however, before the amended pleadings were filed, and was not intended to apply, and by its terms did not apply, to the complaint and answer upon which the consolidated cases were tried. The evidence tended to show that Lizzie was born in Virginia some time before her mother came to North Carolina, and, of course, before she made
(665) the acquaintance of Charlie Howard. Indeed, after the amended pleadings were filed the defendant's chief purpose seems to have been to show that the plaintiff was not the heir of Charlie Howard; and the trend of the defendant's evidence and the charge of the court indicate that the defense was based almost entirely on this theory. We are therefore satisfied that in the respect referred to the defendant was not materially prejudiced, and that the fourth exception cannot be sustained.

Exceptions 5 to 12, inclusive, impute error to the admission of D. A. Smith's testimony concerning the boundaries of the lot, up to which Charlie Howard claimed title. The beginning corner of the lot in controversy was "at an iron stake, Duncan Smith's corner." The witness testified that he was the Smith referred to, and knew the location of this corner; that at the time he purchased from McLaurin his land was surveyed; and McLaurin at that time "put down" the corner in controversy as a corner of the land sold to the witness.

Charlie Howard had no paper title. The plaintiff relied upon Howard's alleged adverse possession, and it was particularly important for her to show the "known and visible lines and boundaries" of the lot. The evidence excepted to was competent. Evidence that McLaurin had "put down" the corner was substantive, not hearsay; but if it can be construed as a declaration tending to locate his own land it was contemporaneous with the survey (*Cherry v. Slade,* 7 N.C. 86); and if as a declaration concerning the corner of an adjoining lot, it was likewise admissible. *Mason v. McCormick,* 85 N.C. 226; *Fry v. Currie,* 91 N.C. 439. Also, the statement of the

witness that Charlie Howard showed him the "common corner" is entirely too indefinite to constitute reversible error.

Exceptions 13 to 20, inclusive, assail the admissibility of Charlie's and Celie's declarations concerning the paternity of Hattie. There was evidence for the plaintiff which tended to show that Celie and Lizzie, her oldest daughter, were brought from Virginia to Rockingham in 1862; that after the custom of slaves Celie intermarried with Charlie Howard a few years afterward, and that Hattie was born after the marriage. C.S. 2497; *Bettis v. Avery,* 140 N.C. 187; *Erwin v. Bailey,* 123 N.C. 628; *Long v. Barnes,* 87 N.C. 330. If the jury should accept this evidence, the declarations, made *ante litem motam* by the alleged father and mother, who have since died, were admissible without regard to C.S. 279. Family tradition or pedigree is a recognized exception to the rule which generally excludes hearsay evidence. *Hodges v. Hodges,* 106 N.C. 374; *Rollins v. Wicker,* 154 N.C. 560; *Turner v. Battle,* 175 N.C. 219; *Moffitt v. Witherspoon,* 32 N.C. 186.

In answer to the question whether he knew the reputed father of Hattie, a witness was permitted to testify over the (666) defendant's objection that he knew her as Charlie Howard's daughter. C.S. 279, is as follows: "When the mother of any bastard child and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall in all respects after such intermarriage be deemed and held to be legitimate, and is entitled to all the rights in and to the estate, real and personal, of its father and mother that it would have had had it been born in lawful wedlock."

In the case on appeal it is said: "No contention as to the statute was made by the defendant except as to the construction of the words 'reputed father,' which the defendant contended should be construed to mean 'actual father.'" The exception is not meritorious. The word "reputed" means considered, or generally supposed, or accepted by general or public opinion. 34 Cyc. 1625; Black's Law Dic. 1022; *Pav. Co. v. Lyons,* 43 Pac. 599. In *McBride v. Sullivan,* 155 Ala. 174, Simpson, J., says: "The use of the word 'reputed' was intended merely to dispense with absolute proof of paternity, so that, if the child is 'regarded,' 'deemed,' 'considered,' or 'held in thought' by the parents themselves as their child, either before or after marriage, it is legitimate."

The issues were framed so as to present the various contentions of each party; and the theory upon which the defense was conducted indicates that the instruction to which the thirty-first exception was directed is not reversible error. Upon this theory his Honor's charge

as to adverse possession also is approved. The first paragraph of the charge, construing C.S. 279, is free from error, and the second paragraph is sustained by the authorities. *McBride v. Sullivan,* 155 Ala. *supra;* 22 C.J. 239; *Kelly v. McGuire,* 15 Ark. 555. If the brothers or sisters of Charlie Howard bring suit to recover the land, the constitutionality of section 279 may be put to the test, but upon the evidence in this case and the theory of the defense we are at a loss to see how the defendant can invoke the doctrine of vested rights.

The forty-fifth exception is to the refusal of the court to set aside the verdict for alleged misconduct of the jury. Charlie Howard claimed to have had possession of the land for more than twenty years under known and visible lines and boundaries. The court found these to be the facts: Without permission of the court or the consent of counsel, the jury went near the property, and one or two of the jurors walked into the yard, and were told by a woman who was there how far back the lot extended. She said nothing about possession. The jury returned to the courthouse about nine o'clock, and before the court convened the officer in charge remarked in the presence of counsel for each party that the jury had gone over the lot.

(667) Approximately four hours elapsed before the verdict was returned, during which counsel had ample time and opportunity to investigate the facts. The court held that the conduct of the jury might have been prejudicial to the defendant, but that the defendant's counsel remained silent when they should have spoken, and denied the motion.

Not infrequently a new trial is granted when jurors, without the authority of the court or consent of the parties, have examined or inspected a place or thing which is the subject of conflicting evidence, but ordinarily the disposition of matters of this kind is within the sound discretion of the court. When the question relates to a juror's misconduct, it is generally within the discretion of the presiding judge to refuse to grant a new trial, if he is satisfied that the verdict should not be set aside. *Harrington v. R. R.,* 157 Mass. 582; *Bank v. Burns,* 120 N.W.R. 626; *S. v. Tilghman,* 33 N.C. 513; *Willeford v. Bailey,* 132 N.C. 408; *S. v. Boggan,* 133 N.C. 766; *S. v. McKenzie,* 166 N.C. 296.

We have considered all the exceptions relied on, and find no sufficient cause for disturbing the verdict.

No error.

STACY, J., dissenting in part: I think the forty-fifth exception, or the one directed to his Honor's refusal to hear and consider the defendants' motion for a new trial, based upon the alleged miscon-

duct of the jury, is fatal, and should be held for reversible error. I have no desire to controvert the well settled principle that ordinarily the disposition of such matters is reposed in the sound discretion of the trial court; but, to my mind, the instant case does not come within the rule stated. The exception presents a legal rather than a discretionary ruling, and it comes to us as a question of law; otherwise I should be content.

This proceeding was instituted upon a petition for partition, and subsequently converted into an action of ejection. After the issues had geen given to the jury for their consideration, they were permitted to go upon the lands and to view the *locus in quo*. This was done without permission of the court or consent of counsel. "One or two of the jurors went into the yard and asked a woman how far the lands went back, and she informed them that the land went back to the fence on one side and to the hog-pen on the other. The lands had been recently plowed, and they were in clear view from the position the jury occupied."

The officer in charge of the jury remarked in the presence of counsel for the defendants that the jury, while out walking, had gone over the lands in controversy, but he said nothing about their having talked to the woman in the yard. This remark was made on Friday morning, just before the opening of court, approximately four hours before the jury returned its verdict, and was not called to the attention of the judge until after the verdict (668) had been received. During the major portion of this time, however, it should be said, counsel for defendants, as well as the court, were engaged in the trial of another cause. I now quote from the record:

"Upon the foregoing finding of facts the court was of the opinion that the aforesaid conduct of the jury might have been prejudicial to the defendants and their cause, but refused and declined to set aside the verdict for reasons stated by the court as follows:

" 'That both of counsel for defendant remained quiet when the court finds that they should and could have been diligent and called the court's attention to the matter, and having failed to call the court's attention to the matter and waiting until the jury had returned their verdict, and having failed to make their motion for a mistrial in apt time, the court concludes, and so finds, that they are now estopped to impeach the verdict of the jury upon the facts presented to and as found by the court, and the motion is denied.' "

It should be remembered that the most hurtful part of the conduct of the jury, to wit, the conversation they had with the woman on the place, was not known to counsel prior to the rendition of the

verdict. This fact seems to have been overlooked by his Honor below, and herein lies the error. It will be readily conceded that if the matter were subject to correction, and had been known, and counsel remained silent when it was their duty to speak, they ought not to be heard now. But if the defendants were entitled to a *venire de novo,* as a matter of right, why should their motion be denied simply because it is made for a new trial rather than for a mistrial? *S. v. Miller,* 18 N.C. 500. These subtle distinctions and technicalities were considered material at the common law, but not so with us under the Code of Civil Procedure. To deny a legal right merely for the observance of form is to forsake the substance for the shadow. Indeed, this would be keeping the spirit of the new and more liberal practice to the ear and breaking it to the hope.

Speaking to this question in *S. v. Tilghman,* 33 N.C. 553, Pearson, J., says: "We take this plain position: If the circumstances are such as merely puts suspicion on the verdict by showing, not that there was, but that there might have been undue influence brought to bear on the jury, because there was opportunity and a chance for it, it is a matter within the discretion of the presiding judge. But if the fact be that undue influence was brought to bear on the jury, as if they were fed at the charge of the prosecutor or the prisoner, or if they be solicited and advised how their verdict should be, *or if they have other evidence than that which was offered on the trial* (italics mine), in all such cases there has, in contemplation
(669) of law, been no trial; and this Court, as a matter of law, will direct a trial to be had."

Time forbids a more extended investigation, but the foregoing will suffice to indicate the outline and basis for the reasons which constrain me to dissent from the otherwise clear and forceful opinion of the Court.

Cited: May v. Menzies, 186 N.C. 146; *Williams v. Geddie,* 193 N.C. 840; *Faison v. Efird,* 202 N.C. 854; *Rooks v. Bruce,* 213 N.C. 60; *In re Adoption of Doe,* 231 N.C. 8; *Carter v. Carter,* 232 N.C. 617.

BURLESON MICA COMPANY ET AL., v. SOUTHERN EXPRESS COMPANY AND AMERICAN RAILWAY EXPRESS COMPANY.

(Filed 14 December, 1921.)

1. Discovery—Evidence—Statutes.

To obtain an order for the inspection of papers, C.S. 1823, it is necessary for the party desiring their use to set forth the facts or circumstances in his affidavit from which their materiality and necessity may be seen by the court, and an allegation merely that an examination, etc., is material and necessary is but a conclusion of law of such party or his own opinion thereof, and is insufficient.

2. Same—Trials—Orders—Judgments.

An order of the court under the provisions of C.S. 1823, 1824, for the inspection of papers by the adverse party to the action, or their necessity for being produced on the trial, is fatally defective when requiring them to be filed with the clerk of the court at a certain time and leaving them there indefinitely, beyond the control of the party to whom they belong, it being required that the order should either designate a certain time for their inspection by the applicant or produce them upon the trial, if a previous inspection of them is not desired.

APPEAL by American Railway Express Company from *Ray, J.*, at August Term, 1921, of MITCHELL.

Summons was issued against both defendants on 22 November, 1919. The Southern Express Company entered a special appearance, and moved to dismiss the action as to it on the ground that process had not been served. There was an order for an alias summons, and an alias writ of attachment against the stock held by the Southern Express Company in the American Railway Express Company. Plaintiffs alleged that mica of the value of $1,290, the property of the mica company, was delivered to the Southern Express Company for transportation from Thomaston, Georgia, to J. E. Burleson at Spruce Pine, Mitchell County; that the Southern Express Company put the mica in care of the American Railway Express Company for transportation, and that the defendants negligently failed to transport and deliver it. Answer was filed by American Railway Express Company. J. E. Burleson made this affidavit: "J. E. Burleson, first being duly sworn, says that in the above (670) entitled action the plaintiff filed with the defendants the shipping receipt and other papers at the time that he filed his claim herein for loss of mica. That he wrote defendants numbers of letters asking that his shipment be traced before he filed his said claim. That said papers filed with the defendants are necessary in the trial of this action, and this affiant asks that the defendant be required to file all papers and correspondence connected with said case with the clerk of the Superior Court of Mitchell County so that the plain-

tiff may have access to same, in the trial of this cause." Thereupon, McElroy, J., made the following order: "Upon affidavit filed, it is ordered by the court that the defendants file with the clerk of the Superior Court of Mitchell County within thirty days prior to the next term of this court all papers filed by the plaintiff with either defendant in connection with this case, including the shipping receipt and all other papers and other correspondence connected with said case."

While the case was in progress, and Erastus Greene was testifying for the plaintiff, he was asked concerning the claim filed by plaintiffs with defendants. Upon defendants' objection, plaintiffs' counsel called to the court's attention the order of McElroy, J., and failure of defendants to comply with the order. The court found the facts, among which are the following: The defendants had neither complied with Judge McElroy's order nor explained their failure to do so; plaintiffs had filed their claim with the agent in charge of the express office at Spruce Pine, and the papers in question were material to the controversy and should have been produced; that counsel for defendants had objected to the introduction of parol evidence, and that defendants had been guilty of a contemptuous disregard of the order. The court rendered the following judgment: "The above entitled action coming on for hearing and being heard, and it appearing to the court that the defendant Southern Express Company is a corporation, and prior to 1 July, 1918, it had property in the State of North Carolina, and was engaged in carrying on business in said State, and that while so engaged it incurred liabilities under its contracts entered into with the citizens of the State of North Carolina and with the plaintiffs herein; and it further appearing to the court that it now has no officer or other agent in this State upon whom process might be served, as provided by law, and that it has failed to comply with section 1137 of the Consolidated Statutes of North Carolina and maintain such process agent in said State; and it further appearing that summons has been duly issued against said defendant Southern Express Company in this action, and that the same was duly served upon J. Bryan Grimes, Secretary of State, as provided by said statute, and that said defendant is now before the court by reason of such service; and it further appearing
(671) that a complaint has been filed by the plaintiffs against the said Southern Express Company, and that said defendant has filed no answer thereto.

"And it further appearing that at July Term, 1920, of this court, that upon application of the plaintiffs herein, an order was entered commanding the defendant American Railway Express Company to produce and file in this Court the shipping receipt and all other

papers and correspondence filed with said defendant American Railway Express Company, including the claim filed by plaintiffs for damages by reason of the loss of the mica, the shipment of which is in controversy herein, together with all papers and correspondence in connection therewith; and it further appearing to the court that the said claim and shipping receipt and other papers and correspondence so filed with the defendant American Railway Express Company contains evidence pertinent on the trial of this cause; and it further appearing to the court that the said defendant, in disregard and contempt of said order so entered in this cause, has failed to satisfactorily account for its failure to produce the same, or make any answer whatsoever to the said order, it is, upon motion of Charles E. Greene and S. J. Black, counsel for plaintiffs, considered, ordered, and adjudged by the court that the plaintiffs herein recover of the defendant American Railway Express Company the sum of $1,290, with interest on said sum from 5 July, 1918, until paid, with the costs of this action, to be taxed by the clerk of this court. It is further considered, ordered, and adjudged that judgment by default be and the same is hereby entered against the defendant, the Southern Express Company."

Only the American Railway Express Company excepted and appealed.

Charles E. Greene, S. J. Ervin, and S. J. Ervin, Jr., for plaintiffs.
Martin, Rollins & Wright for defendant.

ADAMS, J. The appellant's fourteenth exception impeaches the validity of Judge McElroy's order, and incidentally of the affidavit on which it is based. The application for the order rests on the following sections of Consolidated Statutes:

"The court before which an action is pending, or a judge thereof, may, in their discretion, and upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any books, papers, and documents in his possession or under his control, containing evidence relating to the merits of the action or the defense therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both." C.S. 1823.

"The courts have full power, on motion and due notice thereof given, to require the parties to produce books or (672) writings in their possession or control which contains evidence pertinent to the issue, and if a plaintiff shall fail to comply with such order, and shall not satisfactorily account for his failure,

the court, on motion, may give the like judgment for the defendant, as in cases of nonsuit; and if a defendant shall fail to comply with such order, and shall not satisfactorily account for his failure, the court, on motion as aforesaid, may give judgment against him by default." C.S. 1824.

In our opinion the affidavit is insufficient. The plaintiff Burleson alleged that he had filed certain papers with, and had written certain letters to, the defendants, and that the papers filed with the defendants were necessary in the trial of the action. The latter allegation is only an inference of law. In *Evans v. R. R.*, 167 N.C. 416, Justice Brown said: "A mere statement that an examination is material and necessary is not sufficient. This is nothing more than the statement of the applicant's opinion. The facts showing the materiality and necessity must be stated positively and not argumentatively or inferentially." 14 Cyc. 346. The application should also show the necessity for the inspection or production, and it is a generally accepted principle that the affiant's bare conclusion of law is not sufficient for this purpose. 18 C.J. 1124. *Non constat* that the plaintiffs did not have carbon copies of the letters and the other papers filed with the defendant, or such knowledge of their contents as would dispense with the necessity of inspection.

We regard the order also as fatally defective. The plaintiffs alleged that the papers were necessary in the trial of the action; but the order required the defendants to file them with the clerk "within thirty days prior to the next term of this court." If the papers were to be used in the trial, and no inspection was necessary, the order should have required their production when the case was reached on the docket; if inspection before the trial was desired, such definite time and place as the law contemplates should have been designated for that purpose. In *McGibboney v. Mills*, 35 N.C. 162, this Court affirmed an order of the lower court requiring the plaintiff to file the bond sued on with the clerk for inspection "from 1 January, 1852, to 15 January, 1852"; but in *Mills v. Lumber Co.*, 139 N.C. 524, it was held, in an opinion by the Chief Justice, that an order to produce and deposit certain papers in the office of the clerk was unauthorized. The Chief Justice very aptly said: "There is nothing in the statute which authorizes an order that the respondent be required to *deposit the papers*. In practice, this might prove oppressive and detrimental. The papers and books might be necessary in the conduct of the plaintiff's business, and there is no guaranty of their safety when so deposited. All that the statute authorizes is
(673) an order that the papers be produced with sufficient opportunity to the other side to inspect the same and take a copy. *Sheek v. Sain*, 127 N.C. 272." In Corpus Juris it is stated that in

some jurisdictions a party cannot be required to deposit his papers in the clerk's office, and North Carolina is classed among this number. 18 C.J. 1128. In the case at bar the order required that the papers be taken from the defendants before the term of court and deposited or filed with the clerk for an indefinite length of time upon the allegation that they were necessary in the trial. There was no suggestion that it was necessary to impound the papers to secure them against loss or to prevent the perpetration of a fraud.

In these circumstances the presiding judge evidently misinterpreted the statutes upon which the order was made to rest, and inadvertently exceeded the authority conferred when, during the examination of a witness, he undertook of his own motion to withdraw the issues from the jury, find the facts from the record, and render judgment as by default against the defendant while the controverted matters were still pending and unsettled.

For these reasons it becomes unnecessary to consider the other questions discussed in the briefs. We hold, then, that the judgment against the American Railway Express Company must be reversed, and that the matters in controversy must be determined as provided by law.

Reversed.

Cited: *Ross v. Robinson,* 185 N.C. 550; *Bell v. Bank,* 196 N.C. 236; *Dunlap v. Guaranty Co.,* 202 N.C. 654; *Patterson v. R. R.,* 219 N.C. 25; *Gudger v. Robinson Bros.,* 219 N.C. 254; *Flanner v. St. Joseph Home,* 227 N.C. 345; *Vaughan v. Broadfoot,* 267 N.C. 698

J. L. SHERRILL v. B. M. WILHELM.

(Filed 21 December, 1921.)

Evidence—Deceased Persons—Statutes—Title— Common Source — Parol Trusts.

Where a suit seeks to engraft on the title of the grantee in the deed to land a parol trust in favor of the plaintiff, upon condition that he pay the purchase price and receive the title, the grantor, after the death of the holder of the legal title, is incompetent as a witness in plaintiff's favor to testify to the facts relied upon by him, being the common source of title of the plaintiff and the deceased, under whom the defendant claims. C.S. 1795.

APPEAL by defendant from *McElroy, J.,* at August Term, 1921, from IREDELL.

Civil action to recover possession of a tract of land under an alleged parol agreement, whereby the plaintiff contends that the *locus in quo* was purchased by him from one R. J. Plott, title taken in the name of Dr. W. W. Wilhelm, now deceased, who had
(674) advanced a part of the purchase money with the understanding that deed would be made to plaintiff upon the repayment of the amount borrowed or advanced. Plaintiff alleges that the entire purchase price was paid by him to Dr. Wilhelm before his death, but that the deceased neglected to have any conveyance of the land executed to him in accordance with his agreement.

Upon the trial R. J. Plott was allowed to testify, over the defendant's objection, to certain personal transactions and communications which he had with the deceased in regard to purchasing the land for plaintiff, as follows: "He (Dr. Wilhelm) said he wanted to buy the land for John Sherrill. When I went to make the deed, I asked whether it should be made to him or to Sherrill. He said, 'Make the deed to me, and when Sherrill finishes paying for it, I will make him a deed.' The deed was made with this understanding at the time he asked me about the price, and when he told me Sherrill wanted him to buy the land for him, he said he owed Sherrill some amount."

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

D. L. Raymer and H. P. Grier for plaintiff.
W. D. Turner and Dorman Thompson for defendant.

STACY, J. Plaintiff contends that the evidence of R. J. Plott in regard to the personal transactions and communications which he had with Dr. Wilhelm, the deceased, concerning the purchase of the land in question for plaintiff, etc., is incompetent under C.S. 1795, and should have been excluded. It will be observed that Plott is the common grantor from, through, or under whom both parties claim title, mediately or immediately, "by assignment or otherwise," to the *locus in quo*. Thus it would seem that the evidence given by the witness falls directly within the inhibition of the statute, being offered, as it is, against the defendant, who also derives his title or interest "from, through, or under a deceased person," to wit, Dr. Wilhelm, the party with whom the witness had the personal transactions and communications, and about which he testified over objection by the defendant. *Sorrell v. McGehee*, 178 N.C. 279; *Irvin v. R. R.*, 164 N.C. 6; *Bunn v. Todd*, 107 N.C. 266.

Practically the same question here presented arose in the case of *Carey v. Carey*, 104 N.C. 171, and it was there decided that evi-

dence similar to that now under consideration was properly ruled out. The Court saying: "The plaintiff offered, on the trial, to prove by the witness Wheeler that he and his deceased son purchased from the witness the land in controversy. He plainly claims an 'interest' in it against the defendants, who are heirs at law of his deceased son, by virtue of the purchase from the witness; (675) he alleges that he paid to him part of the purchase money; hence, he 'derives his interest' in the land, whether it be legal or equitable, from the witness, through the deceased son — the witness is the source of his interest, whatever it may be. It was proposed to have the witness testify as to a personal transaction or communication between himself and the deceased son, the father of the defendants, who claim under him. Nothing to the contrary appearing, it was proposed to prove such a transaction — this is just implication. If it were not such, the plaintiff should have so shown, and rendered the witness competent. It might possibly be that the son was not present at the purchase; that the witness did not communicate with him on the subject, and if this was so, the plaintiff had the right to prove the fact if he could. So far as appears, the witness was not competent to prove the purchase of the land, as proposed by the plaintiff, because the purchase was a personal transaction with the deceased father of the defendants, who claim under and derive their title from him, and because the plaintiff, claiming adversely to the defendants, derives his interest in the land from the witness, as do, also, the defendants."

It is true this case was modified, in part, on a second appeal, 108 N.C. 271, but not in respect to the above ruling.

We think a fair test in undertaking to ascertain what is a "personal transaction or communication" with the deceased about which the other party to it cannot testify is to inquire whether, in case the witness testify falsely, the deceased, if living, could contradict it of his own knowledge. *Carey v. Carey, supra.* Death having closed the mouth of one of the parties, it is but meet that the law should not permit the other to speak of those matters which are forbidden by the statute. Men quite often understand and interpret personal transactions and communications differently, at best; and the Legislature, in its wisdom, has declared that an *ex parte* statement of such matters shall not be received in evidence. Such is the law as it is written, and we must obey its mandates.

Applying these principles, as previously declared. it would seem that the evidence of the witness Plott, which forms the basis of defendant's second exception, should have been excluded. For the error

in receiving same over objection made in apt time, a new trial must be granted, and it is so ordered.

New trial.

Cited: In re Mann, 192 N.C. 250; *Dill-Cramer-Truitt Corp. v. Downs,* 201 N.C. 483; *In re Will of Brown,* 203 N.C. 349; *Peek v. Shook,* 233 N.C. 262; *Carswell v. Greene,* 253 N.C. 269.

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GIBSON LAND AUCTION COMPANY v. W. T. BRITTAIN.

(Filed 21 December, 1921.)

Contracts—Breach—Principal and Agent—Brokers—Commissions—Compensation—Actions—Evidence—Nonsuit—Trials.

There is no relation of privity or otherwise between the agent or broker who sells lands under contract for compensation by commission with the owner, and the purchaser he has accordingly procured; and when such purchaser has not in any manner obligated to pay anything to the agent or broker, the latter has no cause of action against him to recover the commissions for which the owner has obligated himself, and this is especially so when the owner of the lands has released the purchaser from the obligations of his contract.

APPEAL by plaintiffs from *Shaw, J.,* at July Term, 1921, of McDOWELL.

Civil action to recover damages for loss of commissions arising out of defendant's alleged breach of contract to purchase nine lots, same having been sold to him as the last and highest bidder at a public sale.

From the judgment of nonsuit entered at the close of the evidence, plaintiffs appealed.

Pless, Winborne & Pless for plaintiffs.
Avery & Ervin for defendant.

STACY, J. The following statement of the case will suffice for our present decision:

Plaintiffs, auctioneers, by agreement with the owner of the property, were to receive as their compensation for conducting the sale a given per cent of the selling price of the lands. The defendant was present and became the last and highest bidder of the lots in ques-

tion, and signed memoranda containing the following stipulation: "This is to certify that I have this day bought of R. Williams, through Gibson Land Auction Company, the following real estate, as shown on the map of the R. Williams property, and on the terms and conditions announced at sale of said property."

The defendant refused to accept the deeds, which were tendered for the lots bid off by him, and declined to pay the purchase price, as per his agreement, because of some misunderstanding on his part; and, in consequence of which the owner of the land afterwards released the defendant from his bid and sold the lots to another or other parties.

The written contract between plaintiffs and the owner of the land contained a stipulation to the effect that plaintiffs should receive "a commission of 10 per cent for any sale or sales of any part or all of the property that may be sold by the parties of the second part, and confirmed by the parties of the first part."

The plaintiffs never had any contract with the defendant for their commissions, and the sale to him was not (677) carried out. It is alleged, however, that by reason of the defendant's failure to take the property, according to his bid at the auction sale, the plaintiffs have suffered a loss to the extent of the value of their commissions, and that the defendant should be held liable in damages therefor.

Upon the foregoing facts being made to appear in evidence, his Honor granted the defendant's motion for judgment as of nonsuit, and the appeal presents for review the correctness of this ruling.

It will be observed that the plaintiffs had no contract with the defendant, but their commissions were to be paid by the owner of the land. The case, therefore, in principle, is not unlike *Faison v. Marshburn, ante,* 133, where a recovery was denied to the broker who had sued the prospective purchaser when he alone had a contract for his commissions with the owner. Here, as was the case there, an attempt is being made to hold the defendant responsible for violating his contract, not with the plaintiffs, but with a third party who is a stranger to the suit. It is conceded that the plaintiffs have no interest in the land, and that they cannot sue upon the contract of purchase. They are unable to perform the contract as vendors, or to enforce its performance; hence, they are not in position to maintain an action for its breach. The only contractual obligations which may be insisted on by reason of defendant's bid, so far as he is concerned, are those existing between the defendant and the owner of the land. The plaintiffs are neither parties nor privies to the contract of sale, and the defendant is neither party nor privy to plaintiffs' contract for commissions. So, whatever rights, if any, the plaintiffs

may have, as against the defendant, apparently are not contractual in their nature. On the other hand, there is no contention that the defendant has breached any extra-contractual legal duty for which the plaintiffs may maintain an action in tort. In all events, if the plaintiffs be entitled to recover, they must recover in an action growing out of contract; and none has been shown with the defendant.

In all the cases called to our attention by the plaintiffs, seemingly in support of their position, there was a contract direct with the defendant, or a request by him for the broker's services; and, in each case, recovery was allowed on this contract, or upon an implied contract, for services rendered to the *defendant*, and not upon the contract of purchase, though the loss of commissions may have been fixed as the proper measure of damages. 4 R.C.L. 333.

In *Atkinson v. Pack,* 114 N.C. 597, a case chiefly relied on by plaintiffs, the above distinction is clearly drawn, the Court saying: "There were plainly two contracts made by plaintiffs: the one with defendant, the effect of which was that plaintiffs would provide a purchaser of the land at the agreed price, commissions to
(678) be paid by the purchaser; the other with the purchaser, that he would pay the plaintiffs' commissions upon the conclusion of the sale. If through the negotiation of plaintiffs the parties had been brought together, and had concluded the trade between them, the plaintiffs would have been entitled to their commissions from Harding, the purchaser, according to the terms of their contract. But this action is for damages; the gravamen of the charge is that defendant committed the wrong and injury upon plaintiffs by a refusal, without cause, to comply with his contract with plaintiffs to sell the land to plaintiffs' principal, with the distinct understanding that plaintiffs were to be compensated by the purchaser. The natural effect and consequence of this refusal by defendant was the loss by plaintiffs of their commissions."

To like effect is the decision of the Saint Louis Court of Appeals in the case of *Cavender v. Waddingham,* 2 Mo. App. 551. There it was understood that the plaintiffs were to receive, as commissions, a certain percentage of the purchase price of the land, but it was stipulated that this should be paid by the vendors, and the plaintiffs would divide the same, when realized, with the defendant, allowing him one-fifth part thereof. Plaintiffs consummated the agreement for the purchase in exact accordance with defendant's directions. The defendant then refused to accept the deed. Upon these facts the Court observed:

"The first question to which our attention is directed is whether, upon the facts stated, the plaintiffs had any right of action against the defendant. It is argued that they had none, because it was ex-

pressly stipulated that their commissions were to be paid by the Messrs. Scudder, and not, in any event, by the defendant; that this is an attempt to hold a party responsible for violating his contract, not with the party suing, but with a third party — the defendant here having violated none except that made through the plaintiffs, Messrs. Scudder. But this argument ignores the prominent fact that there were two distinct contracts. One was made by defendant, through his agents, in the purchase of the property. The other was made with the agents, in securing their services to bring about the purchase. The latter is the subject of the present suit.

"When the plaintiffs were employed by the defendant to effect a purchase for his benefit, they undertook to do so for a consideration, which was clearly understood. This was, that, in the event of success, they were to be compensated according to the usages of their business, by a percentage upon the amount of purchase money. The defendant said to them, in effect: 'You procure the consent of the property owners to sell to me upon the terms indicated. I undertake, on my part, to consummate the trade by paying the purchase money, so that you will realize your commissions.' The defendant's undertaking to take and pay for the property, so that plain- (679) tiffs would get their compensation, was as emphatic and as binding as if he had agreed to pay the commissions himself."

Without prolonging this discussion, it may be stated that we have examined the following cases, cited by plaintiffs, and find them to be in support of, rather than in conflict with, what is said above. *Livermore v. Crane*, 26 Wash. 529, and cases cited in briefs as reported in 57 L.R.A. 401; *Eells Bros. v. Parsons*, 132 Iowa 543, and cases cited in note as reported in 11 Anno. Cases 475; *Ackerman v. Bryan*, 33 Neb. 515; 4 R.C.L. 334, and cases there collected. See, also, *Tinsley v. Dowell*, 87 Texas 23, and *Thompson v. Kelly*, 101 Mass. 291.

But for a further reason the plaintiffs are not entitled to maintain this suit. The owner of the land, plaintiffs' principal, has voluntarily released the defendant from his contract of purchase; hence, whatever obligations may have been incurred by the defendant's bid are now at an end. They have been surrendered and discharged with the consent of the owner, who alone was entitled to insist upon performance. There is no contract now existent of any kind relating to this matter to which the defendant is a party. Therefore, upon the record we think the judgment of nonsuit must be upheld.

Affirmed.

Cited: Croom v. Bryant, 194 N.C. 815.

GEORGE C. HAYNES, ADMINISTRATOR, AND SALLIE K. HAYNES v. SOUTHERN RAILWAY COMPANY.

(Filed 21 December, 1921.)

Railroads—Negligence—Contributory Negligence—Last Clear Chance.

Where there is evidence tending to show that the plaintiff's intestate was killed at a public crossing while endeavoring to cross in front of the defendant railroad company's train while it was slowly moving away from its station, and that the defendant's engineer had his attention called to the dangerous position of the intestate in time to have avoided the injury, the contributory negligence of the intestate will not bar his recovery, it being dependent upon the answer to the issue as to the last clear chance.

APPEAL by defendants from *Long, J.*, at the May Term, 1921, of HAYWOOD.

Civil actions to recover damages for an alleged negligent injury to plaintiff's intestate and damages to the automobile in which he was riding, by consent, consolidated and tried together in the Superior Court.

On 21 October, 1920, W. J. Haynes, while attempting to drive his wife's machine over the defendant's track at a public crossing in Hazelwood, N. C., was struck and killed by a freight train
(680) of the Southern Railway Company, and the automobile was badly damaged and demolished.

The administrator brings suit to recover damages for the alleged wrongful death of his intestate; and the wife of the deceased sues to recover for the damage done to her car. For convenience and by consent, the two actions were consolidated and tried together, the evidence upon the question of liability being the same in both cases.

Upon the issues of negligence, contributory negligence, last clear chance, and damages all being answered in favor of the plaintiff, in each case, and from the judgments rendered thereon, the defendants appealed.

John M. Queen and Felix E. Alley for plaintiffs.
Martin, Rollins & Wright for defendants.

STACY, J. The injuries, out of which the present suits arise, were caused by a collision at a public crossing in the village of Hazelwood, between an automobile in which W. J. Haynes was riding and a freight train of the Southern Railway Company. The train was slowly pulling out from the station, moving at a rate of from two and a half to three miles an hour, when plaintiff's intestate drove upon the crossing and was pushed down the track by the engine for a distance of about seventy-two feet and killed.

It was shown by all the evidence that no warning was given of the train's starting and of its approach. The engineer was in his cab, but the witnesses differ as to whether the fireman was on his side where he could have seen the automobile as it came near the crossing. Several hundred yards east of the station another train was coming in on the pass track, and there was evidence tending to show that plaintiff's intestate was watching the westbound train and did not see the eastbound train, the one which struck him, or if he did, he failed to observe that it was moving and entering upon the crossing.

There was also evidence to the effect that a number of bystanders signaled the engineer to stop when it was apparent that a collision was about to occur, but that he failed to do so, though his attention was attracted by the signals and he looked down at his driving wheels.

The automobile was pushed down the track for a distance of about thirty feet when it was turned over and then carried a further distance of forty-two feet before the engineer brought his train to a stop.

Upon this, the evidence chiefly relevant, we think the defendants' motion for judgments of nonsuit were properly overruled.

Conceding for the sake of argument only that *non obstante veredicto* the plaintiff's intestate may have been guilty of negligence in going upon the track at the time in question, yet we think
the evidence was amply sufficient to warrant the jury's find- (681)
ing on the issue of the last clear chance.

It has been held uniformly with us that, notwithstanding the plaintiff's contributory negligence, if the jury should find from the evidence that the defendant, by the exercise of ordinary and reasonable care, could have avoided the injury, and failed to do so, and had the last clear chance to so avoid it, then the defendant would be liable in damages. *Horne v. R. R.*, 170 N.C. 645; *Cullifer v. R. R.*, 168 N.C. 311; *Ray v. R. R.*, 141 N.C. 84; *Bogan v. R. R.*, 129 N.C. 157, and cases there cited; *Pickett v. R. R.*, 117 N.C. 616, See, also, 29 Cyc. 530 *et seq.*

Resting the case upon this ground, it becomes unnecessary to treat in detail in this opinion the remaining exceptions, as they relate almost entirely to other phases of the case. Upon a careful consideration of the defendants' exceptions and assignments of error, we find no reversible or prejudicial error; and this will be certified to the Superior Court.

No error.

Cited: *Construction Co. v. R. R.*, 185 N.C. 47; *Redmon v. R. R.*, 195 N.C. 766; *Morris v. Transportation Co.*, 208 N.C. 811; *Van Duke v. Atlantic Greyhound Corp.*, 218 N.C. 286; *Ingram v. Smoky Mt. Stages*, 225 N.C. 447; *Benton v. Johnson*, 228 N.C. 627; *Aydlett v. Keim*, 232 N.C. 370.

N. A. GREEN v. W. M. RITTER LUMBER COMPANY ET AL.

(Filed 21 December, 1921.)

1. **Employer and Employee—Master and Servant—Safe Place to Work—Negligence—Evidence—Motions—Nonsuit—Trials.**

Where there is evidence tending to show that the plaintiff was injured while in the scope of his employment, by the neglect of the defendant in not furnishing him sufficient help and proper appliances, which resulted in the personal injury complained of in the action, a motion as of nonsuit thereon by the defendant is properly denied.

2. **Appeal and Error—Instructions—Contentions—Objections and Exceptions.**

Objections to the statement of the contentions of the parties by the judge in his charge to the jury must be taken at some appropriate time during the charge or at its conclusion, to afford the trial judge opportunity for correcting errors he may have made therein, in order that an exception thereto may be considered on appeal.

APPEAL by defendants from *Bryson, J.*, at July Term, 1921, of SWAIN.

Civil action to recover damages for an alleged negligent injury to plaintiff while working at the defendant's planing mill on 10 January, 1920.

There was evidence, adduced on the trial, tending to show that the planing machine at which the plaintiff did his work was defective and unsafe; that he was required to operate it without sufficient help or assistance; that, for the want of a helper to bear off
(682) the strips and boards, they were allowed to accumulate around the planer, causing it to stall and rendering it necessary for the plaintiff to make certain adjustments; that, in his effort to remedy this situation, made more hazardous by reason of the conditions above stated, coupled with a worn and defective wrench, which he was required to use, his hand was caught in the revolving knives and painfully and permanently injured.

The usual issues of negligence, contributory negligence, and damages were submitted to the jury, and answered by them in favor of

the plaintiff. From the judgment rendered thereon the defendants appealed.

Thurman Leatherwood and Felix E. Alley for plaintiff.
S. G. Bernard and S. W. Black for defendants.

STACY, J. The defendants rely chiefly upon their motion for judgment as of nonsuit; but, under the principle announced in *Steeley v. Lumber Co.*, 165 N.C. 27; *Pigford v. R. R.*, 160 N.C. 93, and numerous other cases to like import, we think the evidence was sufficient to require its submission to the jury and to warrant a verdict in favor of the plaintiff.

The remaining exception is directed to a portion of his Honor's charge in which he undertakes to state the plaintiff's contentions. Defendants say the contentions of their adversary were overstated, or stated too strongly; that they were not supported by the evidence, and that they were given in an argumentative form. We have examined the charge with a view of determining whether the defendants could have been prejudiced in any degree by the manner in which the contentions were given, but we have found nothing upon which to base any criticism. On the other hand, the charge as a whole seems to have been fair, impartial, and exceptionally clear. Furthermore, this exception comes within the well settled rule that objections to the statement of contentions must be made at some appropriate time during the charge or at its conclusion. This requirement is a reasonable one, and has been adopted so that the trial court may be given an opportunity to correct any error in the respect indicated. *S. v. Hall*, 181 N.C. 527; *McMahan v. Spruce Co.*, 180 N.C. 636, and cases there cited.

We have discovered no sufficient reason for disturbing the verdict and judgment.

No error.

Cited: S. v. Brinkley, 183 N.C. 725; *S. v. Jones*, 188 N.C. 144; *S. v. Steele*, 190 N.C. 510; *Hood, Comr. v. Cobb*, 207 N.C. 131.

(683)

S. S. MITCHELL, ADMINISTRATOR OF W. T. McCUISTON, DECEASED, v. CARL L. TALLEY.

(Filed 21 December, 1921.)

1. Actions—Survival—Attachments—Statutes.

The history of legislation as to attachments culminating in C.S. 798 (4), shows a legislative intent to broaden the right of this writ to make the same well-nigh coextensive with any well grounded demand for judgment *in personam*, and is sufficiently comprehensive to include the action for "causing the death of another by wrongful act, neglect, or default of another." C.S. 160.

2. Same—Wrongful Death—Continuing Cause.

C.S. 160, has been held to create a new cause of action only in the sense that at common law an action for the wrongful death did not survive to the personal representatives of the deceased; and the purpose of the statute was to withdraw claims of this kind from the effect and operation of the maxim *actio personalis moritur cum persona*, and to continue, as the basis of the claim of his estate the wrongful injury to the person resulting in death.

3. Same—Defenses.

A recovery for a wrongful death allowed by C.S. 160, depending upon the question of self-defense in case of willful injury, and on contributory negligence in case of "negligent act," or upon settlement of the damages in his lifetime by the one injured, shows that it was in the contemplation of the statute that the "injury to the person" should continue after his death to be a constituent part of the statutory action allowed to the personal representatives, and comes within the provisions of C.S. 798 (4), affording the remedy by attachment for the "injury to the person by negligent or wrongful act."

4. Actions—Interveners—Attachment.

An intervener in an action wherein attachment on defendant's property has been issued, and who claims a prior lien by reason of a former order of court in another and independent proceeding, becomes party to the present action and may not successfully attack the validity of the proceedings in attachment, and the question of priority is left to be determined in the present action.

5. Same—Husband and Wife—Maintenance—Liens—Conflicting Claims.

Where the wife has obtained an order for support from her husband, declared a lien on his property, C.S. 1667, in order for her to intervene in an action in another jurisdiction and claim priority over an attachment therein issued, it is necessary that she should show some valid service of process, or waiver by her husband in an appropriate civil action against him. Whether the lien of the wife will in any event prevail as against the lien of a valid attachment first levied in another court of equal or concurrent jurisdiction. *Quœre?*

6. Courts—Jurisdiction—Equal Jurisdiction—Superior Courts.

One Superior Court has no power to revoke or modify the orders and judgments of another when the latter has acquired and holds jurisdiction.

MITCHELL *v.* TALLEY.

APPEAL by plaintiff from *Webb, J.*, at the October Term Term, 1921, of GUILFORD. (684)

Civil action to recover damages of the defendant for the willful and wrongful killing of plaintiff's intestate, who was a police officer, and at the time of his death was engaged in the discharge of his duty in undertaking to arrest defendant for violation of the prohibition law. Defendant escaped immediately after plaintiff's intestate was killed and personal service on defendant could not be made. At the time of issuing the summons, plaintiff, on proper affidavit, secured a warrant of attachment and same was levied on personal and real property of defendant in said county, including a levy on $3,111.60 on deposit in the National Bank of Greensboro. Service of summons by publication having been completed, a properly verified complaint was duly filed, and defendant having failed to answer, there was judgment by default and inquiry, and later, the case having been called in open court, the plaintiff moved that the court proceed to execute the inquiry pursuant to the judgment. And thereupon Ethel K. Talley, wife of the defendant, having intervened after said judgment by default was entered, moved to vacate the warrant of attachment, first, for that under the statute, no such warrant would properly lie in this case; and second, because the facts alleged as the basis for the application were untrue. And upon said motion the court being of opinion that the attachment would not lie in an action of this character, entered judgment that the same be vacated. The plaintiff then moved to be allowed to proceed to execute the inquiry, which was refused.

As a basis for the right of Ethel K. Talley to intervene in this cause, it was made to appear in a verified petition filed by the intervener that she was the wife of Carl Talley; that she had four living children of the marriage, aged six, four, and two years, and six months; that her husband was a fugitive from justice, had separated himself from the intervener, and was providing nothing for the support of herself and children; that the petitioner had made application to the Superior Court of Rockingham County, under C.S. 1667, to obtain alimony without divorce; and that on such, her application, the judge presiding in said county had ordered and decreed as follows:

"That the plaintiff is entitled to a reasonable subsistence from the property and earnings of defendant, and that the court hereby allots to plaintiff the dwelling-house and lot referred to and described in the complaint as a home for herself and said children, and further allots and assigns to her the sum of $100 a month as a reasonable subsistence for her and said children, which sum the defendant is required to pay out of his earnings or other moneys to plain-

tiff; and if defendant fails to pay said sum on the first day
(685) of each and every calendar month, then the same may be collected by execution out of other property or funds of the defendant in the State.

"It is further adjudged that plaintiff have and recover of the defendant the sum of $300 as reasonable subsistence for her and said children from date of the abandonment of them by the defendant until the date of the making of this order.

"And it is further ordered and adjudged that the defendant be and he is hereby required to cause all moneys on deposit in the Greensboro National Bank of Greensboro, North Carolina, assigned or transferred to the clerk of this court as trustee in order to secure compliance with this order.

"A certified copy of this order shall be served upon the Greensboro National Bank, to the end that it shall not pay out or permit the transfer of the funds in said bank, except as provided by order in this action, and the allowance to plaintiff is hereby secured by a lien which the court declares upon said fund."

No notice of the motion on which this judgment was entered was served on defendant Talley, and so far as appears, there has been no service by publication on said Talley of either the notice or the summons in said proceedings, nor has there been any order for such service, but the judgment in said proceedings was entered on allegations in the petition, duly verified, as to the kind and placing of the property, and that the defendant, Carl Talley, her husband, was a fugitive from justice, had abandoned and separated himself from the applicant, and was furnishing no support either for herself or infant children, and that the order applied for was absolutely essential to their subsistence.

From the rulings of the court, adversely affecting his interests, plaintiff, having duly excepted, appealed.

King, Sapp & King for plaintiff.

A. W. Dunn and Brooks, Hines & Smith for Ethel K. Talley, intervener.

HOKE, J. In the recent case of *Tisdale v. Eubanks,* 180 N.C. 153 and 155, the Court, in upholding the writ of attachment in an action for slander, had occasion to refer to the successive statutes controlling the matter, by which the lawful use of this writ has been continuously enlarged until under the latest amendment, C.S. 798, subsec. 4, the right is extended to actions for "any injury to the person, caused by negligence or wrongful act," and it was there said

that the history of this legislation and this, the latest amendment to the law, showed an evident intent on the part of the Legislature to broaden the right to this writ and make the same (686) well-nigh coextensive with any well grounded demand for judgment *in personam.* Under this, the correct interpretation, we are of opinion that our statute appertaining to attachments, from the language used and the purpose and policy of the Legislature as evinced in these various amendments, is sufficiently comprehensive to include the action for "causing the death of another by wrongful act, neglect or default of another," as provided in ch. IV, sec. 160, of the Consolidated Statutes.

While we have repeatedly held, and the position is in accord with the authoritative cases on the subject elsewhere, that this law, commonly designated as the Lord Campbell's Act, has the effect of creating a new cause of action in the sense that such a suit could not be maintained at common law, it will appear from the better considered decisions construing the statute, both in England and in this country, that its purpose was to withdraw claims of this kind from the effect and operation of the maxim, *actio personalis moritur cum persona,* and that the action did not thereby lose its identity, but that the basis of such a claim continued to be the wrongful injury to the person resulting in death. Applying the principle, though there are cases to the contrary, it has been very generally held that if, in case of willful injury causing the death, the defendant was acting in his necessary self-defense, or in case of negligence, if the deceased at the time was guilty of contributory negligence, or if the injured party had given a release or had been settled with for the injury during his life, either by adjustment *inter partes* or by suit, under the statute no recovery could be had for the death, thus showing that in case of death following a wrongful injury there were not two causes of action contemplated, but one, and that the "injury to the person" continued to be a constituent and essential feature of the action provided for, and so, as stated, coming under the broad and comprehensive terms of our law of attachment affording the remedy for "injury to the person by negligence or any wrongful act." *Chemical Co. v. Edwards,* 170 N.C. 551; *Mich. Central R. R. v. Vreeland,* 227 U.S. 59-70; *Lincoln v. Detroit, etc., R. R.,* 179 Mich. 189; *Read v. Great Eastern,* 3 L.R. 867-68, p. 555; *Hecht v. R. R.,* 132 Ind. 507; *Littlewood v. Mayor,* 89 N.Y. 24; *Crape v. City of Syracuse,* 183 N.Y. 395; Tiffany, Death by Wrongful Act, sec. 124; 8 R.C.L. 786-790.

In *Chemical Co. v. Edwards, supra,* holding that a judgment for the wrong, duly paid to the injured party in his life, would bar any

action to recover for the death, after quoting from the opinion of Rapallo, J., in *Littlewood v. Mayor, supra,* it was said: "These views of the learned judge, arising chiefly from the language of the statute,

(687) derive strong support from the suggestion that although the statute may be considered in some respects as creating a new right of action, it has its foundation in a single wrong." And in *Vreeland's* case, *supra,* Associate Justice Lurton, delivering the opinion, "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent on the existence of a right in the decedent. And in *Hecht v. Ohio Valley R. R.,* it was said, among other things: "Although some items of evidence may be competent, or even necessary, in one case and not in the other, and the method of proof may differ, still the action in either case is based on the negligence of the defendant in causing the same identical injury, and the damages in either case grow out of such negligence."

It will be understood that we do not intend to qualify the principle upheld in our decisions, *Causey v. R. R.,* 166 N.C. 5, and others, that the statute commonly known as Lord Campbell's Act creates a new cause of action, but we are of opinion, and so hold, that the action it does create is so involved in and dependent upon the injury to the person which results in death as to bring the same within the broad and comprehensive language of our statute on attachment, authorizing the issuance of the writ. We do not consider it necessary or desirable to advert especially to the authorities cited by intervener tending to show that the wrongful causing of another's death is not included in the terms "injuries to the person." Some of them undoubtedly are in support of defendant's position, but the question, as a rule, was presented in facts differing from those of the instant case, and in the construction of statutes having terms of less comprehensive import and permitting other construction than our law as to writs of attachment.

While we have dealt somewhat at length with the ruling of the court vacating the writ, because, as the record now appears, the right of plaintiff to further continue the present suit is dependent on its validity, we must not be understood to hold that the intervener, Mrs. Talley, has the right to raise this question, coming into court and claiming the property held by it, she submits her case to the court's jurisdiction, and the only question open to her is whether she has an interest in the property superior to that conferred by the writ of attachment. In a case at the present term, *Feed Co. v. Feed Co., post,* 690, it was earnestly contended before us that an intervener could raise the question of the court's jurisdiction, and in dis-

approval of the position, Stacy, J., delivering the opinion, said: "This jurisdictional question, arising from an alleged want of proper service, is sought to be raised by the intervener, after having taken the property under proper bonds for its forthcoming. We have held in *Forbis v. Lumber Co.*, 165 N.C. 403, and cases cited therein, that this position is not open to appellant. It is entitled to (688) be heard only upon one issue, viz.: Does the property attached belong to it (the intervener)? *Bank v. Furniture Co.*, 120 N.C. 477."

As to the rights of the intervener and on the facts as they now appear in the record, her claim is based on a preliminary judgment of the Superior Court of Rockingham County, purporting to be under C.S. 1667, providing for an award of alimony without divorce, and we deem it not amiss to say that a perusal of this statute will disclose that the relief in such cases must be wrought by civil action, and for the proper maintenance of which there must be either personal service of summons on defendant within the jurisdiction or voluntary appearance by him, or there must be at least constructive service by publication, *Johnson v. Whilden*, 166 N.C. 104, and while the statute provides that an order for temporary support may be made in the cause without notice of such an application, where the defendant, having abandoned his wife, is absent from the State or is in parts unknown, etc., etc., and our authorities seem to hold that as against such a defendant an award of alimony may be made effective against his property situated within the State without personal service and without an attachment levied, *White v. White*, 179 N.C. 592, it does not necessarily follow that such a judgment would prevail as against the lien of a valid attachment first levied in another court of concurrent or equal jurisdiction, and in any event and as now advised the rights of the parties presented in this litigation must be determined in the present suit and not otherwise. One Superior Court has no power to revoke or modify the orders and judgment of another of which the latter has acquired and holds jurisdiction. *Bear v. Cohen*, 65 N.C. 511.

On the facts as now presented, this opinion will be certified that judgment vacating the attachment be reversed. The amount of plaintiff's damages be ascertained, and the issue then determined between the plaintiff and the intervener as to their respective rights and interests in the property levied on.

Reversed.

Cited: Capps v. R. R., 183 N.C. 187; *Bridger v. Mitchell*, 187 N.C. 376; *Hill v. Patillo*, 187 N.C. 532; *Lockhart v. Ins. Co.*, 193

N.C. 12; *Tieffenbrun v. Flannery,* 198 N.C. 399; *Brown v. R. R.,* 202 N.C. 261; *Davis v. Land Bank,* 217 N.C. 149.

(689)

F. H. COFFEY ET AL., v. C. M. RADER ET AL.

(Filed 21 December, 1921.)

1. Courts—General Statutes—Judicial Notice.

An act withdrawing the operation of a State-wide law within a certain county will be taken judicial notice of by our courts.

2. Statutes—Amendments—Recorders' Courts — Actions — Abatement—Constitutional Law—Appeal and Error.

Where the question of the constitutionality of C.S. 1536, establishing recorder's courts by a general act is the subject of the action, and pending the appeal the Legislature was withdrawn the effect or operation of the statute from a certain county wherein the establishment of the court was the subject of injunctive relief, the cause of action abates and the appeal will be dismissed at the cost of each party, and the order restraining the establishment of the particular court will continue to be effective.

APPEAL by defendants from *Bryson, J.,* 10 October, 1921, from CALDWELL.

Civil action heard on preliminary restraining order before the judge holding the courts of the Sixteenth Judicial District and by consent of the parties at Morganton, N. C., on 10 October, 1921. The action is to restrain the defendants, the board of commissioners of Caldwell County *et al.,* from maintaining a recorder's court in Caldwell County pursuant to a resolution to that effect on the ground chiefly that the act under which defendants had established and were proceeding to organize and maintain said court, C.S., ch. 27, subch. 4, is unconstitutional. The restraining order was continued to the hearing, and defendants excepted and appealed.

Mark Squires, W. C. Newland, and Lawrence Wakefield for plaintiffs.

A. A. Whitener for defendants.

HOKE, J. Pending the appeal, the General Assembly of North Carolina, at the Special Session 1921, has passed an act, same being House Bill No. 568, Senate Bill No. 304, withdrawing the Sixteenth District, including Caldwell County, from the effect and operation

of the sub-chapter in question, and under and by virtue of which these courts are authorized and maintained, and repealing all laws and clauses of laws in conflict with its provisions. As a result of the measure, the power to maintain the court being withdrawn, the court itself is necessarily abolished, and the action which concerns only its existence and maintenance must abate. Our decisions on the subject are to the effect that the Court will take judicial notice of a public statute of this character. *Reid v. R. R.*, 162 N.C. 355; *Wikel v. Comrs.*, 120 N.C. 451. And involving, as it does, the existence and maintenance of a public office, the right to (690) abolish it is well within the legislative power. *Mial v. Ellington*, 134 N.C. 131. The saving clause as to actions already instituted as contained in C.S. 3948, referring only to rights and interest of a private nature.

In a case of this kind, and under the decisions referred to and others of like import, each party will pay his own cost in this Court, and the judgment as to cost in the court below will stand and be enforced as entered.

Action abates.

ROSEMAN FEED COMPANY v. NASHVILLE GRAIN AND FEED COMPANY, AND BLANTON FEED COMPANY v. NASHVILLE GRAIN AND FEED COMPANY.

(Filed 21 December, 1921.)

1. Attachment—Intervener—Issues—Pleadings.

In proceedings in attachment of the funds of a nonresident debtor in the hands of a local bank, a foreign bank intervening and claiming the funds has no interest in the action beyond the question of its ownership; and where the defendants neither appear nor plead, objection of the interpleader is untenable that it does not affirmatively appear that the defendants owned the funds, or that service has not been made on them, and that the court cannot, therefore, further proceed.

2. Same—Service—Process—Waiver.

The defendants in attachment may waive lack of service, and an intervener, a stranger to the action, except upon the issue of his ownership, will not be heard to object on that account.

3. Same—Banks and Banking—Agency for Collection.

The intervening bank in attachment, if it establish the fact of its ownership as purchasers in due course, etc., will vacate the attachment; but if it be found that the intervener was only an agency for collection, the attachment will hold as between the intervener and the plaintiff.

APPEAL by intervener from *Shaw, J.*, at the July Term, 1921, of McDOWELL.

Civil actions to recover damages for alleged breaches of contracts, by consent consolidated and tried together in the Superior Court.

Plaintiffs, local companies, having causes of action against the Nashville Grain and Feed Company, a foreign resident partnership, instituted these suits in the Superior Court of McDowell County, and in each case sought to obtain service upon the defendants by attaching the proceeds of certain drafts in the hands of the First National Bank of Marion, N. C., and the First National Bank of Lincolnton, N. C., it being alleged that said funds belong to the defendants.

(691) Thereafter, in each case, the American National Bank of Nashville, Tennessee, was allowed to intervene and set up its claim of title to the proceeds of said drafts. By consent the funds were turned over to the intervener, bonds being filed, and the garnishee banks were released from further liability. The defendants filed no answer in either case.

The causes, after consolidation, came on for trial upon the issue of ownership raised by the interpleader, and the jury returned the following verdict in each case:

"Is the American National Bank of Nashville, Tenn., the interpleader, the owner of the proceeds of draft paid by Roseman Feed Company to First National Bank of Lincolnton, North Carolina, and of proceeds of draft paid by Blanton Grocery Company to First National Bank of Marion, N. C., and attached in this cause, and entitled to the possession of same? Answer: 'No.'"

From the judgment entered, the intervener appealed.

Kemp B. Nixon and Pless, Winborne & Pless for plaintiffs.
A. L. Quickel for interpleader.

STACY, J. The first exception appearing on the record is directed to his Honor's refusal to vacate the warrants of attachment, for that it does not appear affirmatively that the property attached belongs to the nonresident defendants, and it is therefore contended that the court was without authority to proceed further in the cause. It should be observed that the defendants have made no appearance and filed no answer in either case. This jurisdictional question, arising from an alleged want of proper service, is sought to be raised by the intervener after having taken the property upon the execution of bonds which were to stand in lieu thereof. We have held in *Forbis v. Lumber Co.*, 165 N.C. 403, and cases cited therein, that

this position was not open to appellant. It is entitled to be heard only upon one issue, viz.: Does the property attached belong to it? *Bank v. Furniture Co.*, 120 N.C. 477. The intervening bank ostensibly has no interest in the merits of the actions pending between the present plaintiffs and the present defendants. Furthermore, this is an objection which, even if valid, might be waived by the defendants; and hence a stranger will not be permitted to make it for them. *Blair v. Puryear*, 87 N.C. 101.

If the intervener held the drafts as a purchaser for value, the proceeds derived therefrom could not be attached in the hands of the Marion and Lincolnton banks as the property of the Nashville Grain and Feed Company; but, on the other hand, if the intervener acted merely as a collecting agent, the proceeds would belong to the defendants, and consequently they would be subject to attachment in the hands of the local garnishee banks. *Worth Co. v. Feed Co.*, 172 N.C. 335. The case was tried upon this theory and the question of ownership, as found by the jury, has been determined against the intervener. (692)

Applying these settled principles to the facts presented, it follows that the remaining exceptions must be overruled. His Honor charged correctly on the burden of proof and ruled properly on the plea of estoppel. After carefully examining appellant's exceptions and assignments of error, we have found no sufficient reason for disturbing the result.

No error.

Cited: Mangum v. Grain Co., 184 N.C. 182; *Adams v. Caudle*, 188 N.C. 186; *Gooding v. Pope*, 194 N.C. 403; *Bulluck v. Haley*, 198 N.C. 356.

L. B. BUTNER v. BROWN BROTHERS.

(Filed 21 December, 1921.)

Negligence — Evidence — Nonsuit—New Action—Second Appeal—Appeal and Error.

It appearing in this case, involving the question of defendant's negligence, that a motion of nonsuit on the evidence has been affirmed on a former appeal (180 N.C. 612), and another action has been brought between the same parties for the same cause, and again nonsuited upon substantially the same evidence, the Superior Court having followed the former decisions of the Supreme Court in the former action, the judgment

is affirmed on the appeal in the subsequent action, for the reasons stated in the former decision.

CLARK, C.J., dissents.

APPEAL by plaintiff from *Shaw, J.*, at the August Term, 1921, of YANCEY.

Civil action to recover damages for physical injuries suffered by reason of the alleged negligence of defendant company, its agents and employees, in operating a lumber mill. At close of plaintiff's evidence, on motion, there was judgment of nonsuit, and plaintiff excepted and appealed.

Charles Hutchins and A. Hall Johnson for plaintiff.
Watson, Hudgins, Watson & Fouts for defendant.

HOKE, J. This cause was before the Court in a former appeal, and it was there held that the defendant's motion for nonsuit should have been sustained. This opinion having been certified down, judgment of nonsuit was formally entered pursuant to the opinion. Plaintiff then instituted present suit to recover for the same in-
(693) jury and at close of plaintiff's evidence, on motion, a judgment of nonsuit was again entered and plaintiff excepted and appealed.

On perusal of the present record and a careful comparison with the facts set forth in the former appeal, we are of the opinion that the two actions are made to rest on substantially similar facts, the questions presented are substantially the same, and for the reasons set forth in the former opinion we must hold that the judgment of nonsuit has been properly entered. There, as in this case, the plaintiff at the time of his injury was in the mill getting some edgings, contrary to the rules of the company, contrary to the explicit instructions of his own father, and acting on the invitation and by the directions of one Joe Rischell, a subordinate employee, having no authority, express or implied, to bind or charge the company in this matter by his words or by his conduct. A statement of the pertinent facts and the authorities upon which the ruling is based will sufficiently appear by reference to the former case, reported in 180 N.C. 612. The judgment of the court is

Affirmed.

CLARK, C.J., dissenting: This case was here before, 180 N.C. 612-619. The action is by the same plaintiff against the same defendant, and for the same cause of action. The plaintiff, who, it

appears from the uncontradicted evidence in this appeal, was 11 years old when injured, recovered on the former trial a substantial verdict and judgment. On the former appeal it was held by the majority opinion that the verdict should be set aside and the cause dismissed as on motion of nonsuit. On such judgment, from time immemorial, the plaintiff has had the right to bring a new action for the same cause to strengthen his case if he can do so, and he truly claims that he has done so as will appear by comparing the testimony on this occasion with that offered on the former trial.

It is true that a second appeal in the same cause will not be entertained. But this is not that case. Here there is an entirely new action, and the plaintiff also contends there is much additional testimony which negatives the objection that the evidence now before the court is substantially the same as on the former trial. Besides, the plaintiff on this appeal presents exceptions for the rejection of testimony which were not presented before, and which, if admitted by the court, as it should have been, would have made a material difference in this trial.

On the former trial, as in the present case, there was evidence, which must be taken as true on a motion of nonsuit, that the plaintiff Earl Butner, who sues by his next friend, was a boy 11 years of age at the time of his injury, and that prior to his injury he had worked in the defendant's mill a month or more, having been employed by the defendant company in violation of the laws of this State. There is the testimony of Lonus Butner, the boy's father, p. 17 of the record; of Miller, p. 21; Honeycutt, p. 23; McKinney, p. 23; Garrett Honeycutt, p. 25, and of Earl Butner himself, p. 27, and other witnesses, that the plaintiff, together with other small children were in the habit of playing all over and through the plaintiff's band mill, and that it was their custom for the boys to get strips at the very place where the young boy was injured; that the management of the mill knew of this custom and had made no objection. The testimony of several witnesses is that children would be in the mill getting strips at the live rolls every day *at the exact place* where Earl Butner was injured, and that there were no notices for children to stay out; that the custom was so general for children to be in the mill and all through it and to get strips where Earl got them that it was generally recognized. It was also in evidence, which must be taken as true on the nonsuit, that when Earl and other small children would be in there getting strips, at the place where Earl was injured, the mill foreman would be in there sitting around in the mill, and would raise no objection to this custom. (694)

It was also in evidence that the defendant company owned this large band mill with 25 tenement houses immediately around the

band mill, where the employees of the mill lived, and that at the place where the plaintiff was injured there were live rolls or cogs which were only protected on the top and half way down by the covering. The evidence on this occasion is much fuller as to the absence of the covering than on the former trial. It shows that the saws were running just about the height of the boy's arm when standing up, and that the covering only came down half-way the side of the dangerous machinery or cogs so that he did not, as argued before, have to come up under the machinery to be injured, but was in fact injured because his elbow was caught by the cog when he was in a natural position picking up the strips. The boy, 11 years old, according to the testimony, was sent on the day of the injury to get the strips which the foreman and the superintendent of the mill had promised his father should be thrown out. This had not been done, and when Earl came in, as usual with children, Rischel, who was in charge of the mill at that point, motioned to him to come in and pointed to the strips. Earl went to the place thus shown him, and where he and the other children had been accustomed to go to get the strips, and while getting them his arm was caught by the live rolls of cogs, not underneath the machine, but *on the*
(695) *side,* about the height of his arm and where the cogs were entirely unprotected, and his arm was so mutilated that it had to be amputated near the shoulder.

Among the differences from the evidence on the former appeal, it may be noted that the age of the boy, when injured, was stated, in the opinion of the court, to have been 12 years, and on this trial the testimony, which must be taken as true on the nonsuit by the trial judge, is not only that he was only 11, but this testimony is now uncontradicted. Besides, there are several exceptions and assignments of error which did not appear on the former trial:

1. The court erred in sustaining the objection to this question and excluding the evidence, "What was the custom, if there was any custom, for boys to get strips right at the place where Earl was hurt?" The plaintiff should certainly have been permitted to show, as alleged in his complaint, that the custom had long existed, without restriction, for children to get strips at the *exact place* where this child was injured. This is alleged in the complaint (paragraph 4) as one of the causes of action, and the plaintiff was entitled to ask the question to prove it. If, as alleged, and as the plaintiff offered to show, there had been unrestricted custom for children to get strips at that place, it was material evidence tending to show that the proximate cause of the injury was the negligence of the company.

2. Exception two is that the plaintiff asked the witness Riddle, "What, if anything, do you know about a custom for children to

play in the mill and get strips in the mill?" which was answered by the witness: "They went through there and got strips." This answer was stricken out "because the boy (Riddle) was not there until after the injury." This witness stated that he was in the mill before Earl was hurt, but did not work in that place, but would go in there after the mill was closed down; that he worked at slabs outside, and went in after Earl was hurt. Riddle evidently meant that on the day he did not go to the place where Earl was hurt until after the injury, and it was surely competent for him to say that children as a custom went through the mill, though he was not in that room until after the injury to Earl. He was competent to testify as to the custom, which he stated, being an employee in the mill, and his testimony should not have been stricken out simply because he was not present at the exact moment that Earl was injured.

3. The witness McKinney was asked, "What do you know of the continuance of the custom for children to play in the mill?" This was alleged in the complaint, and was a most pertinent question and a most material circumstance which the plaintiff was entitled to prove by this witness, and it was error to exclude it. The plaintiff was entitled to place before the jury the long-continued custom of the defendant, that the children had been allowed, without restriction, to play around highly dangerous cog-wheels, (696) which were insufficiently protected.

4. The defendant also excepted and assigned as error that when the plaintiff asked the witness, "State whether or not there was any general custom for them (children) to get fuel at the live rolls?" on objection by the defendant the witness was not allowed to state what was the general custom in this respect.

The exclusion of these questions, tending to prove that there was a general custom by the defendant to allow children in the mill, and to get strips at that place, was erroneous, and tended seriously to hamper the plaintiff in laying the facts alleged in his complaint before a jury in order to show that the negligence of the defendant company in this, as well as in other respects, was the proximate cause of the injury, and to negative any allegation of contributory negligence by this 11-year-old boy, who was getting these strips as he and other children of that age had been long permitted to do by the company without objection; that he went in on this occasion not only at the invitation of the man who was operating the machinery, but according to the custom of the company, or those managing it, who had permitted children to do this without restriction. This fixes the responsibility on the company irrespective whether Joe Rischel had authority to invite the plaintiff to come in and get the strips on that occasion or not.

But irrespective of the great harm which accrued to the plaintiff by the refusal to admit the above evidence, even upon the mutilated evidence admitted the case should have been submitted to the jury, and it was error to direct a nonsuit.

In brief, the evidence in this case, which comes before the Court upon its own merits, for it is a new action, and not another appeal in the same case, is as follows: The father testified that the boy was 11 years old when injured, at 7:30 a.m., 16 March, 1918, in the mill of the defendant. He testified he met the foreman of the company one night near the mill and asked him if he could get some strips at the mill. The foreman replied that he could get all he wanted, the witness then asked him who handled the strips and worked at the edger table, and the reply was, Rischel. The witness then went to Joe Rischel and asked him to throw out some strips, and he replied that it would be all right. Some days thereafter when the mill started up he again mentioned the matter to Rischel, who told him that he would throw out some strips, and the next morning he sent his son Earl down to get them, but told Earl not to go into the mill for them. When asked if he knew of any custom existing at the mill for boys to go in, the defendant objected, but the court overruled the objection, and the witness answered that he did and he had noticed
(697) the habit of boys being in the mill. He thought there was danger in it, but it was the custom. This witness also stated that he had seen boys getting strips occasionally where Earl was afterwards hurt; that sometimes he would be at the mill once a week, and he had seen them there several times; that he had seen boys all through the mill; that they would go all through the mill everywhere; that he had a picture that describes the place where Earl was hurt, but it was the picture of another mill, and was admitted by the court only for purposes of illustration and not as evidence in this case. But the witness was permitted to add that the machinery in the picture was similar to that used in this mill. The witness further stated that the place where Earl was standing was at the first live roll in the front of the picture, standing at the edge of table on the left of the edger, at the first live roll. This answer was stricken out, because the witness later admitted he did not see his son at the machine, at the moment when he was hurt. The witness further stated that though he was in the mill often he had never seen any notices forbidding children to come in. This witness further described the machinery as follows: "These live rolls revolve at right angles, and the two cog-wheels under the edge of the table made the rolls move; one cog-wheel was on the live rolls and the other revolved in the cog-wheel next to it; then there was a hood made of steel that came over it on top and *partly down the sides;* if any one

sat down on top of that, his pants might be drawn into it and you would not have to get up under the wheel to get caught, but it has got to go under there before it could get to the cogs. *The housing comes down half-way on the sides.* He further said that he had seen signs in the mill not to smoke, but if there were any signs up to keep children out he did not know it. He testified that Joe Rischel pointed out to him where Earl was hurt, and that it was at the first live roll in the picture. On cross-examination he said again that the covering came down *over the cog-wheels about half-way;* that there were 20 or 25 rental houses about the mill in which the renters lived, and that Earl worked in this mill before he was injured and when he was 11 years old. He further testified without exception, "The cog-wheels were about half covered, that is, all over the top and *half-way down the sides;* Earl pointed out where he was hurt after he came back from the hospital. Arthur Brownie, the foreman, told him that he would have the strips thrown out, but he did not do it. Anyway they were not out there when Earl went down for them. At the Rutherford Hospital they cut off his son's arm. The witness was asked what were the expenses he paid at the hospital and the doctor's bill, and did the lumber company pay any part of these expenses, but on the objection of the defendant this evidence was excluded, as was also the question as to Earl's present health, and the plaintiff excepted.

The witness Miller also testified at the trial (in August, 1921) that he would be 16 next April (1922), and that (698) he was working in the mill in 1918 when Earl Butner was hurt, and that he had worked for the defendant company before that, and had seen other boys working in the mill just about his size; that he had seen boys in the mill, often, at different places; that he knew where Earl was hurt, and had seen boys playing nearly all over the mill; that he had seen boys picking up edgings where Earl was hurt, and had gotten strips there to build a fence with; that this was the only place there to get them; they came through the edger and would be pitched off at the end of the mill; that he had gotten strips where Earl was hurt.

Alex. Wilson testified that he had seen children come in there; that he had seen children up on the dock where the boy was hurt; that some of the children he had seen in there were 5 to 7 years old; that if a boy stood close enough he might be jecked into this machine; that he had seen all sizes of children there from ten years on up; that he does not know anything about children being put out of the mill by the foreman; that he never saw it done.

Dock Forbes testified that he had seen boys in the mill, about 11 years old, but does not know whether they were playing. He also

testified that he did not know anything as to notices about children, but there was a notice up not allowing smoking, but would not say there was such a notice as to children staying out.

Orville McKinney testified that he lived there before Earl was hurt, and was often in the mill, and children were in there 7 years old and up during the day, any time they wanted to go in; that he never saw any notice for children to stay out.

Garrett Honeycutt testified that he had seen children in there; going backwards and forwards through there, 8 years old and up, most any time during the day; that if there was any notice as to children staying out he did not see it, and when children were in the mill they would go most any place they wanted to. He ran the slasher in the mill and saw children in the mill. Charlie Forbes testified that he was not about the mill much, but had seen children going through the mill, 7 years old up.

The plaintiff, Earl Butner, testified that he was hurt 18 March, 1918, when about 11 years old. He worked in the mill before he was injured; that he went to the mill to get strips the day he was hurt; that he did not find the strips outside, and Joe Rischel was in charge of the machinery where he got hurt that day; that when he went for the strips Rischel was standing at the dock and motioned for him to come up into the mill; that he went up and Rischel took him around and showed him where the strips were and told him to get in there and get them, that he was busy; plaintiff went to get them and pulled out several. He grabbed hold of one and it was pretty tight
(699) and he gave a jerk and it pulled out and his sleeve got caught in the cogs; that he saw children in the mill just about every day. They would be in there getting strips every day where he was hurt; that he never saw any notice to children to stay out. The court refused to allow him to answer the question whether he had played in the mill before, but to the question whether he had ever been in the mill before, he was allowed to answer, "Yes, sir; about every day; that the reason he quit carrying water in the mill was that his father stopped him to go to school; that no one ever led him out of the mill; that the foreman (Brownie) never led him out in his life; that they never tried to keep him out of the mill; that the cogs where he was hurt *were covered top and about halfway down the sides;* that when he pulled the strip his arm did not go up but it must have went into it; that his father had told him to stay out of the mill three or four times; that he was 11 years old then; he said he had got strips at this place before, and that when he got them there was not any objection; that when the boys would get strips at that place the foreman of the mill was there sitting around,

and he never had seen him raise any objection." The plaintiff also put in evidence the part of the answer admitting that the foreman had promised the plaintiff's father to throw out the strips.

The rule is without any exception, that on a judgment of nonsuit as in this case the evidence for the plaintiff must be taken in the most favorable aspect with the most favorable inferences to be drawn from it, excluding the evidence for the defendant, for the reason that the judge cannot as a matter of law decide what part of the evidence the jury might or might not believe; and, therefore, the evidence for the plaintiff on such motion must be taken in the most favorable aspect for the plaintiff.

The evidence in this case, mutilated though it may be by the exclusion of the evidence which was offered by the plaintiff, and which exclusion he has assigned as error, still leaves enough to show that the plaintiff was entitled to have this case submitted to the jury. This is not the same case that was here before, but is a new action, and there is much evidence which was not before presented or discussed.

The evidence before us, taken to be true, as it must be on this appeal, and, indeed, there is no contradiction of this, shows that the boy was only 11 years old when hurt; that he had worked in the mill prior to that time, though it was a violation of law by the defendant; that children from 7 to 8 years old up had been customarily allowed to roam through the mill, and there were no notices up forbidding them to do so; that the foreman or manager (Mr. Brownie) knew of this fact; that boys, and, indeed, the plaintiff himself, had been allowed to get strips from this edger to the knowledge of the foreman, who was sitting around, and that he (700) never objected to the plaintiff or other boys getting them; that the father of the plaintiff got permission to send his son down there to get these strips, and the foreman promised to have them thrown out for him; the plaintiff's father told him not to go into the mill on that occasion, but the strips not being thrown out, he mentioned his errand to Rischel, who told him to come in and get them, and showed him where to get them; that having been in the habit of going into the mill, and he and other children having gotten strips at that place before, he did so; that the cogs or live rolls, as they were called, on this machine were covered on top, but only half-way down on the sides; and the plaintiff, in pulling out one of the strips, which was stubborn, had his arm jerked sidewise into the uncovered half of the cogs; that he did not come up underneath the cogs, but his arm was *jerked sidewise into them.*

There was overwhelming testimony, by numerous witnesses, that

children from 7 and 8 years old up were customarily allowed to go throughout the mill, and there was also ample evidence that there were no notices forbidding the children to do so, though there were notices against smoking. Surely this evidence required the submission of the case to the jury upon the evidence of negligence on the part of the defendant as the proximate cause of the injuries sustained by this 11-year-old boy, who, as he had theretofore been permitted to do, and as other children had been permitted to do, and upon the express invitation of Rischel, and by the implied invitation of the mill manager, went into the mill on this occasion to get the strips, and who lost his arm by reason of the dangerous cogs revolving at a high rate of speed being covered *only half-way down the side,* and his arm was jecked sideways into the cogs. He says he did not go under the machine, and his statement must not only be taken as true, *but there is no evidence to the contrary.*

We have numerous cases that clearly sustain the plaintiff's right to recover, among them: *Harrington v. Wadesboro,* 153 N.C. 437; *Ferrell v. Cotton Mills,* 157 N.C. 528; *Benton v. Public Service Corp.,* 165 N.C. 354; *Starling v. Cotton Mills,* 168 N.C. 230; *Ragan v. Traction Co.,* 170 N.C. 92; *Kramer v. R. R.,* 127 N.C. 328, and cases cited in Anno. Ed.

This Court has established the doctrine that the defendant may be held liable in cases where the negligence of the defendant and of a fellow-servant concur in producing the injury. Upon the same theory, a corporation of this kind may likewise be held liable where its negligence and the negligence of its servant, whether he had authority to bind the defendant or not, concurred in producing the injury.

Its foreman sat around while young boys like the plaintiff were near to the dangerous machinery, getting strips every day, and made no objection. In the presence of this negligent foreman and
(701) superintendent, the employees seeing this custom going on every day could not be expected to be more careful than their superiors.

This 11-year-old child, who lost his arm at the shoulder, was entitled at least to a jury of his country to pass upon the above evidence tending so strongly to show that the negligence of the defendant was the cause of his irreparable injury. Indeed, there is not a scintilla of evidence that this child contributed in any way to his own injury, or was guilty of any negligence.

There is evidence that the injury was caused by the unprotected cog-wheels and the long-continued custom of the defendant to permit children of tender years to roam through the mill at will, and

without objection to get strips at this unprotected and dangerous machine. Certainly it cannot be said that there was *no evidence* to that effect, and that is the question here.

"The sob of the child in its helplessness,
Curses deeper than the strong man in his wrath."

Cited: *Fry v. Utilities,* 183 N.C. 295, 296, 300.

T. B. SHEPHERD v. W. H. SELLERS.

(Filed 21 December, 1921.)

Evidence—Hearsay—Principal and Agent—Brokers—Commissions.

When the controversy is whether or not the owner was to pay his selling agent or broker a commission upon the sale of his lands at a certain price, or whether the price was to be net to him, a witness who has had a conversation with the owner respecting it does not render his evidence incompetent as hearsay, by the use of the words "my impression" or "my understanding," etc., these words referring more or less to the uncertainty of the memory of the witness; nor will the evidence be objectionable as uncertain of the source of this recollection when it may be seen by reference to his answers to other questions that he was testifying to what he had heard the owner say.

APPEAL by defendant from *Long, J.,* at April Term, 1921, of MACON.

Civil action to recover agent's commissions on the sale of certain real estate.

There was evidence adduced on the hearing tending to show that the defendant agreed to pay the plaintiff a reasonable compensation for his services if he would procure a purchaser for the defendant's farm at the price of $5,000. A sale was effected upon these terms, but the defendant declined to pay the plaintiff, contending that the amount received was to be net, and that plaintiff agreed to look to the purchaser for his commissions.

Upon the traverse and issues thus joined, there was a verdict and judgment in favor of the plaintiff. Defendant (702) appealed, assigning errors.

Johnston & Horn, Gilmer A. Jones, and Bourne, Parker & Jones for plaintiff.

T. J. Johnston, H. G. Robertson, and R. D. Sisk for defendant.

STACY, J. The defendant's principal exception is directed to the ruling of the court in allowing the witness Greenwood to give his *understanding* of the contract with respect to the plaintiff's commissions. The witness was being examined as to his conversation with the defendant concerning the matter. He had stated, in answer to a question as to what the defendant had said, if anything, in regard to paying the plaintiff for his services, that he could not remember exactly what was said. He was then asked: "Mr. Sellers did say that he would take $5,000 for the farm, but would not be responsible to Mr. Shepherd for anything?" To this the witness replied: "No; as I understood it, he was to take care of Tom (plaintiff)." Defendant objected, and moved to strike out the answer upon the ground that it comes within the rule prohibiting hearsay evidence; and further, because it does not appear from whom or what source the witness obtained his information or understanding.

It will be conceded that the competency of this evidence must be determined by the fair and reasonable inference as to what the witness intended to say, and did say. Plaintiff insists that the witness was only stating what he understood the defendant to say in regard to the matter, while the defendant contends his impression or understanding may have been, and doubtless was, obtained from some other source. We think the next succeeding question and answer, immediately following the defendant's objection, will suffice to make clear his meaning: "Please state again just what you understood Sellers to say in regard to Shepherd getting a commission?" Answer: "I said I will pay you $5,000, one-third in cash, and you settle with Shepherd, and he said, 'All right.' Now that is what was said." From the foregoing we think it reasonably appears that the witness was giving his understanding of what the defendant had said; and, if this be so, the evidence was competent. *Gilliland v. Board of Education*, 141 N.C. 482.

Speaking to a kindred and somewhat similar question in the case just cited, Hoke, J., delivering the opinion, says: "A witness who undertakes to testify to objective facts and qualifies his testimony by using the terms, 'I think,' or 'I have an impression,' etc., if the witness has had no physical observation or has made no note of the facts, but is merely stating to the court and jury his mental inference or deduction, this, as a rule, is incompetent. But if the
(703) witness has had opportunity to note relevant facts himself, and did observe and note them, and simply qualifies his testimony in this way because his impression or memory is more or less indistinct, this, while in the form of opinion, is really the statement of a fact, and will be so received."

Quite a different question was presented in *King v. Bynum*, 137

N.C. 491, and we do not think our present holding conflicts in any way with the decision in that case.

Upon an examination of the whole case, we have found no material error which would justify our disturbing the verdict and judgment, or the result of the trial.

No error.

Cited: *S. v. Brodie,* 190 N.C. 555; *Lookabill v. Regan,* 246 N.C. 201.

J. M. REECE v. WORTH WOODS.

(Filed 21 December, 1921.)

Evidence—Deeds and Conveyances—Delivery—Fraud—Self-serving Declarations—Deceased Persons.

Where the plaintiff claims title to the lands in dispute under a deed from his father, since deceased, conditioned upon support, etc., and seeks to set aside a prior deed given by the same grantor to his son of a former marriage, as a cloud upon his title, and introduces this deed for that purpose, evidence of declarations of the grantor testified to by the plaintiff's attorney seven years afterwards that the defendant's deed, though absolute in form, was not delivered pending an agreement for support as its consideration, and that it was taken secretly by the defendant, and fraudulently registered by him, is inadmissible as a self-serving declaration of the declarant in his own favor and against the right of the defendant, under his deed.

APPEAL by defendant from *Long, J.,* at the April Term, 1921, of CHEROKEE.

The purpose of the action is to have declared void, and set aside as a cloud on plaintiff's title, an alleged deed from W. L. F. Woods and wife, Laura, to defendant, appearing on the registration books of Cherokee County as of December, 1912, on the ground that the said deed had never been delivered to defendant. The cause was before the Court on a former appeal by plaintiffs from a judgment of nonsuit against him in the lower court, and same will be found reported in 180 N.C. 631. Pursuant to the opinion in that appeal setting aside the judgment of nonsuit, the cause in the present trial was submitted to the jury on appropriate issues, and there was verdict for plaintiff. Judgment on the verdict, and defendant excepted and appealed, assigning errors.

J. N. Moody for plaintiff. (704)

D. Witherspoon and Dillard & Hill for defendant.

HOKE, J. On the present trial it appeared that the land in dispute had been the property of W. L. F. Woods, who died on 24 February, 1920. Plaintiff, a son of Mrs. Woods by a former husband, put on evidence a deed from said W. L. F. Woods and wife, Laura, to plaintiff and his wife, Ella, for the land in dispute, dated 27 February, 1919, registered 28 February, 1919, conveying the land in controversy and containing the clause: "This deed is made upon the consideration that J. M. Reese and wife shall support and provide for W. L. F. Woods and wife, Laura, during their lives, and give them a decent burial suitable to their station in life, etc. On full compliance with above conditions, this deed to be in full force and effect, otherwise void."

For the purpose of attacking it, plaintiff introduced the alleged deed from W. L. F. Woods and wife, Laura, to defendants, dated 1 April, 1912, registered 6 December, 1912, in said county, the same being in regular form with general warranty, covering same land "and without reservations, exceptions, or conditions."

There was evidence on part of plaintiff tending to show that the deed under which defendant claims was never in fact delivered, but having been signed and acknowledged by grantors, W. L. F. Woods and wife, was withheld until the alleged grantee, Worth Woods, who was a son of W. L. F. Woods by a former wife, should enter into some binding obligation for support, etc., or because such obligation was not expressed in the deed. That same was in the custody and control of said Laura when defendant surreptitiously took it from the bureau drawer where it was kept and had it put on the registry without any authority therefor from the alleged grantors, or either of them.

On the part of defendant there was evidence offered in support of his alleged deed, among other testimony being declarations of W. L. F. Woods tending to show he had directed the registration of the deed, etc.

In reply, Mr. J. H. McCall, who had been acting as one of plaintiff's attorneys, having withdrawn from the case as attorney, was offered as a witness by plaintiff, and over defendant's objection was allowed to testify in effect that in a conversation with W. L. F. Woods some time in the spring of 1919 said Woods told witness that the deed to his son had been prepared and acknowledged, but that on ascertaining that the same contained no provision for the support of declarant and his wife, and other things the alleged grantee was to do as part of the consideration, the delivery of the deed was withheld and same had been taken and put on registry without authority, etc. It will be noted that this declaration is seven years, or near that,

after the alleged execution and registry of the defendant's deed, and is clearly a self-serving declaration on the part (705) of declarant in impeachment of defendant's deed and in favor of the declarant's own title, and certainly in favor of the right to support stipulated for in the deed to plaintiff.

In our opinion the exception of defendant to the admission of this evidence must be sustained, and for the error, defendant is entitled to a new trial of the issue. *Roe v. Journigan,* 181 N.C. 180.

New trial.

Cited: Nobles v. Davenport, 183 N.C. 210.

L. T. WILDS, JR., ET AL., TRUSTEE OF THE CAROLINE E. FORD AND MARTHA A. HADEN HOME, AND R. B. McRARY, EX PARTE.

(Filed 21 December, 1921.)

Trusts—Charities—Sales—Wills—Courts—Equity.

Upon a devise of a remainder in lands to trustees of a church to be held as a home for needy widows of the ministers of that denomination, an order of court for the sale of a portion of the lands when necessary to preserve the property and effectuate the purposes of the trust is valid in the exercise of the equitable jurisdiction of the court, when otherwise the charity would fail or its usefulness be materially impaired.

APPEAL from *Webb, J.,* at December Term, 1921, of DAVIDSON.

The petitioners, trustees of the Caroline E. Ford and Martha A. Haden Home, and R. B. McRary, life tenant, filed a petition in the Superior Court of Davidson County for the sale of a certain part of the lands devised by Caroline E. Ford, in item 23 of her will appearing in the record. Testatrix died in the year 1909, and the life tenant, R. B. McRary, is still living.

The property devised for this trust, to provide a home for needy widows of Presbyterian ministers in the Presbyterian Church in the United States, consists of about ten acres, now within the residence portion of the city of Lexington. At the time of the death of testatrix it was part of a much larger tract of unimproved land. The portion devised for the trust included the dwelling-house, which is situated near the center of the ten acres, and the house is now old, out of repair, and hardly suitable for occupancy.

A city street, Second Avenue, has been opened up along one side

of the property, and has been improved, and the property has been assessed for such improvement $3,043.45.

Third Avenue extends into the ten acres and up near the residence, and has been opened beyond the property, and the city is proposing to connect the said streets by an extension across
(706) the property, which requires that the dwelling-house be moved. This opening up of the streets will enhance the value of the property.

There is no money provided by the will to pay assessments. The life tenant declines to pay, and unless a fund is secured from the property or otherwise, the city will sell off at forced sale land sufficient for this purpose. To make sale of that part ordered to be sold will leave nearly five acres of land, which will be fully sufficient to carry out the purpose of the trust, and will further provide a sufficient fund to build upon the property some modern and suitable house for those who may desire to occupy the home.

The facts agreed are as follows:

1. That the petitioners filed their petition herein 25 July, 1921, in the office of the clerk of the Superior Court of Davidson County, and same was regularly docketed in the civil-issue docket of said court. That the facts set forth therein are correct, and that the copy of the will of Caroline E. Ford, Exhibit "A," attached thereto, is a correct copy of said will, and said petition is to be taken as part of these facts agreed.

2. That thereafter and during a regular term of the Superior Court of Davidson County, judgment was rendered in said cause by Webb, J., and same is made part of these facts agreed, as fully as if herein copied.

3. That thereafter, on 17 October, Joe V. Moffitt filed with George W. Mountcastle, commissioner, his bid for a part of the property ordered to be sold, and that part for which deed was tendered, offering to pay therefor the sum of $7,500.

4. That upon report of said bid, and after same had been filed for ten days, no advance bid having been offered, the sale was confirmed by judgment of Sam J. Smith, clerk of Superior Court, which judgment is made part of these facts agreed.

5. That after said judgment of confirmation, said George W. Mountcastle, commissioner, prepared and tendered to said Joe V. Moffitt a deed for said lot, copy of which is hereto attached marked Exhibit "A," and demanded payment of the price of $7,500, and said Joe V. Moffitt refused to accept said deed and pay the said price, alleging that the said commissioner could not by his deed convey a good title in fee simple to the said lot, to the said Joe V. Moffitt.

6. That said Joe V. Moffitt is now ready, able, and willing to accept the said deed for said lot and pay the purchase price therefor. if the said deed so tendered conveys a title in fee simple to said purchaser for the said lot.

Item 23 of the will is as follows:

"I give and devise to R. Baxter McRary, for the period of his natural life, that part of my home place bounded by Hargrave Street on the east, Robert Heir's line on the north, a line on the west so drawn as to include my grove, orchard, and spring (707) — this line to be parallel with Hargrave Street — and on the south by R. Baxter McRary's line. I direct that all the remaining part of my home place be sold, publicly or privately, as my executor hereinafter named may deem best, and the moneys arising from such sale, that is to say, the principal, shall be wisely and safely invested by my executor hereinafter named, and shall constitute a perpetual fund, the interest or income of which shall be paid into the hands of the said R. Baxter McRary for his exclusive use and benefit during the period of his natural life. At the death of R. Baxter McRary, I give and devise my said home place to the 'Presbyterian Church in the United States' for and as a home for needy widows of Presbyterian ministers in said church; and it is my will that the principal referred to above in this item as arising from the sale of the remainder of my home place shall, after the death of R. Baxter McRary, revert to the trustees hereinafter named as a permanent endowment fund, in trust, for the purposes aforesaid, and the proceeds or income from said endowment fund shall be annually available and used for the maintenance of said home, which shall be known as the 'Caroline E. Ford and Martha A. Haden Home,' and I appoint as trustees for said 'home' and 'endowment fund' the trustees of the First Presbyterian Church in Lexington, N. C., the pastor for the time being, together with one other Presbyterian minister, the first of whom shall be Rev. W. P. McCorkle; their successors to be chosen, as occasion may require, by the 'General Assembly' of the Presbyterian Church in the United States."

At August Term, 1921, Webb, J., signed an order that the portion of land between Second Avenue West and Third Avenue West and the extension of the same to be sold at private sale by a commissioner. Joe V. Moffitt became the purchaser, and upon his failure to pay the purchase money, Webb, J., at December Term, 1921, made an order directing him to pay the money and accept the deed. Moffitt excepted and appealed.

Raper & Raper for trustees.
W. O. Burgin for R. B. McRary.
Hubert E. Olive for Joe M. Moffitt.

ADAMS, J. The only question presented for decision is whether his Honor had power to make the order of sale. The purchaser declined to accept the commissioner's deed on the ground that the trust will not vest in the trustees until the termination of the life estate. Immediately upon the devisor's death McRary acquired a life estate and the trustees a vested remainder in the home place. His Honor ordered the sale upon the joint petition of the life tenant
(708) and the remaindermen; and as the trust became effective as a vested remainder at the death of the testatrix, subject, of course, to the legal rights of the tenant for life, the purchaser has no valid reason for his refusal to accept the deed or to pay the purchase price. In *Church v. Ange,* 161 N.C. 315, Allen, J., said: "Courts of equity have long exercised the jurisdiction to sell property devised for charitable uses, where, on account of changed conditions, the charity would fail or its usefulness would be materially impaired without a sale." *Lackland v. Walker,* 52 N.W. 422; *Brown v. Baptist Society,* 9 R.I. 184; *Stanly v. Colt,* 72 U.S. 119; *Jones v. Habersham,* 107 U.S. 183; *Fisher v. Fisher,* 170 N.C. 381.

The judgment is
Affirmed.

Cited: Johnson v. Wagner, 219 N.C. 240; *McKay v. Presbyterian Foundation,* 228 N.C. 311.

WILLIAM S. SNYDER v. TOWN OF ASHEBORO.

(Filed 21 December, 1921.)

1. Appeal and Error—Unanswered Questions—Record.

The record on appeal must show what the answer to a question, ruled out at the trial, would have been in order for appellant to rely thereon as error on appeal.

2. Appeal and Error—Instructions—Contentions—Objections and Exceptions.

An exception to the statement of the contentions of a party must be made at the time they were given in the charge to be available to appellant.

3. Negligence—Contributory Negligence—Due Care—Evidence.

Where there is evidence that the plaintiff, the head miller in a grist mill, observing that the mill did not grind properly, and in order to remedy it, has his hand injured by putting it in the first brake while in operation; that the trouble with the mill was caused by the defendant's employees while repairing it, without the knowledge of the plaintiff, it is competent and material for the defendant making the repairs to show plaintiff's want of due care in so doing.

4. Same—Custom—Opinion—Experts—Questions for Jury.

Where it is competent for the defendant to show the plaintiff's want of due care in placing his hands upon a roller in the grist mill he was employed by another to operate, to ascertain why it did not properly operate, experienced witnesses may testify as to the custom in this respect in other like mills; but the question of its necessity or danger under the evidence of the case at bar is one for the jury, upon which the witness may not express his opinion.

APPEAL by defendant from *Bryson, J.*, at March Term, 1921, of RANDOLPH.

Civil action for personal injury alleged to have been caused by the negligence of the defendant. This action was (709) instituted by the plaintiff Snyder to recover damages on account of injuries he sustained while working as head miller of the Southern Crown Milling Company in the town of Asheboro, N. C. The mill was operated by electric current furnished by the defendant from a municipally owned and operated plant. On the day of the injury, the town had notified the Southern Crown Milling Company and the plaintiff that it was necessary to suspend operations pending work on the transmission line necessitating the removal of some of the poles and the severance of the power transmission line. The transmission line, which was composed of three separate wires, connected with a three-phase electric motor at the plant of the Southern Crown Milling Company, by which the machinery of the mill was operated. This transmission line, composed of the three wires, carried an alternating three-phase current of 2,300 voltage. There was testimony indicating that in the course of the work that was done by the employees of the defendant upon the occasion in question, the relative positions of two of the three wires constituting the transmission line became transposed and resulted in the motor at the mill running backward instead of forward as it had been accustomed to do, when the current was turned on. After the lapse of sufficient time, as he thought, for the work to be completed, but before receiving actual notice that the power lines were ready for use, the plaintiff caused an employee of the mill to switch on the current of electricity; and the plaintiff himself threw in gear the brakes or rolls in the usual way, starting the operation of the plant. The ma-

chinery thereby put in operation all operated backward and opposite to the normal or proper way. The plaintiff, who insists he did not at the time notice the machinery was operating backward, went to the first brake or set of rolls, the place where the grinding of the grain was commenced. The brake contained two horizontal corrugated or grooved iron rolls, side by side, revolving together at the top and away from each other at the bottom when in use in the proper way, taking in the grain from above and crushing it as it passed between the corrugated rolls. These rolls were operated by belts and pulleys running at high speed in plain view of the operator. The plaintiff immediately after putting this machinery in operation went to the first brake, inserted his hand and arm in an opening in the stand underneath the rolls, and observing that the rolls were not crushing the wheat as they should, put his hand up against the revolving rolls and his fingers were drawn inward, up and between the rolls, resulting in the injury to his hand and arm complained of. The plaintiff contends that it was necessary that he place his hands upon the revolving rolls of the brake as he did at the time of the injury, for the purpose of determining whether or not they were properly
(710) adjusted; whether they were heating; and whether they were gummed up with wild onions or the crushed grain; and that it was customary for millers to put their hands upon the rolls while in operation as he did for that purpose. The defendant contends that this was neither necessary nor customary, and was dangerous and liable to cause injury, even when the rolls were operating in the proper direction. The case was submitted to the jury upon the three issues of negligence, contributory negligence, and damages.

Brittain & Brittain and J. R. McCrary for plaintiff.
H. M. Robins for defendant.

ADAMS, J. A change in the relative position of certain wires which were connected with the electric motor caused the iron rolls to revolve upward instead of downward; and the plaintiff, upon observing that the rolls were not adequately crushing the grain, placed his hand underneath and upon the rolls in search of the cause, when by reason of the reverse revolution his hand and arm were caught in the machinery and injured. The defendant contended that the proximate cause of the injury was the negligent act of the plaintiff in thrusting his hand into the machinery without apparent necessity. Evidence tending to show the plaintiff's want of due care was, therefore, both pertinent and material. But the defendant's exceptions to his Honor's statement of the plaintiff's contention concerning the

established custom of examining the rolls cannot be sustained because no objection was made by the defendant at the time. *Phifer v. Comrs.*, 157 N.C. 150. We presume the exceptions were intended to show the importance as well as the competency of evidence which the defendant sought to elicit from R. D. Bost. This witness was asked whether it was customary for the miller to put his hand upon the rolls of the first brake in order to determine its condition. The witness was not permitted to answer. It is not necessary to determine whether the witness had shown that he was qualified to answer, or to decide whether the evidence proposed was competent on the question of due care. Since the record fails to disclose what the witness would have said, we cannot assume that his answer would have been favorable to the defendant. It would be vain to grant a new trial upon the hazard of an uncertain answer by the witness. *In re Smith's Will*, 163 N.C. 466; *Dickerson v. Dail*, 159 N.C. 541; *Boney v. R. R.*, 155 N.C. 95; *Fulwood v. Fulwood*, 161 N.C. 601; *Schas v. Assur. Society*, 170 N.C. 421. Exceptions 6, 12, and 13 cannot be sustained.

We are unable to see wherein the admission of the evidence to which the seventh and eighth exceptions relate constitutes reversible error.

Rufus Brady, a witness for the defendant, was not permitted to say whether it was necessary for a miller in the (711) performance of his duties in a mill like that in which the plaintiff was injured to put his hand on the first brake while it was in operation, in order to determine its condition. The objection to the question was properly sustained. It is true that in certain circumstances a person of adequate knowledge and experience may testify whether a particular act is necessary to the accomplishment of a particular result; but in this case whether there was such necessity was a matter for consideration by the jury in their ultimate determination of the question of due care on the part of the plaintiff. Besides, the record does not suggest what the answer of the witness would have been had the evidence been admitted.

Whether there was danger in putting the hand underneath the roll was likewise a question for the determination of the jury upon all the evidence indicating the character, motion, and general operation of the machinery by which the plaintiff was injured. Exceptions 7, 8, 9, 10, and 11 must be overruled. The others are merely formal.

The case seems to have been carefully tried, and the record is free from error.

No error.

Cited: *S. v. Jestes*, 185 N.C. 736; *Hosiery Co. v. Express Co.*, 186 N.C. 557; *Barbee v. Davis*, 187 N.C. 85; *S. v. Ashburn*, 187 N.C.

722; *Smith v. Myers*, 188 N.C. 552; *S. v. Collins*, 189 N.C. 19; *Newbern v. Hinton*, 190 N.C. 111; *Rigsbee v. R. R.*, 190 N.C. 234; *Shields v. Harris*, 190 N.C. 528; *Pace v. McAden*, 191 N.C. 140; *Rawls v. Lupton*, 193 N.C. 430; *Porter v. Construction Co.*, 195 N.C. 332; *Campbell v. R. R.*, 201 N.C. 109; *In re Will of Badgett*, 201 N.C. 567; *Kennedy v. Telegraph Co.*, 201 N.C. 759; *S. v. Rowland*, 205 N.C. 545; *S. v. Poolos*, 241 N.C. 383.

A. O. HAYWOOD, ADMINISTRATOR, v. L. M. RUSSELL AND GEORGE W. MORRIS.

(Filed 21 December, 1921.)

Bills and Notes—Judgments—Indorser—Principal and Surety—Evidence—Pleadings—Liability of Principal—Payment by Indorser.

Where one of two defendants has paid a joint judgment upon a note against them both, and has the judgment assigned to another for his use, who brings action to recover against the other judgment debtor, he may, as between themselves, show that the defendant in the second action was the principal payee, and that he, the plaintiff, was an indorser, though not pleaded in the original action, and recover the full amount of the judgment he has paid, the action being, in substance, one by the surety on the note to recover against the principle thereon. C.S. 3963; 1795, excluding evidence of transactions with deceased persons does not apply, the parties to the action being alive.

ADAMS, J., did not sit.

APPEAL by Morris from *Bryson, J.*, at the April Term, 1921, of MONTGOMERY.

L. M. Russell, in 1892, executed a note to George W. Morris for the sum of $326, with interest at 8 per cent from 1881. It was endorsed by George W. Morris to E. T. R. Livingston, who obtained judgment jointly on said note at January Term, 1899, of
(712) Montgomery, against George W. Morris and L. M. Russell. His administrator, A. O. Haywood, in July, 1908, assigned this judgment to D. T. Russell, the wife of L. M. Russell, who, in December, 1908, issued notice to George W. Morris alone that motion would be made to revive said judgment and to issue execution thereon. Answer was filed to said notice by Morris, and the cause was transferred to the Superior Court for trial on 31 December, 1914, and summons was issued to make L. M. Russell a party to said proceedings on the same day. Said L. M. Russell failed to answer,

plead, or demur, and judgment was rendered against both defendants at Fall Term, 1919, the jury having found that the judgment was not barred by the statute of limitations and had not been paid, but execution was issued on this judgment against George W. Marris only, who, by virtue of said execution, paid the full sum then due thereon, $1,038.32, on 26 September, 1919, and thereupon, pursuant to C.S. 3963, caused such judgment to be transferred to W. R. Harris, trustee, for his benefit, who instituted this proceeding 16 October, 1919, joining George W. Morris therein, against L. M. Russell, who filed answer.

The cause coming to be tried at April Term, 1921, the jury returned a verdict that the defendant L. M. Russell was indebted to the defendants George W. Morris, $519.16, and interest from 26 September, 1919, which was one-half of the amount of the judgment which had been paid by G. W. Morris, and he appealed.

Brittain & Brittain and Dockery & Wildes for G. W. Morris.
R. T. Poole for L. M. Russell.

CLARK, C.J. On 1 January, 1892, L. M. Russell executed a note for $326, with 8 per cent interest from 1881, to George W. Morris, who in turn assigned same to one Livingston, whose administrator recovered judgment January, 1899, for $454.12, against L. M. Russell and George W. Morris. The administrator, O. A. Haywood, assigned the said judgment to D. T. Russell, the wife of L. M. Russell. She instituted proceedings to revive said judgment, and the jury having found, on issues submitted, that it was not barred by the statute of limitations, said judgment was renewed before Adams, J., 26 September, 1919, but execution was issued against George W. Morris alone for $1,038.32, who paid off the same, but caused the judgment to be assigned to W. R. Harris, trustee, for his benefit.

L. M. Russell being a debtor, and the payee, George W. Morris, having endorsed the paper, is entitled in equity to recover the entire sum paid by him for the original debtor, for this is in substance an action, C.S. 3963, by the surety to recover from his principal the amount which he paid upon the execution issued upon the joint judgment against them in favor of the assignee of the (713) original judgment creditor, L. M. Russell, and which was revived by her in an action against both, but execution having been issued and collected out of George W. Morris solely.

Morris having obtained judgment against L. M. Russell in this proceeding for only one-half of the amount paid by him, assigns as error:

1. That the court refused to allow George W. Morris (who is the real plaintiff in this action) to testify that he was payee on the note given by L. M. Russell to G. W. Morris, which was endorsed by him to E. T. R. Livingston, who obtained judgment against them both in 1899.

2. George W. Morris further assigns as error that the court refused to allow him to testify that he endorsed the note to E. T. R. Livingston which had been executed to him by L. M. Russell.

3. George W. Morris further assigns as error that the court refused to allow him to testify that he bore the relation of surety to Russell on the note.

4. G. W. Morris further assigns for error that the court refused to allow the witness I. E. Sanders to testify that George W. Morris' name was endorsed on the note that was in suit, on which the judgment was obtained in 1899.

5. George W. Morris further assigns as error that the court refused to allow him to testify that L. M. Russell was principal on the note which was endorsed by him to E. T. R. Livingston, on which the judgment was obtained.

6. G. W. Morris further assigns as error that the court refused to allow G. W. Morris to testify that he was surety for the defendant L. M. Russell on the note aforesaid.

This is an action by the endorser to recover of the principal the full amount of the note which he has paid. It is well settled that the surety on a note on which judgment has been taken can set up his suretyship, notwithstanding he did not plead it in the original action. In *Kennedy v. Trust Co.,* 180 N.C. 229, it is held: "As between the apparent makers and the original taker of the Kennedy notes, it was competent for the plaintiff to prove which of the two signing the notes to the bank was the principal debtor, and which was the surety. *Welfare v. Thompson,* 83 N.C. 276; *Lockhart v. Ballard,* 113 N.C. 292; *Foster v. Davis,* 175 N.C. 541; *Williams v. Lewis,* 158 N.C. 571."

In *Foster v. Davis,* 175 N.C. 541, it is said that if "The wife promised to pay the debt of her husband when she signed the note she 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." Indeed, the equity and the precedents are so well settled that no citation of authorities or discussion of the principle is necessary.

(714) As both L. M. Russell and George W. Morris are still living, C.S. 1795, did not disqualify this testimony, and we know of no other ground that can be assigned.

There are other exceptions, but it is unnecessary to discuss them,

and, indeed, it seems that we cannot consider several of them, which are exceptions to the rejection of evidence which were not taken till after verdict.

New trial.

ADAMS, J., did not sit.

Cited: Chappell v. Surety Co., 191 N.C. 708; *White v. Russell*, 196 N.C. 92; *Barnes v. Crawford*, 201 N.C. 438; *Davis v. Alexander*, 207 N.C. 420.

GORDON H. CILLEY ET AL., V. G. H. GEITNER ET AL.

(Filed 21 December, 1921.)

1. Wills—Estates—Contingencies—Vested Rights.

After devising and bequeathing his real and personal property to his children, the testator directed his executors to keep his estate intact until the death of his wife, and "after the death of my wife, to distribute and divide my estate among all of my children, share and share alike, the children of any deceased child of mine taking his or her share, provided that if any of my children are dead without lineal descendants, the share of such child or children shall go to my other children, equally": *Held*, the contingency determining those who should take was the death of the testator's wife, or the children or grandchildren of the testator then living, the latter taking under the testator's will, and not as heirs at law of their deceased parent.

2. Same—Husband and Wife—Rescent—Husband's Interest—Curtesy.

Where the grandchildren of the testator have taken as survivors, after a life estate of their mother, under the terms of the will of their deceased grandfather, their father cannot be entitled to take any interest therein as representative of his deceased wife, or as tenant by the curtesy, or agree with the guardians of his minor children to any extent that would affect their rights under the will.

3. Guardian and Ward—Where Appointed—Wills—Testator—Domicile.

Where the infant grandchildren of the testator take upon a contingency, as directed by the will, properly probated here, it is required that the guardian appointed be a resident of this State, according to our law, unless the funds have been properly removed to another state, C.S. 2193, 2196; and the law of this State governs the interpretation of the will when the testator died domiciled here.

HOKE, J., dissenting.

APPEAL by defendants from *Finley, J.*, in chambers at Wilkesboro, 9 July, 1921, from CATAWBA.

A. A. Shuford died in Catawba County in May, 1912,
(715) his will being probated 11 May, 1912. His widow dissented from his will, which was construed *In re Shuford*, 164 N.C. 133. She died 1 March, 1921. Her dissent did not in any manner affect the rights of the devisees and distributees under the will. The annual allowances provided therein were paid until the time of her death, when in accordance with the terms of the will the surviving executors, the defendants Geitner and Menzies, proceeded to divide the properties belonging to the estate of their testator — setting apart a one-seventh portion, specifically described, to the "Cilley heirs," one-seventh to James C. Shuford, and at their request, five-sevenths by specific description to the other devisees. The executors and these devisees are parties defendant.

A. A. Shuford left surviving him his widow, who has since died (1 March, 1921), and 7 children, one of whom, Maude E. Cilley, died intestate 19 June, 1912, domiciled in Philadelphia, Pa. She left her surviving husband, Fordon H. Cilley, and two minor children, Alda V. C. Cilley and Adelaide H. Cilley, who were the only next of kin and heirs at law of Maude E. Cilley. J. L. Cilley has qualified as administrator of the estate of Maude E. Cilley, deceased, in this State, and Alfred G. Clay, has qualified as guardian of the above two infants in the orphan's court in Philadelphia, and these are the petitioners in this proceeding.

The petitioners admit that the estate has been carefully and properly managed, and that the division made by the surviving executors is fair and equitable, but they ask that as to the properties allotted to the "Cilley heirs," the petitioner Gordon H. Cilley, the son-in-law of the testator, be decreed the owner of one-third interest thereof and that Alfred G. Clay, guardian, be decreed the owner of two-thirds undivided interest therein. This is the sole question presented in this case. It further appears from the petition that such decree is asked because of an agreement by the petitioner, Gordon H. Cilley, with Alfred G. Clay, the guardian of his two infant children aforesaid, and that "said agreement is without prejudice to the rights of the petitioner, Gordon H. Cilley, to claim otherwise in the event that the prayer of this petition be not granted."

The clerk entered judgment that the properties which the executors had allotted to the "Cilley heirs" should be sold by the commissioner, Mark Squires, named by the court, and that "the funds in the hands of the said Mark Squires shall, upon confirmation of any sale made by him, be paid over to the said Alfred G. Clay,

guardian of the two infants above stated, to be disbursed or administered by him according to their respective rights."

The surviving executors, Geitner and Menzies, are advised that this judgment authorizes said Alfred G. Clay to administer these funds according to his own determination as to the rights of the petitioners, or in compliance with the agreement above (716) set forth in the petition, and are advised further that said properties should be administered and disbursed according to the provisions of A. A. Shuford's will, as construed under the laws of North Carolina, and that the beneficiaries of the "Cilley heirs" take as devisees and legatees of A. A. Shuford, and not as heirs and next of kin of Maude E. Cilley, who was domiciled in Pennsylvania at the time of her death; that these beneficiaries are the two minor children of Maude E. Cilley, and that the issues raised should be determined under the laws and by the courts of North Carolina. From this judgment of the clerk the defendants, surviving executors, appealed. This judgment of the clerk was approved by the judge. The executors appealed to this Court.

Mark Squires, Herbert V. Steelman, and John M. Abbott for plaintiffs.

Self, Bagby & Aiken for defendants.

CLARK, C.J. It appears from the will of A. A. Shuford that the only specific, unconditional bequests made by him, to become effective at the time of his death, were:

1. The allowance of $2,000 per year to his widow for each and every year that she should survive him.

2. The allowance of $1,000 per year to each of the 7 children, naming them, "during the term of the natural life" of his widow.

3. Two hundred dollars a year to the pastor of the Corinth Reformed Church of Hickory during the life of his widow.

4. An allowance of $200 a year to Julius H. Shuford, and $100 a year to Mrs. Laura Ramseur, to be paid to each during the remainder of his or her life, with definite directions, (4) and (6), as to the manner and means of providing these sums after the death of the testator's widow in the event they or either of them survived her.

5. He expressly directs his executors "as long as his said wife shall live" to keep his estate undivided, managing and handling it according to their best business judgment, and (9) vests in his executors full power and authority to change any investment and to sell, convey, and convert any real estate, exercising that care which they would use in the management of their own business.

In item (7) he says: "I direct my executors, or the survivors of them, after the death of my wife, to distribute and divide my estate among all of my children, share and share alike, the children of any deceased child of mine taking his or her share: *Provided,* that if any of my children are dead without lineal descendants, the
(717) share of such child or children shall go to my other children equally."

He further declares in this item that he does not mean that his estate shall be converted into cash, but that the surviving executors shall value and apportion it, and, in item (8), he makes provision for "meeting certain contingencies in the general division."

The closing language of the will is as follows: "In the event the said Geitner or Menzies should die, leaving the other and my wife surviving, then I direct them to agree upon and nominate an executor as a substitute for the deceased. The person so nominated to have all power and authority as an executor as though he were specifically herein named as such, and in case of the death of any executors during the lifetime of my said wife, I direct the vacancy to be filled in the same way in order that there may be two executors to survive my wife and coöperate with each other in valuing and distributing my estate under the provisions of this will."

It seems clear that the question as to what individuals would become the recipients of the bulk of the estate and its surplus earnings was not to be determined, and could not be, until the death of his widow, at which time the property should be divided by the two executors among the children of the testator living at that time, and the children of such who should be dead leaving children, in which event the children of such deceased child taking his or her share, with a provision that when any child has died without lineal descendants, the share of such child or children should go to the other children of the testator equally.

The provisions of item 7, as above set out, are clear and unequivocal. Under the terms thereof the property devised has been properly divided into 7 equal shares, which it is admitted has been equitably and fairly done. Of these 7 shares each of the 6 living children is entitled to one share, and the other share is to go to the two children of his deceased daughter, Maude E. Cilley. There is no contingency under which the son-in-law, the petitioner, Gordon H. Cilley, is entitled to receive any part of the estate. The two infant children of the deceased daughter take, not as the heirs of the mother, but directly from the testator under item 7 of the will. And, therefore, their father, Gordon H. Cilley, has no interest as representative of his wife. Nor could he derive any by any agreement made with the guardian of said infants, nor can the court authorize said

guardian to disburse or administer the one-seventh share accruing to said infants, according to his own judgment, nor under the laws of this State could said fund accruing to his said children be turned over to a guardian appointed by the courts of another State. It would be necessary that a guardian should qualify in this State. If it is desired to remove the fund to another State, proper proceedings must be taken in accordance with our statute, C.S. 2195, by petition filed before the clerk of the Superior Court, (718) and judgment rendered thereon in the manner provided in C.S. 2196.

The terms of item 7 of the will are clear and explicit, and capable of but one construction, which is as above stated. In *Anderson v. Felton*, 36 N.C. 55, where the provision of the will was for a division "at the time my daughter Sarah arrives to 15," Ruffin, C.J., held that only those children would take who were living when Sarah arrived at 15, saying that until the time appointed for the division the legacies did not vest. To the same effect, *Threadgill v. Ingram*, 23 N.C. 577; *Skinner v. Lamb*, 25 N.C. 157; *Gregory v. Beasley*, 36 N.C. 25; *Nelson v. Moore, ib.*, 31.

"Where a legacy is given *'at 21*, or *in case* or *provided'* the legatee attain such age, these words annex the time to the substance of legacy, and the legatt's right to it will depend on his being alive at the time fixed for payment." *Green v. Green*, 86 N.C. 546; *Giles v. Franks*, 17 N.C. 521. There are numerous other cases to the same effect.

In *Blake v. Blake*, 118 N.C. 575, it is said: "Under the devise in the will, which is appended to the complaint, the property was left in trust to be 'divided when the youngest child should arrive at age.' The contingency not yet having happened, a division cannot be ordered. *Green v. Green*, 86 N.C. 546. The complaint fails to state a cause of action."

Bowen v. Hackney, 136 N.C. 187, and *ib.*, 200, are directly in point, and are decisive of the construction to be placed upon item 7 of this will. In the first of these cases it is said, "Under a devise providing that at the expiration of the estate of a life tenant, the property given to him shall be equally divided between the children of the testator, the representatives of such children as may have died to stand in the place of their ancestors, the husband of one of the children who died without issue and before the life tenant does not take under the will, though he be the sole devisee of the wife." The point is elaborately discussed there, and is restated the second time that case was before the Court, 36 N.C. 200. And the decision has

been repeated in *Clark v. Wimberly,* 171 N.C. 48; *Jenkins v. Lambeth,* 172 N.C. 466, and *Grantham v. Jinnette,* 177 N.C. 229.

In *Clark v. Wimberly, supra,* the Court says: "By the terms of the will the children of Martha L. Wimberly held an estate dependent upon their being alive and filling the description at the death of their mother, the life tenant. If they died before that time, without issue, their interest became extinct, and if they so died, leaving issue, these last became the owners of the interest of their deceased parent, but holding *direct from the testator.*" In *Whitesides v. Cooper,* 115 N.C. 573, the devise was almost *in totidem verbis,* as in
(719) this case, and received the same construction, which has been followed since in *Hutchinson v. Lucas,* 181 N.C. 56.

It is perfectly clear that the children of Maude E. Cilley are entitled to the interest in this estate which she would have taken if she had survived her mother — not as her heirs or next of kin, but as devisees and legatees of A. A. Shuford.

In *Thompson v. Humphrey,* 179 N.C. 44, the Court says: "The construction of the will makes the estate of the children a defeasible fee for they may never take, as the mother may survive all of them, in which event their children would take in their places, and then, not by descent from them, but directly from the devisor under the will as purchasers." To same purport, *Smith v. Lumber Co.,* 155 N.C. 389.

The will must be construed and the distribution of the estate made according to the laws of North Carolina. *Leake v. Gilchrist,* 13 N.C. 77; *Hartness v. Pharr,* 133 N.C. 566; *Hall v. R. R.,* 146 N.C. 345.

Maude E. Cilley having predeceased her mother, Gordon H. Cilley, her surviving husband, would have no right of curtesy in any property. Hoke, J., in *Jones v. Whichard,* 163 N.C. 241.

The case must be remanded that judgment may be entered in the court below, and further proceedings had, in conformity to this opinion.

Reversed.

HOKE, J., dissenting.

Cited: Poole v. Thompson, 183 N.C. 597; *Scales v. Barringer,* 192 N.C. 101; *Trust Co. v. Henderson,* 225 N.C. 570.

GEORGE I. BROOKS v. THE HENRIETTA MILLS COMPANY.

(Filed 21 December, 1921.)

1. Nuisance—Licensor and Licensee—Knowledge—Notice.

In order to create a liability of the owner of land for an injury caused by his licensee thereon, it is necessary that such act amounted to a nuisance, and that the owner had actual or implied notice or knowledge thereof.

2. Same—Employer and Employee—Master and Servant.

Where a cotton mill company lays out a baseball park on its own land for the use and benefit of its own employees, the relation of licensor and licensee is created.

3. Same—Amusement Parks—Evidence—Nonsuit—Trials.

Where the relation of licensor and licensee is created between the owner of a mill and a baseball club of its employees, and the latter has sole control and charges entrance fees for its exclusive benefit, without pecuniary profit to the owner, the owner is not liable in damages occasioned by the employees stretching a rope across a roadway on its premises to aid in collecting the entrance charges, which caused the injury in suit to one traveling by automobile on the roadway, without the owner's knowledge, express or imputed; and in the absence of evidence thereof a judgment as of nonsuit is properly granted.

APPEAL by plaintiff from *Shaw, J.*, at the August Term, 1921, of RUTHERFORD. (720)

Civil action for the recovery of damages for personal injury.

The plaintiff alleged that the defendant owned and operated a cotton mill and mercantile business in the town of Caroleen; that it owned a large tract of land on which its plant was situated and on which had been erected a number of tenement houses, occupied by the operatives of the defendant; that a public highway extended from the defendant's store to Ellenboro, and that the road leading from this highway extended through the defendant's property in the direction of Beasontown in the outskirts of Caroleen; that this road was a thoroughfare used, not only by the defendant's operatives, but by the public generally; that in the spring of 1920 the defendant, for the purpose of gain and profit to itself, organized a baseball team at Caroleen, and permitted the game of baseball to be played on its premises from time to time, and that the defendant hired baseball players and charged its employees and others admission fees. The plaintiff further alleged that the defendant, in order to exclude those who had not paid the admission fee, wrongfully caused to be stretched across the road referred to a rope which was attached to posts or poles on the defendant's premises and thereby wrongfully obstructed said thoroughfare and constituted a nuisance; and that in the month

of September, 1920, the plaintiff, while traveling in a Ford car driven by another, came in contact with the rope stretched across the road; that the rope caught under plaintiff's chin and across his throat and violently threw him from his seat in the car, and that he was thereby painfully and seriously injured.

The defendant alleged that prior to the injury it had prepared a diamond on its premises, had purchased the usual paraphernalia and fixtures, and had built a grandstand for the amusement and pleasure of its operatives, but had nothing whatever to do with the management of the baseball team, and received no compensation or profit from the games played there from time to time; that the operatives of the mill had organized a ball team for the purpose of playing match games among themselves and others in the community, and that the team charged an admission fee merely for the purpose of purchasing balls, bats, gloves, and other equipment, and that all the proceeds were paid to the ball team; that the defendant had no notice of the alleged obstruction in the road, and had nothing to do with it, and no opportunity to remove it before the alleged injury occurred.

At the close of all the evidence, the defendant moved
(721) to dismiss the action as in case of nonsuit. The court granted the motion, and plaintiff excepted and appealed.

W. C. McRorie and Pless, Winborne & Pless for plaintiff.
Quinn, Hamrick & Harris for defendant.

ADAMS, J. The right of the plaintiff to recover damages is conditioned in part upon the legal relation that existed between him and the defendant at the time of the alleged injury. In substance, the plaintiff's allegations are, (1) that the defendant directed and controlled the ball team that used the premises and stretched the rope across the road; and (2) that the defendant wrongfully licensed or permitted the team to obstruct the road in this way. It is true that a ball team had been organized to play baseball on the defendant's premises; but there is no evidence that the defendant had anything to do with the "operation" or control or management of the game, or that those who played or conducted the game were in any sense the servants or agents of the defendant. In fact, the evidence seems conclusively to show that the defendant prepared the ground, purchased playground fixtures, and erected a grandstand for the amusement and recreation of the operatives, but did not receive any pecuniary compensation, or pretend in any way to direct or supervise the game. The defendant, therefore, can derive no aid from the familiar principle that the owner or lessor of a place of amuse-

ment set apart and maintained for his pecuniary benefits is charged with the duty of exercising due care to see that the premises are reasonably safe for the purposes intended. 38 Cyc. 268 *et seq.;* 26 R.C.L. 713 *et seq.*

The plaintiff contends, however, that the obstruction of the road constituted a nuisance on the defendant's premises, and that the defendant, having notice thereof, declined to abate the nuisance, and is therefore liable to the plaintiff in damages. That the unlawful obstruction of a highway is a public nuisance is generally conceded. 29 Cyc. 1177; 20 R.C.L. 399; *Dunn v. Gunn,* 149 Ala. 583; *S. v. Edens,* 85 N.C. 527. But the plaintiff has not shown either that the defendant obstructed the road or had knowledge of the obstruction. The plaintiff relied chiefly upon the testimony of the witness Robbins; but this testimony utterly fails to connect the defendant with the management or control of the game, or to prove that the defendant had actual or implied knowledge of the obstruction in the road. It is manifest that between the defendant and the ball team there existed the relation of licensor and licensee, without any pecuniary compensation to the defendant, and that the team, without notice to or knowledge of the defendant, caused the rope to be extended above and across the road. In these circumstances the plaintiff has no cause of action against the defendant. As a gen- (722)
eral rule, the owner of land is not liable for injury caused by the acts of a licensee unless such acts constitute a nuisance which the owner knowingly suffers to remain. 38 Cyc. 483. The doctrine is pertinently stated in *Rockport v. Granite Co.,* 51 L.R.A. 779: "In case of work done by a licensee, the work is done on the licesnee's own account, as his own business, and the profit of it is his. It is not a case, therefore, where the thing which caused the accident is a thing contracted for by the owner of the land, and for which he may be liable for that reason." Upon a review of the record we think the judgment of nonsuit should be

Affirmed.

C. C. MILLS v. W. M. TABOR ET AL.

(Filed 21 December, 1921.)

1. Deeds and Conveyances—Married Women—Free Trader — Probate — Consideration—Equitable Title—Legal Title.

Where a married woman conveys her land without the written consent of her husband under an invalid registration as a free trader, and has received the full consideration therefor, a part before and a part after her husband's death, it vests the equitable title in her grantee and those claiming under him, which, under a consent judgment between the parties, may vest the legal title to the lands in him.

2. Same—Registration—Liens—Judgments—Mortgages.

Where there is a lien by judgment against the holder of an equitable title, C.S. 614, to lands who also holds a registered mortgage from his grantee under an unregistered deed to secure the balance of the purchase price, his deed registered after the lien of the judgment had taken effect, cannot render the lien under the mortgage superior to the judgment lien, and equity will remove the lien of the mortgage as cloud upon the title of the purchaser at the execution sale holding the sheriff's deed. *Mayo v. Staton*, 137 N.C. 680.

3. Same—Estoppel.

Where the judgment creditor and a mortgagee under a prior registered mortgage claim the land from the same person, they are ordinarily estopped to deny the title of their common source, but where the deed from this common source, upon which the mortgagor's title depends, has been registered after the judgment lien has taken effect, this element of estoppel does not apply to the purchaser at the execution sale.

APPEAL by plaintiff from *Harding, J.*, at the August Term, 1921, of CHEROKEE.

Hattie Palmer, who was defectively registered as a free trader, conveyed, without the joinder of her husband, the lands in dispute to W. M. Tabor by deed dated 26 December, 1916, and
(723) registered 2 days thereafter, in consideration of $2,500, of which Tabor paid $1,000 in cash and executed 3 notes of $500 each for the balance payable 1, 2, and 3 years after date and secured by a mortgage deed on the land.

Tabor and wife, by deed of 23 January, 1918, conveyed said lands to Allen Ashe for the consideration of $2,600, of which $200 was paid in cash, and Ashe assumed the debt of $1,500 to Mrs. Palmer, and gave Tabor a mortgage deed for the balance, $900. The mortgage deed to Tabor was registered 1 April, 1919, but the deed from Tabor to Ashe was not registered till 24 December, 1919.

At November Term, 1919, of Cherokee, which began 3 November, 1919, the plaintiff Mills obtained a judgment against W. M. Tabor for $2,032.32, which was duly docketed and indexed. Tabor's home-

stead was allotted, the lands described in the complaint were sold under execution and purchased for Mills.

Hattie Palmer's husband died 21 October, 1918. After his death, while a widow, she accepted payment of the two last notes from Allen Ashe, who had paid the first of the 3 notes to Mrs. Palmer before her husband's death.

On 23 December, 1920, after the sale under execution and after Mills had sued Ashe for possession, Mrs. Palmer executed to Ashe a deed for said lands. Mills paid Ashe back the $1,500 he had paid Mrs. Palmer, and Mills was, by a consent judgment, decreed owner of the land. Tatham owns the note from Ashe to Tabor for $900, and this action is brought to have the mortgage from Ashe to Tabor removed as a cloud upon Mills' title. Upon the agreed state of facts as above, the court entered judgment that the mortgage from Allen Ashe to the defendant W. M. Tabor was a valid lien upon the property described in the complaint to secure a note of $900, and that the defendants should recover of the plaintiff their costs of the action. Appeal by plaintiff.

Dillard & Hill for plaintiff.
J. N. Moody for defendants.

CLARK, C.J. The deed from Hattie Palmer to A. M. Tabor, dated 26 December, 1916, was defective in that her husband did not give his written assent to the conveyance, but Tabor paid her $1,000 in cash and executed his three notes for $500, which were secured by his mortgage on the land back to Mrs. Palmer. One of these notes was paid to her during her husband's life, and the balance of the purchase money was paid to her after she had become a widow by Allen Ashe, who was the grantee in a deed from Tabor. Mills paid Ashe back the $1,500 he had paid Mrs. Palmer, and by a consent judgment, to which Mills, Ashe, and Mrs. Palmer (724) were parties, Mills has been declared the owner of said lands.

This controversy is over the question whether the $900 note secured by the mortgage from Ashe to Tabor, which was registered prior to the date of the sale under execution in favor of Mills, is a lien upon the title of Mills, which accrued by purchase under the execution against Tabor under a judgment against Tabor docketed prior to the registration of Tabor's deed to Ashe.

It is true that the deed to Tabor by Mrs. Palmer was defective for want of the written consent of her husband, but in addition to $1,000 cash paid to her by Tabor, and by the acceptance by her after she became a widow of the balance of the purchase money, he be-

came the full equitable owner of the property. *Sills v. Bethea,* 178 N.C. 315. She could not assert any title against him, and certainly no one else could, and under the execution sale against Tabor the purchaser, Mills, stood in the shoes of Tabor and acquired his interest in the land except as against his grantee, Ashe. But Ashe's title by virtue of Tabor's deed is inferior to the lien of Mills' judgment, which was docketed first. Tabor executed a deed to Ashe 23 January, 1918, but it was not registered till 24 December, 1919, and in the meantime the judgment by Mills against Tabor was obtained at November Term, 1919 (which began on 3 November), and under it the purchaser, Mills, has title which is good against the deed for the same interest from Tabor to Ashe, which was not registered till after the lien of judgment. Mills' title, therefore, is superior to the deed from Tabor to Ashe.

It is true that Ashe executed back a mortgage on this property to Tabor for $900 to secure the balance of the purchase $900, but that though registered 1 April, 1919, could have no effect as against the lien of Mills' judgment, as the deed from Tabor to Ashe for the land was not registered till after Mills' judgment was docketed. We are, therefore, of the opinion that by the payment of the purchase money and the acceptance of the balance thereof after Mrs. Palmer became a widow the equitable title was vested in Tabor. By virtue of the judgment against Tabor in favor of Mills, and his purchase of land under the execution, he acquired the interest of Tabor, prior to the conveyance of the same interest by Tabor to Ashe, which was not recorded till after the lien of the judgment, and hence the $900 mortgage executed by Ashe back to Tabor to secure the note assigned to the defendant Tatham is a cloud upon the title which the plaintiff is entitled to have removed. The mortgage secured by this note was registered prior to the lien of the judgment, but at that time the conveyance from Tabor to Ashe not being recorded, such mortgage conveyed no interest as against the judgment of Mills.

(725) Both the plaintiff and the defendants derive their title from Tabor, and they cannot contest the title conveyed to him by Hattie Palmer. The plaintiff claims under a judgment, by virtue of an execution issued on which the plaintiff Mills acquired the sheriff's deed. The assignee, John A. Tatham, holds under a mortgage executed by Ashe back to Tabor, and has no claim except by virtue of the deed from Tabor to Ashe, and that not having been recorded till after date of the judgment obtained by Mills, Mills is entitled to a decree confirming his title, and to remove the defendant's claim as a cloud upon plaintiff's title.

Both the plaintiffs and the defendant claim under Tabor, and the

title which has accrued to him from Mrs. Palmer, as above stated. The sole controversy is whether the plaintiff has acquired by judgment and execution the interest of Tabor in the land by a lien prior to the interest which Ashe acquired by Tabor's deed, which was not registered till after the lien of the docketed judgment under which Mills purchased. The mortgage securing the note, executed by Ashe to Tabor, and assigned by him to Tatham, though the mortgage was registered prior to the judgment, is invalid as against the lien of the judgment, since the mortgage had nothing upon which to rest.

Though Tabor, and those claiming under him, would be estopped as to Ashe by his warranty deed, this does not affect the lien acquired under the judgment against Tabor, which was docketed before his deed to Ashe was registered. Whatever the title or interest of Tabor in the land, his junior registered conveyance thereof is inferior to title acquired by sale under execution upon the prior docketed judgment.

The plaintiff is entitled to a decree removing the claim of the defendant as a cloud upon his title.

Reversed.

Cited: *Wimes v. Hufman,* 185 N.C. 179; *Spence v. Pottery Co.,* 185 N.C. 223; *Eaton v. Doub,* 190 N.C. 17; *Harrell v. Powell,* 251 N.C. 640; *Cruthis v. Steele,* 259 N.C. 703.

ERNEST FARR v. BABCOCK LUMBER COMPANY.

(Filed 21 December, 1921.)

1. Appeal and Error—Fragmentary Appeal—Dismissal.

An appeal from an order dismissing the action as to one cause set forth in the complaint, and retaining it as to the other causes therein alleged, is fragmentary, and will be dismissed.

2. Courts—Jurisdiction — Negligence — Foreign Defendants — Lex Loci Contractus.

An employee of a foreign lumber manufacturing company was injured while engaged in the scope of his duties at one of its plants operated here, and it was properly made to appear that his services had been engaged by the defendant at its home office. The defendant contended that our courts were without jurisdiction, and that its liability depended upon a workman's compensation act of the state of its home office: *Held,* upon the record, as now appears, there was no error in the Superior Court retaining the second, third, and fourth causes of action, relating respectively to the contractual duty of the defendant to provide and keep a

physician at the camp where the plaintiff was injured, and its neglect to furnish him transportation to his home, as elements of damage.

WALKER, J., concurs only in dismissal of appeal.

APPEAL by defendant from *Harding, J.*, at the Spring
(726) Term, 1921, of GRAHAM.

The plaintiff is a resident of Graham County, and the defendant is a foreign corporation, engaged in the manufacture of lumber, with plants in Tennessee. The defendant owned timber lands in Graham County and operated a railroad for hauling logs from Graham to its plants. The defendant had camps, a hospital, and an office in Graham County. The plaintiff, an employee of the defendant, was injured while in the prosecution of the work assigned him. The complaint states four causes of action: (1) Defendant's failure to provide for plaintiff a safe place in which to work; (2) defendant's failure to keep a physician at the camp to attend plaintiff after he was injured; (3) defendant's employment of an incompetent physician; (4) defendant's negligent failure to provide plaintiff transportation to his home from the junction on the road of defendant and Knoxville Power Company. Plaintiff alleged that defendant had undertaken to provide for the plaintiff and other employees a competent physician and surgeon when needed, and made a monthly charge or assessment, which was deducted from the employees' wages.

The defendant denied the plaintiff's material allegations and alleged that the contract of employment was made in Tennessee and subject to the provisions of the Workmen's Compensation Act, passed by the General Assembly of Tennessee on 15 April, 1919, and made effective from 1 July, 1919.

The defendant contended that upon the face of the pleadings — it having been agreed that the contract of employment had been made in Tennessee — the court had no jurisdiction. The court sustained the motion as to the first cause of action, and overruled it as to the second, third, and fourth. Upon the intimation of the court, the plaintiff submitted to a nonsuit as to the first cause, and did not appeal. The court further adjudged that the trial should proceed upon the second, third, and fourth causes. The defendant excepted and appealed.

R. L. Phillips and T. M. Jenkins for plaintiff.
Merrimon, Adams & Johnston for defendant.

ADAMS, J. His Honor held that the court had no jur-
(727) isdiction of the first cause of action, and retained the second, third, and fourth causes for trial by jury. The defend-

ant thereupon excepted and appealed. The order appealed from was not final, or of such character as to deprive the defendant of any substantial right, and for this reason the appeal was premature. The defendant can preserve its exception until a final judgment is rendered. In numerous cases this Court has held that a premature or fragmentary appeal will not be considered. *Hailey v. Gray*, 93 N.C. 196; *Lane v. Richardson*, 101 N.C. 182; *Mfg. Co. v. Buxton*, 105 N.C. 74; *Emry v. Parker*, 111 N.C. 261; *R. R. v. King*, 125 N.C. 454.

We are requested, however, to review so much of the judgment as retains for trial the second, third, and fourth causes of action. As now advised, especially in the absence of an opposing interpretation by the Supreme Court of Tennessee, we are of opinion that the sections of the Workmen's Compensation Act cited and relied on by the defendant do not purport to interfere with the jurisdiction of the Superior Court of Graham as to the second, third, and fourth causes of action stated in the complaint, and that there was no error in his Honor's order that these causes be retained for trial.

Appeal dismissed.

WALKER, J., concurs only in dismissal of appeal.

Cited: *Goldsboro v. Holmes*, 183 N.C. 204; *Teal v. Liles*, 183 N.C. 679; *Johnson v. R. R.*, 191 N.C. 83; *Meekins v. Game Preserves*, 212 N.C. 96; *Johnson v. Ins. Co.*, 215 N.C. 122; *Reaves v. Mill Co.*, 216 N.C. 466; *Belk's Dept. Store v. Guilford County*, 222 N.C. 450; *Utilities Com. v. R. R.*, 223 N.C. 841; *Johnson v. Catlett*, 245 N.C. 348.

C. T. ROANE AND F. L. SILER v. JULIUS McCOY AND M. M. McCOY.

(Filed 21 December, 1921.)

1. Evidence—Surveys—Maps.

Where the plaintiffs and defendants claim title to the same lands by prior and junior grants from the State, respectively, the latter under color and the ownership of the *locus in quo* depends upon the lappage of the plaintiffs' lands upon that of the defendant, it is competent for one who has surveyed a part of the lands to locate on his map the remaining part from a map that had been since made by another, properly in evidence, as illustrating his own survey, and to testify that the defendants, taking the other evidence as true, had cut timber from the plaintiff's land if the map made by the second survey was correct as to certain lines marked as boundaries.

2. Evidence—Grants—Maps.

Where the plaintiff claims title to the *locus in quo* under a grant from the State, testimony of a witness upon the question as to whether he knew the location of the grant was properly excluded when the grant had not been introduced in evidence.

3. Appeal and Error—Harmless Error — Evidence — Subsequent Admissions of Evidence.

Excluded evidence afterwards admitted on the trial is not reversible error, and evidence relating to the rights of an interpleader and the defendant between themselves becomes immaterial when the verdict is rendered in the plaintiff's favor.

4. Instructions—Deeds and Conveyances—Adverse Possession — Color — Boundaries—State Grants.

Where the title to the *locus in quo* is dependent upon the allegation in the answer that the lands under the plaintiff's grant from the State overlapped the land claimed by adverse possession under color, and this is the only disputed fact, an instruction to the jury that defendant's possession, outside of the plaintiffs' boundaries, would not be extended to defeat the latter's title, and putting the burden on the plaintiff to show his title, and on the defendant to show the lappage upon his own land, is not reversible error.

APPEAL by defendant from *Long, J.*, at the Spring Term,
(728) 1921, of MACON.

Civil action to recover damages for trespass on land.

Plaintiffs claimed title under a grant from the State to themselves, No. 16,105, dated 31 December, 1903, and registered 27 January, 1904.

The defendants alleged that on 20 May, 1864, the State issued grant No. 2,924 to H. H. P. McCoy; that in 1875, or prior thereto, H. H. P. McCoy sold the land described in this grant to D. McDowell McCoy, his brother, and executed a deed in fee, which had been lost; that H. H. P. McCoy had delivered to D. McDowell McCoy grant No. 2,924, after making the following endorsement, which was signed also by his wife: "I, H. P. McCoy, do assign the within land to D. McDowell McCoy to have and to hold forever. This 14 January, 1875"; that D. McDowell McCoy had died intestate without issue, and his real estate had descended to his brothers, who had agreed to a verbal division of the land; that grant No. 2,924 had been allotted to J. J. W. McCoy, and that he had entered into possession; that thereafter, on or about 3 April, 1895, deeds had been mutually executed by J. J. W. McCoy and W. L. McCoy, by which J. J. W. McCoy had conveyed all his interest in the estate of D. McDowell McCoy east of a certain described line, and W. L. McCoy had conveyed to J. J. W. McCoy all the land described in grant No. 2,924, which lies to the west of the line referred to; that

J. J. W. McCoy had conveyed this land to the defendant M. M. McCoy, and that said McCoy has been in the adverse possession under color and title more than twenty-one years.

The heirs at law of H. H. P. McCoy had previously been allowed to interplead and file a complaint alleging that they were the owners of the land in grant No. 2,924.

There seems to have been no serious controversy as to the location of grant No. 16,105; but the interpleaders and (729) the defendants, claiming respectively to be the owners of the land in grant No. 2,924, contended that the junior grant lapped upon or was embraced in the senior grant. The controversy turned upon the location of grant No. 2,924; for if this grant and grant No. 16,105 did not interfere, there was no ground for denying that the plaintiffs were the owners of the land described in their grant. The interpleaders alleged that neither the plaintiffs nor defendants had title, and alleged that the interpleaders were the sole owners.

The issues and the answers were as follows:

"1. Are the plaintiffs, Siler and Roane, the owners of the lands described in the complaint, and within the red lines on the map, designated by the red letters and lines from red A to B, C, D, E, F, G, and back to red A? Answer: 'Yes.'

"2. Have the defendants, Mrs. M. M. McCoy and Julius McCoy, unlawfully trespassed upon the lands referred to in the first issue, as alleged in the complaint? A. 'Yes.'

"3. If the defendants have so wrongfully trespassed, what damages, if any, are the plaintiffs entitled to recover of the defendants, Mrs. M. M. McCoy and Julius McCoy? A. '$10.'

"4. Is the defendant Mrs. M. M. McCoy the owner of the lands embraced under State grant 2,924? Answer: .....

"5. Does State grant No. 2,924, under which Mrs. M. M. McCoy and the heirs at law of H. H. P. McCoy claim, include any portion of the lands included in grant 16,105; and if so, what portion thereof as represented on the map? Answer: .....

"6. Are the defendant's the heirs at law of H. H. P. McCoy, the owners of the lands embraced under State grant No. 2,924, as alleged by them in their interplea? Answer: .....

"7. What damages, if any, is Mrs. M. M. McCoy entitled to recover of the plaintiffs? Answer: ....."

Judgment was entered for the plaintiffs, and the defendants appealed.

T. J. Johnston and R. D. Sisk for plaintiffs.
Henry G. Robertson for appellants.

ADAMS, J. The first five exceptions must be overruled. John H. Dalton, a witness for the plaintiff, testified that he had surveyed all the lines of the grant under which the plaintiffs claimed title, except the last three; that he had prepared the plat; that the last three lines followed the courses and distances called for; and that the red lines represented the land embraced in the grant issued to the plaintiffs. The witness was then permitted to testify, over the
(730) defendant's objection, that the line from E to F "will run north of some cut timber." A. T. Siler, a witness for plaintiffs, testified that he surveyed the boundaries of the plaintiffs' grant in 1893 and in 1894; that he had a record of his surveys, showing that his plat corresponded with Dalton's; that he could indicate on Dalton's map the survey he had made; and that he had found an oak at one of the corners. To all this evidence the defendants excepted.

The former witness described the lines he had actually surveyed and the others, which he said indicated the last three calls in the grant, and testified in effect that if these lines represented the true location of the grant, timber had been cut inside the boundaries; and the examination of the latter witness was so carefully limited by the court that it could have been understood only as illustrating the testimony of the witness as to the surveys he had previously made.

The plaintiffs called as a witness Julius McCoy, one of the defendants, to prove the alleged trespass. On cross-examination counsel for the defendants asked the witness if he knew the location of the grant under which the defendants claimed title. The grant had not then been offered in evidence, and the answer was properly excluded. His Honor, however, explicitly stated that the witness might be examined as to the location, in case the grant should afterwards be introduced by the defendants.

The excluded evidence, which is the subject of the ninth exception, was afterwards admitted; and exceptions eight, ten, eleven, twelve, and seventeen were relevant only to the controversy between the interpleaders and the defendants, and upon return of the verdict for the plaintiffs became immaterial.

His Honor instructed the jury that unless the defendants and the interpleaders had shown by the greater weight of the evidence that the lines of the plaintiffs' grant lapped upon the grant under which the defendant claimed, the possession of the defendants or interpleaders, or of those under whom they claimed, outside the boundaries of the plaintiffs' grant would not be extended so as to defeat or affect the title of the plaintiffs. The instruction must be considered

as a part of the entire charge, and in connection with the admissions in the pleadings. His Honor had previously told the jury that upon the plaintiffs rested the burden of establishing their title by the greater weight of the evidence. In their answer the defendants did not expressly deny the plaintiffs' title, but only denied that the plaintiffs were the owners of such part of grant No. 16,105 as may lap upon grant No. 2,924. It will be observed that the defendants attempted to defeat the plaintiffs' recovery by showing an interference of the two grants. Under these circumstances the charge of his Honor as to the burden of proof and as to possession under grant No. 2,924 is free from error; and the instruction as to the measure of damages is a substantial compliance with the rule stated (731) in *Whitfield v. Lumber Co.*, 152 N.C. 214.

The remaining exceptions have received full consideration, and must be disallowed. The controversy between the parties was reduced almost entirely to questions of fact pertaining to the location of the grant under which the defendants claimed, and the jury adopted the contentions of the plaintiff. We find in the record no sufficient cause for disturbing the verdict or the judgment.

No error.

Cited: *S. v. Stanley*, 227 N.C. 656; *Poole v. Gentry*, 229 N.C. 269.

J. W. FERGUSON v. THE CHAMPION FIBRE COMPANY.

(Filed 21 December, 1921.)

1. Deeds and Conveyances—Descriptions—Boundaries.

The principle upon which a deed to lands must be construed most strongly against the grantor does not extend to including lands not embraced in the description.

2. Same—Specific Descriptions—General Descriptions.

The principle upon which a general description may enlarge the boundaries embraced in a more definite description of lands which it follows, depends upon the intent as gathered from the deed that it should do so, and it appears that the grantor intended that the general description was inserted in an attempt to make the specific description more certain.

3. Appeal and Error—Record—Admissions—Remanding Case—Judgment.

The Supreme Court will remand the case and order a judgment to be entered in the Superior Court for the appellee, when such appears to be proper upon the facts admitted of record.

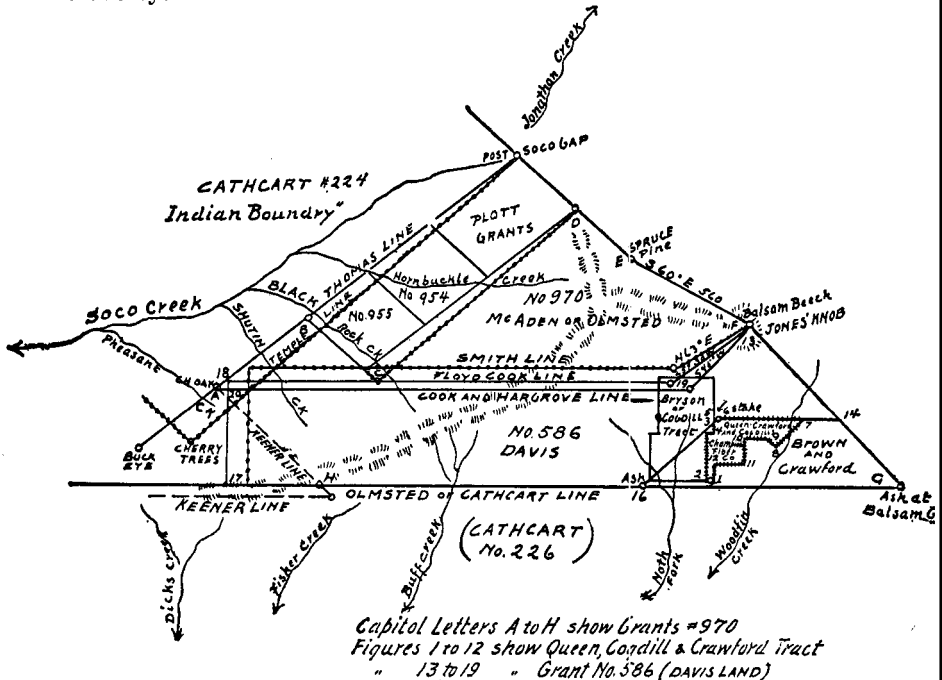
APPEAL by defendant from *Long, J.*, at the February Term, 1921, of JACKSON.

This action was brought by the plaintiff to recover damages for cutting timber, and other trespasses on the plaintiff's land, and to remove the claim of the defendant as a cloud on the plaintiff's title.

The cause was heard upon an agreed statement of facts, together with certain oral testimony as appears in the record; and by consent, the judge rendered judgment therein out of term and outside of Jackson County, as of May Term, 1921, of the Superior Court, adjudging the plaintiff the owner of the lands and removing the claim of the defendant as a cloud upon the plaintiff's title as prayed for in the complaint.

As will appear from an examination of the agreed statement of facts, the plaintiff and the defendant claim the land under a common source of title, to wit, what is known as the Olmstead Grant,

No. 970, and by a chain of conveyances to the respective
(732) parties; the boundaries of the grant are stated in the third agreement as to the facts, and embrace the land in controversy.



But to be more accurate:

1. Both parties claim title to said land by and through grant No. 970, issued by the State to E. B. Olmstead on 10 November, 1867, and by and through the estate and heirs of R. Y. McAden, deceased, as aforesaid. The location of the Olmstead Grant, No. 970, is designated on Queen map aforesaid, commencing at point marked "Ch. Oak" at the capital letter A; thence to capital letters B, C, D, E, and thence to F, at the point marked "Balsam Beach — Jones Knob," and thence to the capital letter G at the point marked "Ash at Balsam Gap," thence west with the line marked "Olmstead or Cathcart line," to the capital letter H; thence with the Keener line to the beginning. It is admitted that the 114 acres of land, more or less, in controversy in this action lies inside of Olmstead Grant, No. 970.

2. The title to the tract in dispute depends upon the construction of a deed made by the McAdens to plaintiff (733) J. W. Ferguson, dated 30 July, 1904, and it is admitted that the specific description in said deed does not cover the disputed area.

3. Defendant also claims title to the disputed tract under deed from and agreement with the McAdens, dated 20 June, 1915, and it is admitted that the deed covers the land, and that title thereto passed by said deed, provided the same had not vested in J. W. Ferguson, under his deed from the McAdens, dated 30 July, 1904.

4. The plaintiff claims that the second description contained in his deed covers the disputed area. Defendant denies that this description covers the land, but admits that if said description does cover the tract that plaintiff has a good title thereto.

The plaintiff holds, and claims, under a deed from John H. McAden, executor and trustee, and others to himself, dated 30 July, 1904, and relies for his recovery, among other things, upon a clause in that deed, which appears therein immediately after the description by metes and bounds, which is substantially as follows: The specific description in the Ferguson deed commences at "A," "Ch. Oak" on map, and this point is by description located in the Cathcart or Indian boundary line; and it is admitted that line A to B on map is the line of Indian boundary, and also line of Cathcart grant 224; and runs with said line to B; with Keener grants to C, and with Keener and Plott grants to D, with the Love line to E, and to F; thence southwest and crossing the mountain with the line of the Davis tract (calling for definite monuments) to the beginning. It is admitted that this description does not cover the land in dispute. It is a definite description except that there was, at the time of the execution of the deed, a dispute as to the north line of Davis tract, No. 586, and so soon as this dispute was settled, the "Floyd Cook

line," shown on map, became the true north boundary line of the Davis tract, No. 586, and the description, by metes and bounds, in the Ferguson deed became certain and fixed as the true location.

It being conceded that the description of the land by metes and bounds, above set forth, does not embrace the *locus in quo*, or any part thereof, the plaintiff contends that it is included within the second description in the deed, which is now fully set forth as follows:

"It being the intention of the parties of the first part to convey to the parties of the second part, his heirs and assigns, in fee simple, so much of that part of the boundary of land embraced in State grant No. 970, issued by the State of North Carolina to E. V. Olmstead on 10 November, 1867, for 10,580 acres of land that lies in between the lines of the Cathcart boundary, Indian boundary, and the two Keener tracts and the seven Plott tracts, or grants, of one hundred acres each on the Soco side of the mountain, and
(734) the line of the Love speculation land or Allison grant, No. 251, as claimed by the Love estate, and the line of the Welch or Davis tract, grant No. 586, running from the top of the Jones Knob so as to exclude the Welch or Davis tract, grant 586, but to run with the line of the same, crossing the mountain in the closing line of the land herein conveyed."

The several tracts referred to in said description are shown and designated on the map to be printed as a part of the record. It was admitted at the trial that the line A to B is the line of the Indian boundary and the line of the Cathcart grant, No. 224; that the broken line marked D, E, F, G, is the line of the Love boundary; that the line G to H is also called the Cathcart line; and the Keener line, H to A, is marked "Keener Line." The Plott tracts also are located on the map; the southern line of the Davis tract is marked "Olmstead" or "Cathcart" line. This line crosses the mountain.

The disputed land is designated on the map by the words "Queen, Crawford and Cogdill, and Champion Fibre Company," between the figures 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and back to 1. It was admitted that the lands in dispute lie inside of Olmstead grant, No. 970.

It is proper that we set forth the material part of the deed executed on 20 June, 1915, by Henry M. McAden and others to the Champion Fibre Company, for the purpose of correcting a mistake in the description as contained in the deed of 30 July, 1904, executed by John H. McAden, executor, and others, to J. W. Ferguson, the plaintiff:

"This deed is executed by the parties of the first part, to the party of the second part, in order to correct the third call in the

deed made and executed by John H. McAden, executor, etc., Henry M. McAden and others to J. W. Ferguson, bearing date 30 July, 1904, for the tract of land known as the McAden-Balsam timber tract as aforesaid, so as to vest the title in fee in the said J. W. Ferguson and cover the land intended to be conveyed to him by said deed, and to perfect the title to the Champion Fibre Company to the stumpage rights on certain parts of the said McAden-Balsam timber tract of land as their respective rights may appear, and for the further purpose of conveying to the Champion Fibre Company, party of the second part, the scraps or pieces of land of a few hundred acres lying inside of grant No. 970, to E. B. Olmstead aforesaid, outside of the McAden-Balsam timber tract and the Davis lands — Welch grant, No. 588 — and other older and superior titles inside of grant No. 970, and in order to carry out the indenture and agreement of 20 June, 1915, aforesaid."

There was evidence on the one side that the McAdens never listed the disputed land for taxes after the date of their deed to the plaintiff, 30 July, 1904, and, on the other, that it was listed on what is known as the "Discovery List," but this may not be material in the view taken of the case by the court. The judge (735) held that the plaintiff is the owner of the *locus in quo*, and that he is entitled to have the claim of the defendant declared to be a cloud upon his title, and it was so adjudged. Defendant duly excepted and appealed.

Felix E. Alley and Manning, Bickett & Ferguson for plaintiff.
Sutton & Stillwell and Smathers & Ward for defendant.

WALKER, J., after stating the facts: It cannot now be questioned, after so much has been said by this and many other courts upon the subject, that a deed must be construed most strongly against the grantor (*R. R. v. Carpenter*, 165 N.C. 465), but that does not mean that its description must be made to include land not conveyed by it. There are two descriptions of the land in this case to be found in the deed in question, one is by metes and bounds, and the other by more general words. It is admitted that the land in dispute is not embraced by the metes and bounds set forth in the deed, but it is contended by the plaintiff that it is included in the other description. The plaintiff argues that if the particular description by metes and bounds does not cover the lands in dispute, it is competent to read it in connection with the second description, although more general in form, in order to show, that while the grantor did not use apt terms to convey any of it by the first description, he did

enlarge the boundaries by the second, so that they take in the *locus in quo* as well as the lands first described, and he relies on the case of *Quelch v. Futch,* 172 N.C. 316. It was there substantially held that if the first or specific description is entirely eliminated from the deed, the second, or general description, is sufficient to cover the land described in the complaint, and 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. The entire description in a deed should be considered in determining the identity of the land conveyed, citing *Triplett v. Williams,* 149 N.C. 394; 13 Cyc. 627. And further, that clauses inserted in a deed should be regarded as put there for a purpose, and should be given a meaning that will aid the description. Every part of the deed ought, if possible, to take effect, and every word to operate, and if, from the language of the deed, an intent to convey the entire tract is plainly manifest, this intent will not be defeated because the grantor inserted metes and bounds that are erroneous and do not cover it. As the general description is added, not simply to set out the grantor's title, but to identify and further describe the tract of land conveyed, such general description will be given effect, and the additional clause will be considered as added for the purpose of giving a more
(736) particular or certain description. *Jones v. McCormick,* 174 N.C. 82; *Quelch v. Futch,* 175 N.C. 694. This principle may be conceded when confined within its proper limits, and correctly applied to the special facts under consideration, but we do not deem it applicable to our case. If the first description by metes and bounds does not embrace the *locus in quo,* the second one should not be allowed to control it, and thereby enlarge its boundaries, unless it was the clear, if not manifest, intention of the grantor to do so and to convey lands not covered by the first description. Instead of showing such a purpose, on the part of the grantor, to extend the boundaries beyond those set forth by metes and bounds, we are of the opinion that the second or further description gives strength and confirmation to the view that it was not the intention of the grantor to do so, but merely to repeat the former description, but in different, and, as he evidently supposed, plainer and more unmistakable language.

It will be observed that the general boundaries of the last description are substantially those of the more particular one, or that by metes and bounds, except in respect to the "Love speculation lands" or "Allison grant, No. 251," as claimed by the Love estate, the last boundary mentioned being "the line of the Welch or Davis

tract of land." There would be a perfect correspondence between the two descriptions, if it were not for the description of the boundary next to the last, or closing line, as the "Love speculation land or Allison grant, No. 251," but the latter is so limited or restricted in its extent by the fact that it does not go beyond, and was not intended to go beyond the "top of the Jones Knob," that this makes but little or no difference.

The closing words of the second description are such as to show almost, if not quite, conclusively that the intention was that the calls should be run with the line of the "Love speculation land," down to its intersection with the line of the Welch or Davis tract (grant No. 586), on the Jones Knob, and from that point, "so as to exclude the Welch or Davis tract (grant No. 586), but to run with the line of the same, crossing the mountain, and as the closing line of the land conveyed, to the beginning. This must, of necessity, mean, if it means anything, that the closing line is the upper or northern boundary line of the Welch or Davis tract of land; for the reason, at least, if for no other, that we must run from the Jones Knob to the beginning, so as to exclude the Welch or Davis tract, and we would not obey this instruction of the grantor should we run from the Jones Knob by 14, G. H., and thence by the "Keener line" to the beginning at A. If we should pursue the latter course it would include, instead of exclude, the Welch or Davis tract. This, we think inevitably follows from the very words employed by the grantor when applied to the map in the record, and our knowledge of the lands, and the several tracts composing it, in their relative positions with respect to each other. The turning words in the description, (737) and the most significant as indicating the true intention, are those which require us to start on the Jones Knob at the intersection of the Allison and the Welch or Davis line, and run with the latter line, but so as to exclude the Welch or Davis land, grant No. 586 (designated as the Davis tract on the map), to the beginning. Those words were well chosen by the grantor to express the intention that no land should pass by his deed except those described in the first description by metes and bounds, and that the second description was inserted not for the purpose of extending the boundaries of the lands, but merely as another way of making his meaning, in the first description, less liable to misunderstanding. It is the same as if he said, after conveying the lands by metes and bounds, "or, in other words, and to describe the said land more certainly, I declare my intention to be," and then using the language of the second or further description. Nothing in the way of land was to be added to that already conveyed, and this was to appear with greater certainty, if

possible, by the use of the definite words of exclusion, that the closing line should be the Welch or Davis line so run from the Jones Knob as to exclude the Welch or Davis tract. If close attention is given to the map when reading these two descriptions together, or even separately, but one conclusion is even permissible, which is the one we have adopted and already stated. There are other considerations which lead us to the same result; one of which is that if we should follow the course, or calls, as suggested by the plaintiff from the Jones Knok to the beginning at A (on the map), we would necessarily have to adopt at least three different calls instead of the two mentioned in the deed, and, besides, there are physical marks, and one line of another tract, in that course which do not appear in the deed; and again, the length of the lines are so different, and still further we may say, that the lower line of the Welch or Davis tract, known as the Olmstead or Cathcart line, is crossed by at least three creeks, or streams, that is, Buff Creek, North Fork, and Woodfin Creek, and Fisher Creek near by, which are not referred to in the deed, while Black Rock Creek and Shulin Creek, which cross the other line near its terminus at A, are mentioned when closely approaching the beginning corner at A (on the map). We are clearly of the opinion that the line of the Cathcart grant, Indian boundary (which means that it is the Indian boundary, the two terms being placed in apposition), is not the Olmstead or Cathcart line, which is the lower or southern boundary of the Welch or Davis tract, and it is so indicated on the court map, but the line of the Cathcart grant, which is the same as the "Indian boundary." The land in this Cathcart grant or Indian boundary lies north or northwest of Soco Creek, Black Rock Creek, Shulin Creek, and Hornbuckle Creek, and is not anywhere near the Olmstead or lower Cathcart tract. There is no Indian boundary at the latter place or in its neighborhood. There are still other reasons we could assign for the view that the line running from the Jones Knob with the Welch or Davis line is the only one that answers all calls and descriptions, and, too, the only one that will exclude the Welch or Davis tract in returning to A, the beginning corner. The map shows that both lines, the upper and the lower, cross the mountains.

(738)

It would appear from the deed dated 20 June, 1915, that in a certain settlement between the McAdens and the defendant, the former conveyed to the latter "the scraps or pieces of land of a few hundred acres lying inside of grant No. 970, to E. B. Olmstead aforesaid, outside of the McAden-Balsam timber tract and the Davis lands or Welch grant, No. 586 — and other older and superior titles inside

of grant No. 970, and in order to carry out the indenture and agreement of 20 June, 1915, aforesaid." This would indicate that the McAdens did own land within the Olmstead grant, No. 970, described in the deed as "a few hundred acres," other than the lands they had previously conveyed to J. W. Ferguson, and the particular description of these "scraps or pieces of land,"if examined in connection with the map, appear to be the *locus in quo*, or in its vicinity, and to include it.

As we have before said, we attach little or no significance to the claim that the McAdens listed no lands for taxation in Jackson County after the date of the deed to J. W. Ferguson, as the evidence concerning it, if not contradictory, is, at least, vague and unreliable, and the plaintiff's testimony relating to it is not at all definite. The county register of deeds testified that certain lands were listed by them on what he called the "Discovery List," that is, as lands omitted from the regular lists, and afterwards discovered as being unlisted.

We have not discussed all the many and variety of questions raised in this case, as it would be vain and useless to do so, but have confined ourselves strictly to those which are the most material and relevant, and which are determinative of the controversy.

As the case was practically decided in the court below upon facts admitted by the parties, we direct that the judgment be reversed, and that the case be remanded to the end that judgment be entered for the defendant.

Reversed.

HOKE, J., did not sit.

Cited: Penny v. Battle, 191 N.C. 223; *Realty Corp. v. Fisher,* 216 N.C. 201; *Bailey v. Hayman,* 218 N.C. 177; *Lee v. McDonald,* 230 N.C. 521; *Carney v. Edwards,* 256 N.C. 24.

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(739)

B. B. MERONEY v. CHEROKEE LODGE, No. 146, A. F. AND A. M.

(Filed 21 December, 1921.)

1. Easements—Implication—Necessity—Deeds and Conveyances—Severance of Title.

Where there is an easement upon the lands of the owner in continuous necessary use by the lessee, having a right thereto, of such character as to be open and visible or readily seen or known, upon the severance of

the title it will remain an easement upon the land of the purchaser upon which it is situated during the continuance of the lease without the use of the word "appurtenances" therein.

2. Same—Presumptions.

To create an easement by implication under a lease upon the severance of the lands by the owner, the intention of the parties will be presumed that the lessee of the premises shall continue to enjoy such right or easement when it is necessary to the beneficial use of the premises, and to its convenient and comfortable enjoyment, as it existed at the time of the execution of the lease, and when known and visible.

3. Same—Outside Stairways.

The owner of lands with a building thereon leased an upper story thereof to be used by a fraternal order for its place of meeting, with the only means of ingress and egress by a stairway on the outside, and then conveyed the title to a part of his lands whereon the stairway was situate at the time of the lease and the severance of the title: *Held*, the lessees held an easement by implication in the lands severed, for the necessary enjoyment of the leased premises.

4. Deeds and Conveyances—Leases—Interpretation—Easements.

In construing a written instrument of lease, the whole thereof will be considered in order to effectuate the intention of the parties as gathered from the words employed; and where, in a lease of land, the word "appurtenances" has inappropriately been used only in the warranty, it may be considered as bearing upon the intention of the lessor to pass an easement when construed with other appropriate words appearing in the writing.

APPEAL by plaintiff from *Long, J.*, at the Spring Term, 1921, of CHEROKEE.

This is an action to try the right or title to an easement, and to remove a cloud which rests upon it because of an adverse claim, which is asserted by the defendant.

In the year 1908, and prior thereto, A. A. Fain owned a lot in the town of Murphy. Upon one part of the lot there was a three-story brick building, the third story of which was leased to the defendant Cherokee Lodge, at which time access to the third story was by means of a stairway on the outside of the building, over the vacant part of the lot adjoining the same, and which was owned by A. A. Fain, which led to a hall on the second floor of the building, and thence up an inside stairway in the hall to the third story.

On 7 July, 1908, while the defendant Cherokee Lodge
(740) had the third story leased, and was using the same as a Masonic hall, access thereto being by said stairways, A. A. Fain and wife conveyed the third story of the building, "together with the right to keep, use, and enjoy a stairway, substantially as now placed in the building, with full, free, and proper ingress, egress, and regress to said third story, etc., to defendant Cherokee Lodge,

and contracted and agreed that their heirs and assigns shall keep up and maintain, at their own expense, the stairways in the building leading to the third story."

From the making of the deed in the year 1908, the Masons have occupied the third story of the building under it, and have at all times used the stairways, as above described, and are now using the same. A. A. Fain continued to own the adjoining lot, and the lot on which the three-story brick building stood, until a short time before the commencement of this action, when he sold both lots, and as defendant contends, subject to the easement or right of defendant to use the stairway over the vacant lot. From the time the third story, together with the right of ingress, egress, and regress by way of said stairways was conveyed by A. A. Fain to the Cherokee Lodge, in the year 1908, it was understood by all parties, as defendant contends, that the lodge was the owner of an easement in said stairway over the adjoining lot, and this ownership was not questioned, but was recognized, until some time in the year 1920, being more than twelve years after the conveyance was made to the lodge by A. A. Fain, and about two years after plaintiff bought the vacant lot, and then it was only questioned by the plaintiff, the purchaser of the property to which the easement was attached, and then only after he had failed to make payment of the balance of the purchase price of the lot and the same was advertised under the deed of trust that plaintiff Meroney had given as security for the balance due on the purchase price for the lot, and defendant contends that this question was not at this time made *bona fide*, but was raised for the purpose of delaying the collection of the purchase money, as plaintiff enjoined the trustee from collecting the money under the deed of trust. (This not being material.)

It was not disputed that A. A. Fain was the owner of the entire land embracing both lots, when he made the deed to Cherokee Lodge in 1908, and there was no dispute that the stairway in question was exactly the same when the deed was made in 1908 as it was on the day plaintiff brought his action, and it was not denied that the stairway had been kept and maintained all the time in the same place, manner, and condition as when the conveyance was made in the year 1908, nor that the defendant, under the deed, took charge of the stairway and used the same all the time since the deed was made, and that it is now using the same, and that plaintiff bought the vacant lot in 1918 with said stairway upon it, and with the knowledge that the defendant was using the stairway in (741) the same condition as it was when Fain conveyed the property.

The following are the provisions in the deed to the defendant of

A. A. Fain and wife, under whom plaintiff claims both lots: This deed conveys the land in fee, "together with the right to keep, use, and enjoy a stairway substantially as now constituted in said building, and full, free, and proper ingress, egress, and regress to said third story; the unreserved and unrestricted right to have, use, and enjoy the third story of any building that may in future be erected on said lot, with said rights of ingress, egress, and regress thereto and therefrom; and also the full and unrestricted right to have, erect, use, maintain, and enjoy the second story of any building in the future erected on said lot thereon of less height than three stories by the grantors, their heirs or assigns, including the right to build above any building that may be erected on said lot one story, for a lodge room and ante-rooms, with full rights of egress, ingress, and regress as aforesaid." That they are seized in fee of said premises, and have a right to convey the same in fee simple; that the same are free from incumbrances, that they will, and their heirs, administrators, and executors shall forever warrant and defend the title to the said land and premises, with the appurtenances, unto the said party of the second part, heirs and assigns, against the lawful claims of all persons whomsoever. And it is covenanted and agreed between the parties to these presents that the said parties of the first part, and their heirs and assigns, shall keep up and maintain, at their own expense, the stairways in said building leading to said third story, and suitable and convenient stairways in any building in future erected on said lot."

It was agreed by the parties that the presiding judge might hear the case without the aid of a jury, and it was stated by counsel for both parties that the matter to be tried was a question of law for the court to decide, but the judge stated that he would have a jury impaneled to the end that he might submit an issue of fact, if any should arise.

The court rendered the following judgment:

This cause coming on to be tried by the court and a jury, counsel for the parties make the following admissions: "It is admitted that on 7 July, 1908, A. A. Fain was the owner of the lands described in plaintiff's complaint. It is further admitted that A. A. Fain was the owner of the adjoining lot known as the 'Hardware Lot,' described in the deed from A. A. Fain and wife to Cherokee Lodge, No. 146, dated 7 July, 1908, which was duly recorded. Defendant's counsel say they admit that the plaintiff owns the lot described in the complaint, subject to the easement in the stairway set up in the defendant's answer." It was further agreed that the court might find the facts and apply the law and render judgment, but the court stated

that it would submit an issue to the jury if the court saw fit to do so, and did submit the following issue, viz.: "1. (742) Does the defendant own an easement in the stairway on the lot described in the complaint?" and, under instructions of the court, after hearing the evidence and argument, and, in view of said admissions, the jury having answered the issue "Yes"; it is now, on motion of attorneys for defendant, considered and adjudged by the court, that the defendant Cherokee Lodge, No. 146, A. F. and A. M., is the owner of the easement in the stairway on the land described in the complaint, as set up in the answer in this cause, and is entitled to use and enjoy said easement under its right and title thereto, the same not being a cloud on plaintiff's title, and it is further adjudged that the defendant have and recover its costs in this action incurred, to be taxed by the clerk.

Plaintiff excepted and appealed.

Dillard & Hill for plaintiff.

M. W. Bell and J. D. Mallonee for defendant.

WALKER, J., after stating the case: There was evidence in this case which very strongly tended to show that the lodge never paid any rent nor gave any other consideration for the use of the stairway, but has continued to use it from the beginning without let or hindrance. W. W. Woodbury testified: "There is no other means of ingress and egress to and from the lodge other than this stairway. It is about four feet wide." There was no other way to and from the third story of the building which defendant had any right to use except the stairway in question. There was an elevator in the building from the ground floor to the second story, but it belonged to the hardware company, and was not, in law or in fact, usable by the defendant as a way, or part of the way up and down. The plaintiff himself testified: "I knew the lodge had been using the stairway, and had used it as a member myself. I brought suit to restrain the sale of that lot under deed of trust to Jarrett, after default on my part as to the note, which I refused to pay when due. Up to that time I had never made any claim to the lodge about the stairway, and had not spoken to any member or officer of the lodge with reference to quitting its use. I set up this claim last year. The second consideration in bringing this suit is to obtain a diminution in the purchase price. I made no demand upon any one for that stairway until after my property was advertised for sale." It will be seen, therefore, that the present claim is the result of an afterthought, the plaintiff having no real excuse, in reason or justice, for his present attitude.

But we deem it clear that his position, now assumed, is indefensible in law, and, besides, that his conduct has been such, with reference to the use of the stairway, as to indicate that he believed
(743) all the time, and until he was pressed for the payment of a debt, that he had, by his deed and the outward, visible, and undeniable circumstances and surroundings attending its execution, conveyed the easement for the use of the stairway with the land itself, and as incident and appurtenant thereto. The third story of the building would have been worthless to the defendant, without the privilege of using the only way for ingress and egress, which was essential to its reasonable enjoyment. We held in *Carmon v. Dick,* 170 N.C. 305-308, that there are three things necessary to the creation of an easement upon the severance of an estate, where the owner, before the severance, made or used an improvement in one part of the estate for the benefit of another. First, there must be a separation of the title; second, it must appear that before the separation took place the use which gives rise to the easement shall have been so long continued and so obvious or manifest as to show that it was meant to be permanent; and third, that the easement shall be necessary to the beneficial enjoyment of the land granted or retained. An easement which is apparent and continuous, such as a drain or other artificial watercourse, a thing which is continuous in its service, and which does not require any active intervention of the owner for its continuance, and can always be seen or known on careful inspection, will pass on the severance of two tenements as appurtenant, without the use of the word "appurtenances"; but an easement which is not apparent and continuous, such as a right of way, which is enjoyed at intervals, leaving no visible sign, in the interim of its existence, will not pass unless the grantor uses language sufficient to create the easement *de novo:* Jones on Easements, sec. 145; *Kelly v. Dunning,* 43 N.J. Eq. 62; 26 Pa. St. 438. It was said by Justice Earle that there is a distinction between an easement, such as a right of way or easement used from time to time, and an easement of necessity, or continuous easement, which the law recognizes, and it is clear that upon a severance of tenements an easement used as of necessity, or in its nature continuous, will pass by implication of law without any words of grant; but with regard to an easement which is used from time to time only, it will not pass, unless the owner, by appropriate language, shows an intention that it should pass. *Polden v. Bastard,* 4 B. & S. 258 (S. C. L. R., 1 Q.B. 156). A way of necessity is founded upon an implied grant, the necessity of itself not creating the right; but being only a circumstance resorted to for the purpose of showing the intention of the parties, and thereby raising the implication

of a grant. This right is created by the change of ownership of a portion of an estate, the latter having attached to it by construction, as an incident, a right of way over the ungranted portion, this being presumed to have been the intention of the parties. Jones on Easements, sec. 304, thus states this view: "This (744) is an application of the maxim that one is always understood to intend, as an incident to a grant, what is necessary to give effect thereto which is in the grantor's power to bestow. The rule applies when there has been a severance of the property, one portion of which has been rendered inaccessible except by passing over the other or by trespassing on the lands of a stranger. When a landowner conveys a portion of his lot the law will not presume it to have been the intention of the parties that the grantee shall derive no beneficial enjoyment thereof in consequence of its being inaccessible from the highway, or that the other portion shall, for like reason, prove useless to the grantor. This species of right of way, therefore, in the absence of anything to the contrary contained in the deed, becomes an incident to the grant as indicative of the intention of the parties." As to what should be the degree of necessity in order to create this right by implication based upon the presumed intention of the parties, it was said in *Kelly v. Dunning, supra,* that the right must be necessary to the beneficial use of the land granted or retained, and to its convenient and comfortable enjoyment, as it existed at the time of the grant; this rule being deemed as eminently reasonable and just, and its adoption as essential, that full effect may be given to the principle of which it is an adjunct. Chancellor Kent said in his Commentaries, at 467: "Some things will pass by the conveyance of land as incidents appendant or appurtenant thereto. This is the case with a right of way or other easement appurtenant to land. And if a house or store be conveyed, everything passes which belongs to and is in use for it, as an incident or appurtenance." It was held in *Hair v. Downing,* 96 N.C. 172-175, that the servitude of the one (tract of land) to the other, existing when both belonged to one owner, remained when the severance was effected by the different conveyances. The easement passed with the legal estate in the tract to which it adhered, and in the like plight was the servient tenement conveyed to the plaintiff, whose rights, especially after full notice, cannot be superior to those of his grantor.

Where one having two tenements, and a gutter from one of them ran over or across the other, sold one tenement to one and the other to another, it was held that the easement and servitude of the gutter passed with the respective estates by the form of the grant. *Cope's* case, Year Book, 11 Hen. VII. 25. So where the owner built an aque-

duct from a spring on his land to his dwelling, and granted the dwelling, the easement passed with it. *Nicholas v. Chamberlain*, Cro. Jac. 121; both of the above cases are cited in Washburn on Easements, with other cases, at page 49 and following. In Gould on Waters, page 354, the doctrine is thus declared: "A grant by the owner of a tenement of part of that tenement, as it is then used
(745) and enjoyed, passes to the grantee by implication, . . . as also those easements which the grantor can convey, and which are necessary to the reasonable enjoyment of the granted property, and have been, and are at the time of the grant, used by the owner of the entirety for the benefit of the granted tenement." So it is said by another author, that where the terms of a grant are general or indefinite, so that its construction is uncertain and ambiguous, the acts of the parties contemporaneous with the grant, giving a practical construction to it, shall be deemed to be a just exposition of the intent of the parties. Angell on Water Courses, p. 363, and cases cited in note 1, and among them *Jonnison v. Walker*, 11 Gray 426; and *Woodcock v. Estey*, 43 Verm. 522. The effect of a conveyance of land, with the attaching easements, in transferring them, also is ruled in a similar way in *Lampman v. Milks*, 21 N.Y. 505; the court declaring that the diversion of a natural stream into an artificial channel for relief from overflow, and the land in that condition being sold to different persons, they each take their respective estates, benefited or burdened with the easement. The same doctrine is recognized in *Shaw v. Etheridge*, 3 Jones 300. The suit there was for obstructing a ditch, and the outflow of water from the plaintiff's land through it. The defendant, when owning both, had cut the ditch, and then sold the lower tract to the plaintiff. The court charged that if the defendant obstructed the ditch after he sold to the plaintiff, or if additional obstructions were placed in the ditch so as to impede the flow of water from plaintiff's land, he was entitled to damages, and this charge was sustained.

These views are substantially stated and approved by this Court in *Hair v. Downing, supra*, and the principles there applied coincide with those we laid down in *Carmon v. Dick, supra*, the two cases being closely analogous.

This case is stronger for the defendant, if it is possible for it to be so, than any of the cases we have cited were for the parties therein, who claimed the easements by implication. The deed we are considering does not use the word "appurtenances," in the premises of the deed, but this is not essential to the existence of the easement, under the facts and circumstances of this case, as the easement of using the stairway, for access to and exit from the upper stories of

the building, was not only "open and visible" at the time of the conveyance to the defendant, but manifestly intended by the plaintiff to pass with the land as essential to its enjoyment. It could hardly be more so.

The word "appurtenances" is used in the warranty and while this is not the appropriate part of the deed for a conveyance of an easement, it throws light upon the previous clauses of the instrument, if there is any ambiguity in them. The modern doctrine, that a deed must be construed as a whole, or by spreading it out before us so that we see it by its four corners, was adopted by us (746) many years ago, one of the earlier cases being *Kea v. Robeson*, 40 N.C. 373, which was later followed by *Gudger v. White*, 141 N.C. 507, where the rule was exhaustively considered and the former cases fully cited. It was there said that 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. It 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." And again, that words should 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 will 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. That case was followed by *Bryan v. Eason*, 147 N.C. 284, where this sensible and liberal canon of interpretation was approved and applied in the construction of three deeds, which were considered as parts of one indivisible transaction, for the purpose of deciding what estate was conveyed thereby. After this came *Triplett v. Williams*, 149 N.C. 394, and still later on, *Beacom v. Amos*, 161 N.C. 357, where all the intervening cases are collected and some of them reviewed. Justice Story in *Tiernan v. Jackson*, 5 Peters (U.S.S.C.) 58, stated the principle to be that whatever may be the inaccuracy of expression, or the inaptness of the words used in an instrument, in a legal view, if the intention to pass the legal title to property can be clearly discovered, the

Court will give effect to it, and construe the words accordingly. Jones on the Law of Real Property asserts that 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. Vol. 1, sec. 568.

If we construe the deed in question under this well established rule, we are of the opinion that the deed, on its face, keeping all of its provisions distinctly before us, clearly indicates the in-
(747) tention of the parties to have been, at the time it was executed, that the use of the outer stairway should pass to the grantee.

We therefore hold that the claim of an easement in the stairway is no cloud upon plaintiff's title, and that the verdict and judgment were correct.

No error.

Cited: Bank v. Vass, 184 N.C. 301; *Blankenship v. Dowtin,* 191 N.C. 794; *Lee v. Barefoot,* 196 N.C. 114; *Ferrell v. Trust Co.,* 221 N.C. 435; *Smith v. Moore,* 254 N.C. 190.

R. L. HAMMOND v. D. K. McRAE ET AL., TRUSTEES OF LAURINBURG GRADED SCHOOL DISTRICT.

(Filed 29 December, 1921.)

1. Constitutional Law—Schools—Statutes—Election—Majority Vote.

Under the legal presumption that an act passed by the Legislature is valid under the Constitution, an act requiring that the question of bonds be submitted to the voters of a school district, empowering the board of trustees to issue bonds if a majority of the qualified voters at the election to be called for the purpose vote in favor thereof, nothing else appearing, requires for the validity of the bonds, a majority vote of the qualified electors of the district as ascertained by a valid registry, Const., Art. VII, sec. 7.

2. Same—Results of Election.

An issue of bonds for a school district will not be declared invalid because the special act under which they were approved by the voters did not expressly require for their validity that a majority of the qualified voters of the district must vote in their favor, when it appears that such

majority, as ascertained from a valid registry, was cast in favor of the issue.

3. Elections — Schools — Timber — Registration — Statutes — Bonds —Taxation.

The failure to keep the registry, for the question of the issuance of bonds in a special school district, open for twenty days, etc., C.S. 5947, does not of itself render invalid the issuance of the bonds accordingly approved, when it appears that the matter was fully known and discussed, opportunity offered every voter to register, there was nothing to show that every elector desiring to vote had not done so, and there was no opposition to the measure manifested.

4. Elections—Schools—Bonds—Floating Debt—Ratification.

Where a special school district has included a floating debt previously incurred for school purposes, in an issuance of bonds for like purposes under an act authorizing the issuance of the bonds, approved by the electors of the district, though this is not for a necessary expense, Const., Art. VII, sec. 7, the validity of the bonds may not be successfully assailed on that account, it being within the legislative authority to validate by ratification the indebtedness thus incurred, and this principle including ratification by the electorate.

5. Constitutional Law — Amendments — Schools — Bonds — Taxation — Equalization.

Where the question of the issuance of school bonds by a special school district has been authorized by statute to be submitted to the electorate of the district, observing the equation between the property and poll tax as formerly required by our Constitution, Art. V, sec. 1, and since the recent amendment of 1920, the proper authorities have submitted the question to the electorate, without observing the equation, this amendment of substitution is self-executing and has the effect of repealing the statutory requirement of equalization, as required by the former organic law; and the action of the proper authorities in eliminating that part of the statutory requirement, does not affect the validity of the issue.

6. Same—Purchasers—Vested Rights.

The substitution of a new section for Art. V, sec. 1, of the State's Constitution by the amendment of 1920, eliminating the proportion between property and poll tax, does not interfere with the rights theretofore acquired by the purchasers of State or municipal bonds.

7. Constitutional Law—Taxation—Bonds—Schools — Municipal Corporations—Cities and Towns—Elections.

An act that authorizes the officers of an incorporated city or town within a special school district to submit the question of issuing bonds by the district to its electorate, is not objectionable in not conferring this authority on the officers of the special district. *Woodall v. Comrs.*, 176 N.C. 377; *Smith v. School Trustees*, 141 N.C. 143.

APPEAL by plaintiff from *Lane, J.*, at the November Term, 1921, of SCOTLAND. (748)

Civil action, heard on case agreed.

The action is to restrain defendant board from issuance and sale of $150,000 of bonds of said district pursuant to an election under ch. 79, Private Laws of 1920. From the facts stated in the case agreed it appears that under ch. 53, Laws of 1909, the Laurinburg Graded School District was established, including the town of Laurinburg and two or more adjacent mill villages; that said school was conducted under that and other pertinent legislation, and prior to 1920, the defendant board had incurred or assumed a floating indebtedness to the amount of $12,280.33, for the following purposes: A note for deficiency in operation of the schools during previous years, $1,250; a note for plumbing addition and stoves at East Laurinburg School, $2,339.65; note for plumbing repairs and stoves at old public school building, $2,216.95; note for desks for central building and fire escapes for same, $3,664.85; note for furnishing teachers' home, $2,808.89; and that all of these notes were issued for money borrowed by defendant board for special purposes, and none of the indebtedness so evidenced was authorized by a vote of the electors of the district.

(749) It having become necessary to establish greater educational facilities for the said school district, the General Assembly, at the Extra Session of 1920, in chapter 79, passed a statute providing that on a petition of the majority of the trustees of the district, the commissioners of the town of Laurinburg should call an election within sixty days from the filing of the petition for the purpose of submitting to the vote of the qualified voters of the said school district the question of "whether the Laurinburg Graded School District shall issue bonds to the amount of $150,000 for the following purposes: (*a*) To float the present unbonded indebtedness of the district; (*b*) to construct and properly equip a high school building for said district; (*c*) to remodel and properly equip the present graded school buildings of the district; and (*d*) to purchase or build and equip a home for the teachers." The said act containing provision that "if a majority of the qualified voters in said election vote in favor of issuing said bonds, then the board of trustees are empowered to issue the same." etc. Again, the act provides, in section 4, that "upon the issuing of said bonds by the board of trustees, it shall be the duty of the board of commissioners of the town of Laurinburg to levy a special tax sufficient to pay the interest on said bonds and to provide a sinking fund sufficient to discharge the same when they matured, said tax to be levied upon all property and polls within the graded school district, the constitutional equation being observed in levying the tax."

It is also stated in the case agreed that the registry of voters had for the purpose of said election, the books were kept open only from

1 July to 9 July; that at said election, in addition to the question submitting the bonds, there was submitted also the question of levying a special tax on the property of the district, sufficient to pay the interest on said bonds, and providing a sinking fund, but the question of levying a poll tax was not submitted. It further appears that at said election, of 251 qualified voters duly registered in the district, there were 235 votes cast for issuing the bonds and levying the tax, one vote cast against the measure, and fifteen of the duly qualified voters did not vote.

It further appears that the defendant board have contracted to sell the said bonds to Stacy & Braun of Toledo, Ohio, at par value, and accrued interest, and it is their purpose to carry out said contract by causing said bonds to be executed and delivered as negotiable obligations of said district.

Upon these, the facts chiefly pertinent, with additional facts found by his Honor in reference to time in which the registration books were kept open, judgment was entered in terms as follows:

"This cause coming on to be heard before Lane, J., as a controversy without action upon an agreed case duly verified and filed in court, and upon the affidavits of O. L. Moore, S. J. Siler, and S. W. Covington, which were submitted to the court as a part of the agreed case, the court, in addition to the matters set (750) forth in the first eleven paragraphs of the agreed case which are here found as facts, finds the following facts:

"That the order of the board of commissioners of the town of Laurinburg, calling the said election, specified the four purposes for which the said bonds were to be issued, including that of paying the unbonded indebtedness of the said school district, as set forth in the act of the General Assembly, ratified on 25 August, 1920, and entitled 'An act to provide for the better facilities in the Laurinburg Graded School District,' and that the notice of said order of said board of commissioners, which was duly published in the *Laurinburg Exchange*, contained a full statement of all the purposes set forth in said act of the General Assembly, including the purpose of paying the unbonded indebtedness of the said district; that the said newspaper is the only paper published in the said district, and has six hundred subscribers in the territory covered by the said school district, and that the said notice of said election was published in said paper, which is published weekly, for a period of seven weeks next preceding the closing of the registration of books for the said election.

"That at the time of the opening of the said registration books, and at the time of the said election, the purposes for which the said

bonds were issued were generally known by the people of the said school district, including the purpose of paying the unbonded indebtedness of the said school district.

"That while the registration books for said election were open all electors who presented themselves for registration were duly registered, and since the said books closed no elector presented himself or herself for registration; that no elector in said school district has lost his vote by reason of the failure to strictly comply with the law as regards the time for keeping open the books, but that all were registered who deserved to be; that the election was fairly held, and the people had a free and full opportunity to express their will upon the questions submitted to them; that the election and the registration were well advertised, and that the time for registration and for the election, as appointed by the law and the order of the board of commissioners, was well known to the people, and the right to register was available to all who felt interest enough in the election to cast their vote; that there is no evidence of the failure of any voter to register, but if there were those who did not register, such failure to register was not due to the shortness of the time the registration books were open, but to the apathy or indifference on the part of such voter or voters; that the election and the purposes for which the said bonds were to be issued met with the general acquiescence of the people, and there was no organized opposition thereto.

"That all acts, conditions, and things required by the
(751) Constitution and laws of the State of North Carolina to happen, exist, and be performed precedent to and in the issuance of the said bonds, have happened, exist, and been performed, except the failure to keep the registration books open the full twenty days, as required by law, which failure, the court finds, did not affect the election, and if the said books had been kept open the full twenty days, the result of the election would not have been changed:

"It is therefore, upon the facts, admitted in the agreed case and upon the facts found by the court, adjudged that the failure to keep the registration books open the full twenty days does not affect the validity of the said election or the said bonds; that the said election was a ratification by the people of a moral obligation of the unbonded indebtedness incurred by the trustees of the district in the proper management of the schools of the district; that the said act of the General Assembly, and every part thereof, ratified on 25 August, 1920, is valid and not in violation of the Constitution; that the words in said act, 'a majority of the qualified voters in said

election,' means a majority of the persons qualified to vote in said election.

"It is further adjudged and decreed that the said election was properly held, and is valid, and the bonds issued pursuant thereto are and will be valid and binding obligations of the said school district; that the said trustees have the right and power to sell and deliver the said bonds to the said purchasers, and to use the proceeds therefrom for the purposes set forth in the said act of the General Assembly.

"It is further adjudged and decreed that the said board of commissioners of the town of Laurinburg, under the provisions of the said act of the General Assembly, have the power and authority to levy a special tax sufficient to pay interest and provide a sinking fund upon all property within the school district.

"It is further adjudged and decreed that the plaintiff's motion for an order restraining the defendants from issuing and delivering the said bonds as binding obligations to the purchasers be and the same is hereby denied, and the costs of the action are ordered taxed against the plaintiff by the clerk."

From this judgment the plaintiff excepted and appealed, assigning errors.

Walter H. Neal for plaintiff.
E. H. Gibson and Russell & Weatherspoon for defendants.

HOKE, J. It is objected to the validity of this bond issue, first, that the act of 1920, under which the election was held, is unconstitutional in that it provides for approval of the measure by a majority of those voting at the election. In construing (752) Art. VII, sec. 7, of the Constitution, which requires the approval of a "majority of the qualified voters therein," before any county, city, or town or other municipal corporation can contract a debt or levy a tax, etc., except for necessary expenses, it has been repeatedly held that the term "qualified voters therein" means all persons resident in the district and qualified to vote there, as evidenced by a valid registry of voters made pursuant to law, and unless a majority of such voters shall approve the measure, a majority of those voting will not suffice. *Long v. Comrs.*, 181 N.C. 146; *Williams v. Comrs.*, 176 N.C. 554; *Clark v. Statesville*, 139 N.C. 490.

In our opinion, however, the present statute does not come within the inhibition of the principle. There is a presumption against an interpretation that will render a law invalid, Black on Interpretation of Laws, p. 89, and the present statute clearly permits, if it does

not require, the construction that a majority of the qualified voters of the district is intended. Apart from this, our decisions on the subject are to the effect that although a statute should provide that only a majority of those voting is required, yet if a majority of the qualified voters actually approve, this cures the defect and the election will be upheld. *Riggsbee v. Durham,* 99 N.C. 341; *Wood v. Oxford,* 97 N.C. 228. In the present case it appears that in a registry showing 251 qualified voters in the district, 235 were cast for the issuing of the bonds and levying an adequate property tax, and with only one vote dissenting, the objection is disallowed.

Appellant objects further that the registration books were only kept open from the first to the ninth of July preceding the election, whereas, the statute, C.S. 5947, provides that the books shall remain open for twenty days. It is always better that the requirements of the law should be observed and it may be that the officials charged with this duty should be dealt with for a wilful default if this can be established, but in the instant case the judge, hearing the matter on further evidence taken by consent, finds in this connection that the matter was fully known and discussed; that opportunity was afforded to every voter to register; that there is no evidence of the failure of any voter to register or that any application was made to register after the books were closed; that the measure was very generally acquiesced in and no organized opposition thereto. On these, and the other pertinent findings of the court, it has been held that the election will not be declared invalid for the reason suggested, and, on authority, this exception must also be disallowed. *Hill v. Skinner,* 169 N.C. 405.

Again, it is insisted that the act and election had thereunder are invalid for the reason that the law provides for the payment of the floating indebtedness, consisting chiefly in repairs, improve-
(753) ments, desks, etc., the same not being for necessary expenses, and having been contracted without a vote of the people of the district. It has been held that a debt of this character may not be regarded as a necessary expense within the meaning of Art. VII, sec. 7, of the Constitution. *Williams v. Comrs.,* 176 N.C. 554; *Sprague v. Comrs.,* 165 N.C. 603. But there is nothing inherently vicious in this indebtedness; on the contrary, it is shown to be an altogether meritorious claim, expended for the necessary maintenance of the schools, and of which the district is even now enjoying the benefit, and this being clearly an indebtedness which the electors, proceeding under a proper statute, could authorize, we are of opinion that acting under like sanction they may ratify and thus make valid. This has been held with us in reference to legislative measures. *Reid v. R. R.,* 162 N.C. 355, and there are authori-

tative decisions elsewhere extending the principle to the action of the electorate. *Township Board v. Carolan,* 182 Ill. 119; *McGillivray, Appellant, v. Joint School District,* 112 Wis. 254; *Baker v. Seattle,* 2 Wash. 576; *Williams v. Showdy, County Treasurer,* 12 Wash. 362.

It is further contended that the election and the proposed bond issue predicated thereon should not be approved because the authorities, departing from the provisions of the statute under which they acted, have submitted the question only of a property tax, thus ignoring the requirement of the law as originally passed that the tax should be laid also on the poll, and that the constitutional equation between the two should be observed. In a case at the present term, *Proctor v. Comrs., ante,* 56, the Court has held that where a municipality is proceeding to act under a certain statute, the requirements of the statute must be observed. But the principle does not apply to the facts presented on this record, for the reason that after the enactment of the law in question and before election held, this portion of the statute requiring a tax upon the poll has been set aside by a constitutional amendment approved by the people in the fall of 1920, and becoming effective on the certificate of the Governor, on 1 January, 1921. Under Art. V, sec. 1, of the Constitution as originally adopted, the General Assembly was required to levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty, which shall be equal to the tax on property valued at $300, with the provision that the State and county capitation tax combined shall not exceed $2 per head. In the construction of this section the Court has held that its provisions, both as to the limitation in amount and the proportion to be observed between the property and the poll, applied only to the ordinary taxation for State and county purposes, and that under and by virtue of subsequent sections of the article, the question of taxation in cities, towns, and special-tax districts, both as to the amount and the proportion between the property and the poll, or (754) whether there shall be any tax on the poll, was in the discretion of the Legislature, subject to the provisions of Article VII, section 7, requiring a vote of the people whether the proposed debt was for other than necessary expenses. *Moose v. Comrs.,* 172 N.C. 419; *Perry v. Comrs.,* 148 N.C. 521; *Wingate v. Parker,* 136 N.C. 369; *Jones v. Comrs.,* 107 N.C. 248. This, as stated, being the original provision of the Constitution and the authoritative construction of the same, and under its operation the poll tax having become unduly burdensome by reason of special legislation in certain localities, by an amendment ratified in the fall of 1920, the section referred to was abrogated, and the following substituted in its stead:

"SECTION 1. *Capitation tax; exemptions.* The General Assembly may levy a capitation tax on every male inhabitant of the State over twenty-one and under fifty years of age, which said tax shall not exceed $2, and cities and towns may levy a capitation tax which shall not exceed $1, but no other capitation tax shall be levied. Commissioners of the several counties and of the cities and towns may exempt from the capitation tax any special case on account of poverty or infirmity."

It will thus be noted that the requirement as to the proportion between the poll and property tax is entirely eliminated, and that the only poll tax permitted is one by the State, which may not exceed $2, and by the cities and towns, which may not exceed $1, and that no other poll tax may be imposed.

In so far as a poll tax is concerned, this substituted section of the Constitution being, as it is, inhibitive in terms and plain of meaning, is to be considered as self-executing and as to all elections held and liabilities incurred after it became a part of our organic law, has the effect of repealing all laws and clauses of laws which impose a poll tax in contravention of its provisions. *Kitchin v. Woods*, 154 N.C. 565, and authorities cited. Under the clause, therefore, of the section, "That no other capitation tax shall be levied," this school district, composed, as it is, of the town of Laurinburg and two or more unincorporated mill villages or settlements, is a special-tax district, and is without power to levy a capitation tax of any amount, and the authorities having charge of the matter, in proper recognition of this principle, were right in submitting the question of the property tax alone, and thus providing for the interest and sinking fund contemplated and required by the law.

It may be well to note that as to all liabilities theretofore incurred, and all bonds theretofore issued under statutes or elections requiring the levy of a tax on both property and poll, the power and obligation to levy the taxation on both will continue, for a State, no more by constitutional amendment than by statute, can impair the vested rights held by the creditor in assurance of his debt.
(755) *Smith v. Comrs., ante*, 149, citing, among others, *Port of Mobile v. Watson*, 116 U.S. 289.

There is no merit in the objection also urged by appellant that the election was held on the order and under the supervision of the municipal authorities of the town of Laurinburg. It has long been recognized that the Legislature has full power to create these taxing districts for special governmental purposes, and in the exercise of this power it is not restricted to towns or counties or other, the ordinary, political subdivisions of the State. *Smith v. Trustees*, 141 N.C.

143, approved as late as *Woodall v. Comrs.*, 176 N.C. 377, and in many other cases. In application of the principle, the Legislature, in the original act, ch. 53, Laws of 1919, has created a special school district, composed, as stated, of the town of Laurinburg and adjacent territory, and there is no reason why it should not, as it has done in this instance, confer upon the municipal authorities of a town within the district the power to order an election on the petition of the school authorities of the district, and to control and supervise the same. It would seem to be a very satisfactory and efficient method of taking the sense of the voters on the question, and thus obtaining lawful authority to issue the bonds as the statute provides.

We are of opinion that the bonds in question will constitute a valid indebtedness of the school district and the judgment dissolving the injunction is

Affirmed.

Cited: Jones v. New Bern, 184 N.C. 134; *Miller v. School Dist.*, 184 N.C. 202; *Galloway v. Bd. of Ed.*, 184 N.C. 248; *Burney v. Comrs.*, 184 N.C. 277; *Bd. of Ed. v. Bray*, 184 N.C. 487; *S. v. Kee*, 186 N.C. 473; *Whitley v. Washington*, 193 N.C. 243; *Green v. Asheville*, 199 N.C. 520; *Dixon v. Comrs. of Pitt*, 200 N.C. 219; *Glenn v. Comrs. of Durham*, 201 N.C. 240; *Nash v. Comrs.*, 211 N.C. 303; *Bank v. Bryson City*, 213 N.C. 170; *Green v. Briggs*, 243 N.C. 749.

ROBERT C. WALLACE v. SOUTHERN COTTON OIL COMPANY.

(Filed 14 September, 1921.)

APPEAL by defendant from *Calvert, J.*, at January Term, 1921, of NASH.

Action to recover damages for an alleged negligent injury, tried upon the usual issues of negligence, contributory negligence and damages. From a verdict and judgment in favor of plaintiff the defendant appealed.

Battle & Winslow for plaintiff.

M. V. Barnhill and F. S. Spruill for defendant.

PER CURIAM. All the defendant's exceptions and assignments of error, not abandoned in its brief, are directed exclusively to the

charge. After a careful examination of the Court's charge to the jury and the defendant's exceptions thereto, we can find no prejudicial or reversible error. A perusal of the record, in its entirety,
(756) leaves us with the impression that the case has been tried in substantial conformity to our decisions and we have discovered no sufficient reason for disturbing the result.

No error.

S. W. SYKES v. FOREMAN-DERRICKSON VENEER COMPANY, INC.

(Filed 14 September, 1921.)

APPEAL by defendant from *Allen, J.*, at February Term, 1921, of TYRRELL.

Action to recover damages for an alleged breach of contract, wherein the defendant agreed to sell to the plaintiff 500 truck barrels to be used in moving and marketing a certain quantity of Irish potatoes. Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Did plaintiff and defendant contract to buy and sell the barrels, as alleged in the complaint? Answer: 'Yes.'

"2. Did the defendant breach the contract, as alleged in complaint? Answer: 'Yes.'

"3. If so, what damages did the plaintiff sustain? Answer: '$400.'"

From a judgment in favor of the plaintiff the defendant appealed.

W. L. Whitley and T. H. Woodley for plaintiff.
Aydlett & Simpson and H. L. Swain for defendant.

PER CURIAM. The controversy between the parties to this action, and here presented, deals only with questions of fact. These the jury have answered in favor of the plaintiff. No new point of law is raised by any of the exceptions which would seem to merit an extended discussion. We have carefully examined the record and defendant's assignments of error, but no reversible or prejudicial ruling has been made to appear.

No error.

(757)

J. H. LEROY v. DR. JOHN SALIBA.

(Filed 14 September, 1921.)

Appeal and Error—Fragmentary Appeals—Partnership—Reference.

Where the jury has found in the affirmative upon the issue of partnership, an appeal from an order of reference by the court for the taking of an account of the partnership's receipts and expenses necessary for the information of the court is fragmentary, and will be dismissed by the court *ex mero motu.*

APPEAL by defendant from *Allen, J.*, at January Term, 1921, of PASQUOTANK.

Upon the issue whether the plaintiff and defendant entered into a contract of partnership, as alleged in the complaint, the jury answered "Yes," and it appearing to the court that the taking of an account of the partnership receipts and expenses was necessary for the information of the court, such reference is ordered, and the defendant appealed.

Ehringhaus & Small, Thompson & Wilson, and Meekins & McMullan for plaintiff.

T. J. Markham and Aydlett & Simpson for defendant.

PER CURIAM. The jury having found that the partnership existed, an appeal from the order of reference before judgment upon the report thereon is premature and fragmentary, and must be dismissed by the court *ex mero motu.* The defendant should have noted his exception and upon the coming in of the report and exceptions thereto should have brought up his appeal from the final judgment. No appeal lay at this stage. C.S. 573(2), and cases there cited.

In *Blackwell v. McCaine,* 105 N.C. 460, the Court said: "Many cases decide that an appeal does not lie at once from an interlocutory judgment or order, unless it puts an end to the action or may destroy or impair a substantial right of the complaining party to delay his appeal until the final judgment. He must assign error or except, and have the same noted in the record and bring the whole up by an appeal from the final judgment." See, also, citations to that case in the Anno. Ed., especially *Shankle v. Whitley,* 131 N.C. 168.

The practice is thus stated nowhere more clearly than by Hoke, J., in *Jones v. Wooten,* 137 N.C. 425: "Where a plea in bar is overruled or sustained as a matter of law by the judge, it is optional with the party to take an appeal at once or preserve his rights by having an exception noted. Where, however, the issues are tried by a jury, and the right to an account is established by a verdict, and

an order of reference is made, it is proper to proceed with the reference, and an appeal can be taken only from a final judgment after report."

Appeal dismissed.

Cited: Teal v. Liles, 183 N.C. 679; *Nissen v. Nissen,* 198 N.C. 809; *Cole v. Trust Co.,* 221 N.C. 251; *Whitehurst v. Hinton,* 222 N.C. 86; *Parker v. Helms,* 231 N.C. 336; *Rudisill v. Hoyle,* 254 N.C. 46.

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(758)

E. R. CAPPS, ADMINISTRATOR, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 14 September, 1921.)

Appeal and Error—Motion to Dismiss.

An appeal does not lie from the refusal of a motion to dismiss an action.

APPEAL by defendant from *Calvert, J.,* at May Term, 1921, of WILSON.

C. P. Dickinson for plaintiff.
F. S. Spruill and Carl H. Davis for defendants.

PER CURIAM. The judgment appealed from is as follows: "The motion to dismiss, made by the defendant in his answer, is hereby overruled; and the other matters and things set up in the pleadings are hereby continued for further consideration by the court."

The uniform decisions of this Court have always been that "no appeal lies from a refusal to dismiss." *McBryde v. Patterson,* 78 N.C. 412, down to date, see cases cited under C.S. 638, at p. 278 of vol. 1. If it were otherwise, the defendant in every case could always get from 6 to 12 months delay by simply moving to dismiss and appealing from a refusal to do so.

It is useless to cite cases, for they are very numerous and without any exception. As this Court has said (as to another point): "There are *some* matters, at least, which should be deemed settled, and this is one of them." *Burrell v. Hughes,* 120 N.C. 279.

Appeal dismissed.

Cited: Capps v. R. R., 183 N.C. 184, 185; *Wimberly v. R. R.,* 190 N.C. 445; *Johnson v. Ins. Co.,* 215 N.C. 122.

JOHN A. MIDGETT, SR., v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 21 September, 1921.)

Appeal and Error—Evidence—Nonsuit—Motions.

From this appeal of the defendant from the refusal of the court to grant his motion as of nonsuit upon the evidence, the evidence is *held* sufficient to have taken the case to the jury.

APPEAL by defendant from *Ferguson, J.*, at June Term, 1921, of DARE.

Action to recover damages for an alleged negligent injury to plaintiff's property. Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Did the defendant negligently injure the boat of the plaintiff as alleged? Answer: 'Yes.' (759)

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

From a judgment in favor of plaintiff, the defendant appealed.

P. W. McMullan, B. G. Crisp, and Aydlett & Simpson for plaintiff.

Thompson & Wilson for defendant.

PER CURIAM. The only exception presented for our consideration comes from his Honor's refusal to grant the defendant's motion for judgment as of nonsuit. We have carefully examined the evidence, and have reached the conclusion that the reasonable inferences arising therefrom are sufficient to carry the case to the jury. No material benefit would be derived from setting out the evidence, as it presents only a question of fact.

Upon the record and the exceptions, we think the judgment should be affirmed; and it is so ordered.

No error.

STANDARD MANUFACTURING COMPANY v. RAEFORD POWER AND MANUFACTURING COMPANY.

(Filed 21 September, 1921.)

Contracts—Agreement of Parties.

A written contract, to be enforceable, must show that the minds of the parties had come to a valid agreement.

APPEAL by plaintiff from *Allen, J.*, at February Term, 1921, of PASQUOTANK.

Action to recover damages for an alleged breach of contract, plaintiff contending that the defendant had agreed to sell and deliver, as per terms of acceptance, 50,000 pounds of hosiery yarns during the fall of 1919. The negotiations between the parties, leading up to the alleged agreement, are in writing and consists of certain letters and telegrams, all of which were offered in evidence.

His Honor, being of the opinion that the plaintiff's evidence was insufficient to establish the existence of a contract, or to show an *aggregatio mentium* between the parties, granted the defendant's motion for judgment as of nonsuit. Plaintiff appealed.

(760) *Thompson & Wilson and George J. Spence for plaintiff.*
Currie & Leach and Ehringhaus & Small for defendant.

PER CURIAM. No material benefit would be derived from setting out in detail the correspondence had between the parties, and which forms the basis of this suit. Suffice it to say, we have examined the evidence with care and concur fully with his Honor below that no valid or enforcible contract has been shown or established.

The judgment of nonsuit must be sustained.

Affirmed.

W. H. WHITLEY v. O. O. KAFIR ET AL.

(Filed 21 September, 1921.)

Appeal and Error—Instructions—Evidence.

A requested instruction, though stating a correct principle of law, is properly refused when not supported by, or in conformity with, the evidence in the case.

APPEAL by plaintiff from *Allen, J.*, at May Term, 1921, of BEAUFORT.

Action for trespass involving the true location of the boundary line between the lands of plaintiff and defendants, admittedly adjoining property owners.

From a verdict and judgment in favor of the defendants, the plaintiff appealed.

W. C. Rodman and Ward & Grimes for plaintiff.
John H. Bonner and Small, MacLean, Bragaw & Rodman for defendants.

PER CURIAM. The only exception in the record relates to his Honor's refusal to give one of plaintiff's special prayers for instructions. While the prayer, as requested, probably states a correct principle of law, as an abstract proposition, yet we think it was properly refused under the evidence in the instant case. It omitted all reference to the marked lines; and these should have been considered by the jury, even under the facts stated in the prayer.

No error.

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(761)

STATE v. BOSE BROWN.

(Filed 28 September, 1921.)

Criminal Law—Indictments—Consolidation of Bill.

Where the grant jury has found two separate indictments, one charging arson and the other the less offense of house burning, both arising from the same transaction, the two may be consolidated and a conviction of the less offense will be sustained on appeal. C.S. 4622.

APPEAL by defendant from *Kerr, J.*, at February Term, 1921, of HERTFORD.

Criminal prosecution, tried upon an indictment charging the defendant with arson and house-burning. The defendant was acquitted of the charge of arson, but convicted of the lesser offense. From the judgment pronounced upon the verdict, the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.
Roswell C. Bridger for defendant.

PER CURIAM. There were originally two bills found by the grand jury: one charging the defendant with the common-law crime of arson and the other with the statutory offense of house-burning, both of which arose out of the same transaction. Upon motion of the solicitor, the bills were consolidated; and the defendant was tried, over his objection, on both counts at the same time. This was clearly permissible under C.S. 4622, which provides that "if two or more in-

dictments are found in such cases (where they arise out of the same transaction), the court will order them to be consolidated."

The remaining exception relied on by defendant was to his Honor's refusal to grant the motion for judgment as of nonsuit. The evidence was entirely circumstantial; but, from a perusal of the record, we think it was quite sufficient to support the verdict.

We have found no error; and this will be certified to the Superior Court.

No error.

Cited: *S. v. Malpass,* 189 N.C. 351; *S. v. McLean,* 209 N.C. 39.

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(762)

F. M. COBURN v. AMERICAN RAILWAY EXPRESS COMPANY.

(Filed 28 September, 1921.)

Appeal and Error—Verdict—Evidence.

The verdict of the jury on conflicting and sufficient evidence will not be disturbed on appeal.

APPEAL by defendant from *Cranmer, J.,* at March Term, 1921, of HALIFAX.

Action to recover damages for the loss of two express packages alleged to be worth the sum of $136.75.

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

No counsel for plaintiff.
Daniel & Daniel for defendant.

PER CURIAM. The controversy on trial narrowed itself to a question as to whether the defendant had accepted the packages for shipment in its capacity as a common carrier, the defendant contending that its duties were only those of a warehouseman at the time of the loss of the goods. Upon this disputed question of fact, his Honor submitted the case to the jury, and they have found in favor of the plaintiff.

There was an exception to the charge and the refusal to give one of plaintiff's prayers for instructions. Upon the record, we do not think these exceptions can be sustained. The motion to nonsuit was

properly overruled. We have discovered no sufficient reason for disturbing the result.

No error.

CORBETT BUGGY COMPANY v. GETHRO McLAMB ET AL.

(Filed 28 September, 1921.)

Appeal and Error—Docketing of Record—Dismissal.

Appellee's motion to dismiss in the Supreme Court will be allowed if the appellant has failed to have the record docketed until after the expiration of the term in the Supreme Court at which ie should have been docketed.

APPEAL by defendant from *Devin, J.*, at November Term, 1920, of HARNETT.

This was a motion, filed in the Superior Court, to set aside two judgments upon the ground of excusable neglect and upon the further ground that they purported to be consent judgments; whereas, movants allege that said judgments were entered (763) by their codefendant without authority from them, and without their consent. From a judgment rendered at the November Term, 1920, overruling the motion, defendants appealed.

L. J. Best and Clifford & Townsend for plaintiff.
E. F. Young for Seth and Natham McLamb.

PER CURIAM. The judgment which forms the basis of this appeal was rendered at the November Term, 1920, of Harnett Superior Court. The record was not docketed here until 27 August, 1921, long after the term at which the case should have been heard had expired. Hence, the plaintiff's motion to dismiss the appeal must be allowed. *S. v. Telfair,* 139 N.C. 555.

Notwithstanding the motion to dismiss, we have examined the record and have been unable to find any reason for disturbing the result below. Upon the merits, the case should be affirmed.

Appeal dismissed.

Cited: S. v. Johnson, 183 N.C. 732; *S. v. Barksdale,* 183 N.C. 786; *Rose v. Rocky Mount,* 184 N.C. 610; *S. v. Ward,* 184 N.C. 618; *Pruitt v. Wood,* 199 N.C. 790.

THE NATIONAL BANK OF HOPEWELL v. S. T. CARSON.

(Filed 5 October, 1921.)

Bills and Notes—Due Course.

This controversy involved the question of whether the plaintiff was a holder in due course of the note sued on, and no error is found under the doctrine announced in *Bank v. Exum*, 163 N.C. 199, and *Worth Co. v. Feed Co.*, 172 N.C. 342.

APPEAL by defendant from *Devin, J.*, at May Term, 1921, of PITT.

Action to recover the face value of defendant's promissory note, executed and delivered to the Limestone Products Company, and, by the latter concern, sold and transferred to the plaintiff bank.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Did the plaintiff acquire the note sued on, in good faith for value, before maturity and without notice of any alleged defect or failure in consideration of said note? Answer: 'Yes.'

"2. What amount, if any, does the defendant owe on said note? Answer: '$1,200 with interest.' "

From a judgment on the verdict in favor of plaintiff, the defendant appealed.

(764) *G. M. T. Fountain & Son and F. G. James & Son for plaintiff.*

Julius Brown for defendant.

PER CURIAM. The controversy on trial in the Superior Court narrowed itself principally to the question as to whether the plaintiff was a holder in due course (C.S. 3033) of the note sued on, under the doctrine announced in *Bank v. Exum*, 163 N.C. 199, and *Worth v. Feed Co.*, 172 N.C. 342. This fact having been established in plaintiff's favor by the jury's answer to the first issue, we think the exceptions appearing in the record must be overruled. The case presents no new point, or issue, which would seem to merit an extended discussion.

No error.

J. K. KERR ET AL., v. W. B. DRAKE, JR., ET AL.

(Filed 5 October, 1921.)

1. Appeal and Error—Service of Case — Motion to Dismiss — Notice — Waiver.

It is not necessary for the appellee to give appellant notice of a motion to dismiss the appeal under the rules of court, and counsel saying that he had not examined the appellant's statement of the case, served after the expiration of the time allowed, is not a waiver of his client's rights.

2. Same—Agreement—Extension of Time.

An extension of time by consent for appellant to serve his case on appeal to the Supreme Court must be strictly complied with, within the time agreed upon with the appellee's counsel, unless a further agreement has been made for an extension of time.

3. Appeal and Error—Statutory Right.

The right of appeal to the Supreme Court rests upon the statute, and is not an absolute one, and the appeal will be dismissed, under the rules, unless appellant shows sufficient cause, and that he has not been negligent therein.

4. Same—Transcript—Docketing—Certiorari.

Where the appellant is not in default in bringing up his case to the Supreme Court, the appeal will nevertheless be dismissed under the rule unless at the first term after the trial below and at or before the time when the appeal should be docketed, the appellant shall file a transcript of all the record available, and ask for a *certiorari* to complete the transcript or to have the case settled.

5. Appeal and Error—Docketing—Laches—Attorney and Client.

The negligence of counsel in sending up, docketing, and printing the transcript is that of his client, and is imputed to him.

MOTION by defendants to reinstate the appeal in this case, which has been docketed and dismissed under Rule 17, on (765) motion of plaintiffs.

Butler & Herring and Grady & Graham for plaintiffs.
B. H. Crumpler and A. L. Cox for defendants.

PER CURIAM. This case was tried at June Special Term, 1921, of Sampson before Lyon, J. Seven days before the docket from that district was reached the appellee filed the certificate required by Rule 17, 174 N.C. 831, and his motion to docket and dismiss under said rule, which was allowed when the call of the district began. Thereafter, on the same day, the appellants filed an affidavit and moved to reinstate.

There was a verdict against the defendants and judgment from

which they appealed. By consent the defendants obtained 30 days from the adjournment of said term of court to serve case on appeal, and plaintiffs were allowed 30 days thereafter to serve counter case. No case on appeal was served by defendants within the time agreed upon, but, on the contrary, it was not served until 2 September, 1921, *i. e.*, 61 days after adjournment of said June Special Term.

On 27 September the appellants filed an affidavit and motion to reinstate the case on appeal which sets forth the above agreement of 30 days after 2 July to serve countercase, and alleged that on 29 July, 1921, the resident counsel in Sampson having received transcript of the evidence from the court stenographer, forwarded the same to their associate counsel in the city of Raleigh. It appears from the affidavit of the stenographer that she furnished the evidence complete to defendants' counsel in Clinton on 16 July, 1921. It does not appear on what date the defendants' counsel forwarded the papers to counsel in Raleigh. There is no evidence of any delay in the mail. The counsel in Raleigh filed his affidavit that he was absent from his office in Raleigh from 30 July to 15 August, and that after receiving the papers on 15 August, he was unable to see his client, one of the codefendants in this case, until on the following week, owing to his client's absence from the city and his being busy, and further, that after seeing his client he himself was again called from the city and did not return till 29 August, and upon his return he completed the preparation of the case on appeal and forwarded it to the counsel in Clinton on 1 September, who delivered it the next day to counsel for the plaintiff, who on 12 September notified the counsel for the defendants that they would not accept the case on appeal, but would move to dismiss, under Rule 17, which was done in apt time, and the motion was allowed. The only other allegation the appellants make is that between 2 September, when the case was served, and 12 September, and prior to the receipt of this notice,

(766) one of the counsel for the appellants met one of the counsel for the defendants, who did not then state to the defendants that he would move to dismiss the appeal, but said he had not fully examined appellant's statement of the case on appeal. This was not a waiver of the motion to dismiss. Besides, it was not necessary that the appellee should give any notice of the motion to dismiss.

The other matters set forth show, in every particular, a disregard of the statutory requirements as to the time of service of case on appeal, and in every respect ignored the statute as to making up a case on appeal.

The agreement for 30 days in which to serve the case on appeal was merely a substitute for the 15 days allowed by statute. The

statutory requirements as to making up cases on appeal must be strictly complied with except when there is an agreement to extend the time, and then only to the extent of such agreement.

In *Hardee v. Timberlake,* 159 N.C. 552, where, by consent, the appellant was allowed 30 days in which to serve the case on appeal, but it was not served till the 32d day, the appeal was dismissed. In *Guano Co. v. Hicks,* 120 N.C. 29, where there was a like agreement allowing 30 days but the appeal was not served till the 31st day, it was dismissed.

The right to appeal is not an absolute right, but is only given upon compliance with the requirements of the statute, and when these are not observed the appeal will be dismissed, unless sufficient cause is shown that there was no negligence on the part of the appellant. The appellee has his rights, and it is no excuse that it was not convenient for the appellant or his counsel to observe the requirements of the statute.

The appeal will be dismissed, even when there has been sufficient ground to excuse compliance with the statute, unless, at the first term after the trial below and at or before the time when the appeal should be docketed, the appellant shall file a transcript of all the record that is available and ask for a *certiorari* to complete the transcript or to have the case settled. *Burrell v. Hughes,* 120 N.C. 277, and numerous cases there cited, and cases cited to that case in the Anno. Ed.

The negligence of counsel in sending up, docketing, and printing the transcript is that of the client, and will not excuse failure to do so. *Truelove v. Norris,* 152 N.C. 755; *Vivian v. Mitchell,* 144 N.C. 477, citing numerous cases. See, also, citations to that case in Anno. Ed.

In this case the appellant's affidavits disprove any allegation of reasonable ground for not complying with the statute. But if there had been any grounds to excuse the failure to serve the case on appeal within proper time they have failed to file a transcript of the record and move for *certiorari.* More than this, they did not even file a transcript of the record proper with this motion to reinstate.

Motion denied.

Cited: S. v. Barksdale, 183 N.C. 786; *Rose v. Rocky Mount,* 184 N.C. 610; *Pruitt v. Wood,* 199 N.C. 791; *Little v. Sheets,* 239 N.C. 432.

(767)

CHARLIE ROLLISON v. SAM ALEXANDER.

(Filed 12 October, 1921.)

Appeal and Error—Negligence.

This case involved controverted issues of fact as to negligence and contributory negligence, and no material error is found in the rulings of law by the trial judge.

APPEAL by plaintiff from *Devin, J.*, at May Term, 1921, of PAMLICO.

Civil action to recover damages for an alleged negligent personal injury.

Upon denial of liability and issues joined, the jury returned the following verdict:

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

"2. Did plaintiff by his own negligence contribute to his injury? Answer: 'Yes.'

"3. What damage, if any, is plaintiff entitled to recover? Answer: '.....'"

From a judgment in favor of defendant, the plaintiff appealed.

D. L. Ward and F. C. Brinson for plaintiff.

Ward & Ward and Z. V. Rawls for defendant.

PER CURIAM. An examination of the instant record leaves us with the impression that the case has been tried in substantial conformity to our decisions. Upon the controverted issues of fact, the jury have answered in favor of the defendant; and we have found no material error which would warrant us in disturbing the result.

The appeal raises no new question of law and we conclude that the trial below must be upheld.

No error.

TRIPP ET AL. v. SOMERSETT.

(Filed 19 October, 1921.)

1. Appeal and Error—Parol Agreement of Counsel—Dismissal of Case—Rules of Court.

Where a case on appeal to the Supreme Court has been dismissed under Rule 17, the Court, upon motion to reinstate, will not consider any agreement as to extension of time beyond that allowed by the statute, for the

appellant to serve his case, unless in writing and properly signed, or admitted by the opposing counsel.

2. Same—Duty of Appellant—Illness of Counsel.

It is the duty of appellant to employ counsel to perfect his appeal to the Supreme Court, and the illness of one of his attorneys is not a sufficient excuse, on motion to reinstate an appeal dismissed under Rule 17.

3. Appeal and Error—Docketing of Record—Motion — Certiorari — Dismissal of Appeal.

When for sufficient cause a case on appeal has not been settled in time to have it docketed at the term to which it should have been brought, it is the appellant's duty, in apt time, to docket a transcript of the record proper and move for a *certiorari;* and when this has not been done by him, and the case has been dismissed under Rule 17, his motion to reinstate will be denied.

MOTION to reinstate appeal. This case was tried at June Term, 1921, of BRUNSWICK, before *Kerr, J.*, and a jury. (768) Verdict and judgment against defendants, who appealed, and were allowed by consent 60 days in which to serve case on appeal, and plaintiff 60 days thereafter to serve countercase. The transcript on appeal not being docketed at this term at the beginning of the call of the docket of the district to which it belonged, the motion to docket and dismiss under Rule 17 was allowed. Immediately thereafter the appellants moved to reinstate.

PER CURIAM. This was a motion for leave to reinstate an appeal from June Term, 1921, of Brunswick, which had been dismissed for failure to docket the transcript on appeal at this term. It appears from the affidavits filed that just before the expiration of the 60 days allowed appellants by agreement to serve case on appeal, one of their counsel asked one of the counsel for the appellee for an extension of the time. The appellant's counsel insist that there was a verbal agreement that the time would be indefinitely extended, to which the appellee replies that the agreement for extension was upon the express agreement that the time would be extended 10 days, and upon condition only that the appeal should be settled in time for the case on appeal to be docketed at this term.

We have often given notice that the time for the settlement of the case on appeal can be extended only by agreement of counsel, and when the alleged agreement is oral is cannot be considered, if denied. This Court will not pass upon the relative accuracy of memory of counsel when they do not put their agreements in writing. Agreements to extend time for the settlement of cases on appeal are not favored by the courts. The statute has fixed the time, and this

should be observed, and must be observed strictly, unless there is a mutual agreement which is either in writing or admitted.

One of the counsel for the appellants also contends that the failure to settle the case on appeal was due to his illness. This, however, is not sufficient ground, seeing that he was not the only
(769) counsel for the appellants, and, besides, if he had been it was the duty of the parties to employ other counsel to represent them.

It is also elementary that when for any sufficient cause the "case on appeal" is not settled in time to have the case docketed at the term of this Court to which the appeal should be brought, the appellant should in apt time docket a transcript of the record proper and move for a *certiorari*. This not having been done, the motion to docket and dismiss was properly allowed, and this motion by the appellants to reinstate and continue the cause must be denied. The appellant does not even docket a transcript of the record proper with his motion to reinstate.

These requirements for the orderly settlement of cases on appeal and for docketing the same in this Court are clearly marked out by the statute and the rules of this Court, and it admits of more than a mild surprise that counsel should not observe them and should take the time of the Court, which is intended for the discussion and decision of cases, by motions to excuse themselves from a failure to observe the well settled and orderly procedure which is necessary in bringing appeals to this Court when a party deems that there has been error in the proceedings below. This is the second time at this term that we have been called upon to consider the failure to observe the well known requirements in bringing up the case on appeal, to which the appellee has a statutory right. *Kerr v. Drake, ante,* 764.

The motion to reinstate the appeal is denied.

Cited: S. v. Barksdale, 183 N.C. 786; *Rose v. Rocky Mount,* 184 N.C. 610; *Pruitt v. Wood,* 199 N.C. 792.

STATE v. CLEM BRADSHAW.

(Filed 26 October, 1921.)

Appeal and Error—Criminal Law—Prostitution—Evidence — Motions — Nonsuit—Statutes.

On this appeal from conviction for the defendant's having engaged in immoral prostitution and unlawfully using a building for like purpose in violation of C.S. 4357 *et seq.*, the judgment is reversed for the lack of evidence to justify the verdict, and the defendant's motion for judgment as of nonsuit under the Mason Act, ch. 73, Laws 1913, should have been granted.

APPEAL by defendant from *Horton, J.*, at June Special Term, 1921, of ALAMANCE.

Criminal prosecution, tried upon an indictment charging the defendant with having engaged in immoral prostitution, and unlawfully using a building for like purpose, in violation of the statute.

The defendant offered no evidence, but moved to dismiss the action or for judgment as of nonsuit under the (770) Mason Act, chapter 73, Public Laws 1913. Motion overruled, and defendant excepted.

From a verdict of guilty, and judgment of 9 months on the roads pronounced thereon, the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

No brief filed on behalf of defendant.

PER CURIAM. The following is the whole of the State's brief:

"The defendant was tried and convicted at the June Term, 1921, of the Alamance Superior Court, Hon. J. Lloyd Horton presiding, of prostitution as defined in sections 4357 *et seq.*, of the Consolidated Statutes.

"Without analyzing the evidence, we think it is not sufficient to justify the verdict. It does not, we submit, bring defendant within the plain definition of prostitution or of assignation as contained in section 4357."

For the reasons assigned by the Attorney-General, we think the defendant's motion for judgment as of nonsuit should have been allowed.

Reversed.

MARGUERITE McGINNIS ET AL., V. RALEIGH TYPOGRAPHICAL UNION, No. 54, ET AL.

(Filed 26 October, 1921.)

Injunction—Labor Unions—Strikes—Evidence—Dismissal.

The evidence in this action to restrain the "strikers" individually and as printers' unions from such acts and conduct as are alleged to prevent the plaintiff printing establishments and certain of their employees, non-union printers, from exercising their rights to employ and receive employment, etc., is *held* not sufficient to sustain an injunction granted to the hearing, by the trial judge, and the injunction is dissolved without prejudice to the rights of any of the parties.

APPEAL by defendants from *Bond, J.*, at chambers, 3 September, 1921, from WAKE.

Civil action to enjoin the defendants from certain alleged unlawful and wrongful practices.

The material allegations upon which the plaintiffs have come into equity and asked for injunctive relief are contained in the following paragraphs of the complaint:

"First. That the individual complainants above named are residents and citizens of the State of North Carolina, and are all engaged in doing work for the printing houses above named
(771) in the city of Raleigh, N. C.

"Second. That the printing houses above named are all corporations, organized under the laws of the State of North Carolina, with their principal places of business in the city of Raleigh, N. C., with the exception of M. J. Carroll & Son, which is a copartnership, engaged in the printing business in the city of Raleigh, N. C.

"Third. That the Raleigh Typographical Union, the Raleigh Printers Pressmen's Union, and Raleigh Bookbinders Union are labor unions, with headquarters in the city of Raleigh, N. C., and the individual defendants above named are officers and members of said unions.

"Fourth. The individual complainants above named, in behalf of themselves and all other employees of the several printing houses above named, respectfully show unto the court:

"(1) That the labor unions above named, and their officers, members, and associates above named, have entered into a conspiracy to drive these individual complainants from their positions as employees of the several printing houses above named, and to make it impossible for these complainants to work and live in peace in the city of Raleigh while they are engaged in their present employment.

"(2) That these individual complainants have done the defend-

ants no wrong, and the said defendants have no grievance of any kind against these complainants. Some time in May, 1921, the unions above named demanded of the printing houses above named (which were then running as closed shops) that the number of hours for a week's work be reduced from forty-eight to forty-four. Upon the refusal of the printing companies to accede to this demand, the members of the several labor unions above named quit work and went on what is popularly known as a 'strike.' The printing companies offered in writing to submit all differences between themselves and their employees and the unions to an impartial board of arbitration, but this proposition was summarily rejected by the unions. Thereupon, the printing companies gave notice that they would be compelled to run their shops with whatever labor they might be able to obtain, whether the laborers belonged to a printers' union or not, but also gave notice that the jobs of all former employees would be open to them if they returned within a given time. The defendants above named refused to return to work, and have since then been making war on the printing houses and their employees.

"(3) That in pursuance of the plan, purpose, and conspiracy mentioned in subsection 1 above, the defendants have devised and are executing a systematic course of espionage, annoyance, intimidation, threats, abuse, and insults, which are intended to make, are calculated to make, and are making the lives of these complainants and all other employees of the several printing houses above mentioned miserable, intolerable, and unendurable, and unless the defendants are compelled to desist from such conduct (772) these complainants will be forced to give up their jobs and become objects of charity or else leave the city of Raleigh and seek employment elsewhere, and these complainants allege that they are informed and believe that it is well-nigh impossible for one who loses his job to obtain another in the present economic condition of the country.

"(4) In pursuance of said plan, purpose, and conspiracy the said defendants (*a*) gather in large numbers around the places of business where complainants are employed, and when complainants finish their day's work and emerge from their places of employment, the defendants indulge in threatening gestures, insulting jeers and hisses, and in many ways annoy, disturb, humiliate, and put in fear these complainants. (*b*) After complainants leave their several places of employment the defendants constantly 'shadow' them. As soon as complainants leave their work, two or more of the defendants will trail them wherever they go. On the streets, in the stores, to their homes, to their work, in the day, in the night, always and everywhere they are pursued and persecuted by these defendants,

sometimes with abusive language, sometimes with threats, sometimes in such numbers as to cause complainants to fear for their lives. (*c*) The defendants, whenever and wherever they can find one or more of these complainants, surround them and by words and gestures humiliate them and put them in fear. (*d*) The said defendants constantly and systematically call these complainants insulting names, such as rats, scabs, runts, bowery bums, and other epithets calculated to humiliate and distress, and which do humiliate and distress these complainants, and have a tendency to bring on breaches of the peace, and but for the forbearance of these complainants bloodshed and probable loss of life would result. (*e*) Said defendants are constantly and systematically threatening these complainants by saying in their presence: 'We'll get them yet.' 'There are plenty of us to do it.' 'They had better not let us catch them walking home.' 'We will break his damn neck.' 'If this thing goes on, I will be in the penitentiary soon,' meaning that they would perpetrate some crime against these complainants. (*f*) The young girls above mentioned as complainants are not free from the insult and abuse above set forth, but have been subjected by the defendants to all sorts of embarrassment and humiliation. As they pass along the streets they are jeered and hissed and scraped at and called 'kitty-cat.' In the drug stores they are sneered at and called cats. In the picture shows they are disturbed and annoyed. They are yelled at by defendants when they are a block away. They are shadowed and pursued as they pass along the streets, and unless they are afforder protection they will be compelled to leave the city of Raleigh.

"Fifth. This course of conduct has been so persistently
(773) and relentlessly pursued by the defendants that already more than one hundred employees of the printing houses above named have been literally driven from their work and been forced to leave the city.

"Sixth. These individual complainants have no object or purpose in bringing this action other than to secure for themselves and all their associates the right to work and live in peace, as free American citizens, desirous of the privilege of doing an honest day's work for a fair day's pay, and to this end they invoke the protection of the law.

"Seventh. The printing houses above named complain and allege:

"(1) That they have read the complaint of their employees, and from observation and reliable information they know the same to be true.

"(2) That the defendants above named have planned and con-

spired to destroy the business of these printing companies for no other reason than that they decline to accede to the unreasonable and unrighteous demands of the labor unions and are now exercising the right of every American citizen to run their business on the American plan and to give employment to any man who applies for the same, this right being odious to and utterly denied by the defendants herein.

"(3) In furtherance of their said plan, purpose, and conspiracy to utterly destroy the business of these complainants, the defendants have gathered in large numbers in front of and near the places of business of these complainants, have used threatening words and gestures, have threatened to kill the officers and relatives and employees of these complainants, have pursued and taunted and hissed and jerred the employees of these complainants, and have endeavored to render burdensome and intolerable the life of every man and woman who dares to work in the employ of these complainants.

"(4) In further pursuance of said plan, purpose, and conspiracy to utterly destroy the business of these complainants, the said defendants have induced and bribed many of the employees of complainants to break their contracts that they have made to work for these complainants.

"(5) In further pursuance of said plan, purpose, and conspiracy to destroy the business of these complainants, the defendants have literally driven, by threats, annoyances, pursuits, and a relentless policy of 'hell-hacking,' more than one hundred employees of these complainants from their jobs and away from the city of Raleigh.

"The complainants have this day commenced a civil action against the defendants in the Superior Court of Wake County for the purpose of obtaining a perpetual injunction, and summons has been issued therein.

"Wherefore, these complainants pray the court that an injunction be issued against the labor unions above named and against all their officers, members, aiders, abettors, and associates, compelling them to desist from indulging in any of the conduct (774) above set forth, and to leave these complainants free to work and to carry on their business without molestation or annoyance of any kind."

The foregoing having been duly verified and used as an affidavit in the cause, his Honor, Cranmer, J., issued a temporary restraining order returnable before his Honor, Bond, J., in the city of Raleigh on 3 September, 1921. Upon the hearing, the defendants filed several motions to dismiss, and demurred upon the ground of a misjoinder of both parties and causes, and further, that the complaint

did not state facts sufficient to constitute a cause of action. All motions to dismiss and the demurrer were overruled; whereupon a large number of affidavits were filed by both sides; and, after a full consideration of the evidence, his Honor continued the temporary restraining order until the final hearing. From this ruling the defendants excepted, and appealed.

William B. Umstead, Murray Allen, and T. W. Bickett for plaintiffs.

Evans & Eason, R. N. Simms, Charles U. Harris, and Douglass & Douglass for defendants.

PER CURIAM. Some serious and weighty questions of law are presented by the demurrer and the several motions filed in the cause; but we deem it unnecessary to pass upon them now, as we are convinced, from a perusal of the record, that the evidence adduced and offered on the hearing was not sufficient to warrant a continuance of the injunction. It will, therefore, be dissolved without prejudice to the rights of any of the parties.

Error.

Cited: *Citizens Co. v. Typo. Union*, 187 N.C. 51.

E. L. LANE v. SOUTHERN RAILWAY COMPANY.

(Filed 9 November, 1921.)

Railroads—Director General—War—Actions—Procedure.

An action to recover damages against a railroad company for a personal injury negligently inflicted while operated by the Director General as a war measure, will not lie, and, on appeal, will be dismissed without prejudice to the plaintiff's right of action against the Director General of Railroads.

APPEAL by defendant from *Finley, J.*, at March Term, 1921, of GUILFORD.

Action to recover damages for an alleged negligent injury to plaintiff while performing the duties of a brakeman in the city of Danville, Va., on 24 March, 1919.

(775) It appeared from the plaintiff's evidence that at the time of the accident and injury complained of the plaintiff, and those in charge of the train upon which the injury

occurred, were employed by and working for the Director General of Railroads under the United States Railroad Administration.

The Director General has not been made a party to this action, and the Southern Railway Company is the only defendant.

There was a motion to dismiss upon the ground that the Federal Control Act (1920) did not impose any liability upon the defendant on any cause of action arising out of the operation of its system of transportation by the United States Government; and that, therefore, a suit for such an injury could not be maintained as against it. This motion was overruled; and upon the usual issues of negligence, contributory negligence, and damages being answered by the jury in favor of the plaintiff, and from a judgment rendered thereon, the defendant Southern Railway Company appealed.

John A. Barringer for plaintiff.
Wilson & Frazier for defendant.

PER CURIAM. Upon authority of the recent decision of the United States Supreme Court in *Mo. Pac. R. R. Co. v. Ault,* decided 1 June, 1921 (since the case at bar was tried in the Superior Court), and reported in the Advanced Opinions of that Court, at page 647, No. 16, 1 July, 1921, the present action will be dismissed without prejudice to the rights of the plaintiff to proceed hereafter against the Director General of Railroads.

Action dismissed.

JOHN P. BARBEE v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 9 November, 1921.)

(For digest, see *Lane v. R. R.*, immediately preceding.)

APPEAL by defendant from *Finley, J.*, at February Term, 1921, of GUILFORD.

Action to recover damages for an alleged negligent injury to plaintiff while performing the duties of a brakeman in the Pomona yards, near Greensboro, N. C., on the morning of 8 April, 1919.

John A. Barringer for plaintiff.
Wilson & Frazier for defendant.

PER CURIAM. The question raised on this appeal, being identical with that presented in the case of *Lane v. R. R., ante,* 774, and for the reasons assigned in that case, the action will be dismissed without prejudice to the rights of the plaintiff to proceed hereafter against the Director General of Railroads.

(776)

Action dismissed.

B. M. FELLOWS v. J. L. DOWD AND W. R. CLEGG.

(Filed 16 November, 1921.)

1. Deeds and Conveyances—"Color"—Adverse Possession — Evidence — Chain of Title.

Where plaintiff shows title by *mesne* conveyances of land in question from a State grant, with evidence of possession, and defendant claims under a prior grant from the State, without connecting himself therewith with only evidence of three years possession, it is insufficient to ripen the defendant's title, and an instruction to the jury to that effect saying it would require seven years adverse possession, etc., under color, is correct.

2. Deeds and Conveyances—"Color"—Adverse Possession—Evidence.

Where the defendant claims title to land by seven years adverse possession under "color," evidence alone that he had a boiler and engine on ten acres of the land at some indefinitely stated length of time, for the purpose of pumping water through pipes to a sawmill on an adjoining tract, is too indefinite to ripen his title.

3. Appeal and Error—Objections and Exceptions—Harmless Error—Result of Trial—Evidence—Questions and Answers.

Exception to evidence that could not affect the result of the trial, or to questions without showing what the answers would be, are untenable on appeal.

APPEAL by defendant from *Ray, J.*, at the May Term, 1921, of MOORE.

Action to remove a cloud from plaintiff's title, and for general relief. On issues joined, there was verdict for plaintiff. Judgment, and defendant excepted and appealed.

H. F. Seawell for plaintiff.
L. B. Clegg for defendant.

PER CURIAM. We have carefully considered the record and find no valid reason for disturbing the results of the trial. On the issue

as to title, plaintiff offered in evidence a grant to Lewis Grimm of date 16 December, 1881, and *mesne* conveyances from the grantee to plaintiff with evidence tending to show that the grant included the land in controversy and continuous possession of plaintiff and those under whom he claimed, with assertion of (777) ownership under his deed, etc., and deeds to the time of trial.

Defendant, claiming title, offered evidence tending to show that the land granted to said Grimm in 1881 was included in an older grant to David Allison, of date in 1796, and also a deed from one John McLeod to Josiah Wallace, of date 26 November, 1852, registered on 26 August, 1886, covering 10 acres of land, lying within the boundaries of plaintiff's deeds and *mesne* conveyances from Josiah Wallace to defendants. Defendant showed no deed connecting his claim with the Allison grant. There was evidence tending to show possession of defendants, or those under whom they claimed, of this ten acres, asserting ownership under these deeds from January, 1903, to January, 1906. There was also evidence to show that defendant, or his predecessors, at some time prior to this period, had a boiler and engine on this ten acres for the purpose of pumping water through pipes to a sawmill situated on an adjoining tract, but neither the time nor the duration of this last occupation is disclosed in the record.

Upon this, the testimony chiefly pertinent, his Honor, without objection noted, submitted the issue of plaintiff's title on the evidence, and charged the jury that if this were established, evidence of adverse occupation by defendant from 1903 to 1906 was not sufficient to mature title in defendant's favor, the law requiring seven years under color for that result.

Objection is also made for that his Honor charged the jury that maintaining a boiler on the land and pumping water therefrom would not constitute adverse possession of a kind to mature title, same not being sufficiently notorious. On the record, the objection as stated is not available to appellant, as it is nowhere made to appear when this occupation commenced, nor how long continued. There is a presumption against error, and if this instruction is erroneous the evidence concerning it is too indefinite to enable the Court to say that any harm has been wrought by the ruling.

The objections to the decisions of the court on questions of evidence are without merit. Some of them could have had no possible effect on the results of the trial, and in others the objection is to the question, and the answer of the witness not being suggested or made to appear, the Court is unable to determine the significance of his

Honor's ruling or allow the same for error. On the record the judgment for plaintiff is affirmed.

No error.

Cited: *S. v. Beam,* 184 N.C. 744.

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(778)

T. J. DUFFY v. J. HENRY PHIPPS.

(Filed 7 December, 1921.)

Appeal and Error—Decision of Supreme Court—Retrial—Law of the Case.

The opinion of the Supreme Court rendered in a former appeal in the same action is the law of that case, and where, upon the overruling of a demurrer and a trial, the Superior Court has ruled the law in accordance with the opinion, no error on the second appeal will be found.

APPEAL by defendant from *Finley, J.*, at the May Term, 1921, of GUILFORD.

Civil action to recover damages for an alleged shortage in acreage in a tract of land bought by plaintiff from the defendant.

The contract of purchase is set out and construed in this same case as reported on the former appeal in 180 N.C. 313.

Upon trial in the Superior Court, the jury returned the following verdict:

"1. Was the deed from the defendant to the plaintiff made pursuant to the paper-writing offered in evidence? Answer: 'Yes.'

"2. If so, was there a shortage of acreage in the land conveyed by the defendant to the plaintiff, and if so, how much? Answer: '40 43/100 acres.'

"3. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: '$4,043.50.' "

From a judgment on the verdict in favor of plaintiff, the defendant appealed.

Justice & Broadhurst, Oliver C. Cox, and Brooks, Hines & Smith for plaintiff.

Fentress & Jerome for defendant.

PER CURIAM. From a perusal of the record it appears that the cause has been tried in accordance with our former interpretation

and construction of the contract of sale entered into between the parties. The case was here before on appeal from a judgment overruling the defendant's demurrer; and we deem it unnecessary to repeat our previous holding, which has now become the law of the case. *Public Service Co. v. Power Co.*, 181 N.C. 356; *Lewis v. Nunn, ante*, 119.

After a full investigation of the defendant's exceptions and assignments of error, we have discovered no sufficient reason for disturbing the result.

No error.

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(779)

PICKENS & BRADLEY v. G. V. WHITTON AND C. M. HERRING.

(Filed 14 December, 1921.)

1. Appeal and Error — Courts — Justices' Courts — Superior Courts — Recordari.

Where the defendant has appealed from a judgment in a justice's court, and has failed to docket his case at the next term of the Superior Court commencing ten days or more after the rendition of the judgment, in order for him to obtain a *recordari* from the Superior Court he must move therefor at the earliest moment, and also show a meritorious defense.

2. Same—Laches—Meritorious Defense.

Upon motion for a *recordari* to issue from the Superior Court to bring up an appeal from a justice's court, the mere allegation in an affidavit that the movant has a meritorious defense is insufficient, it being required that the facts be shown for the court to determine the matter.

3. Appeal—Recordari—Statutes.

The provisions of C.S. 660, as to the writ of *certiorari*, have no application where an appeal from the justice's court has been lost through the default of the appellant, and the failure of the appellee to docket and dismiss is no waiver of the appellee's rights upon appellant's motion for a *certiorari*.

APPEAL by defendants from *Adams, J.*, at August Term, 1921, of BUNCOMBE.

This action was begun before a justice of the peace, and on 4 June, 1921, judgment was rendered by said justice against the defendants, who appealed. On 13 August the defendants applied to Adams, J., in the Superior Court, for *recordari*. The motion was refused, and the petitioner appealed.

W. P. Brown for plaintiffs.
Ruffner Campbell for defendants.

CLARK, C.J. The justice of the peace rendered judgment against the defendants 4 June, 1921. The next term of the Superior Court began within two days thereafter, and it was not incumbent upon the appellants to docket the appeal at that term, it being within less than 10 days, though they could have done so if they had chosen. But the appeal was required to be docketed at the next term of the Superior Court, which began on 11 July, being for the trial of both civil and criminal causes, *Barnes v. Saleeby,* 177 N.C. 256; *Abell v. Power Co.,* 159 N.C. 348; *Peltz v. Bailey,* 157 N.C. 166; *Blair v. Coakley,* 136 N.C. 405, and other cases cited under C.S. 1532. The next term thereafter began on 1 August, 1921, and was for
(780) the trial of civil actions only. The appellants took no action until towards the close of this term, when on 13 August they applied for *recordari,* which was refused

To enable an appellant who has not docketed his appeal within the time required by the statute, C.S. 1532, *i. e.,* at the first term of the Superior Court beginning not less than 10 days after the appeal was taken, to bring up his appeal by *recordari* he must show both (1) a lack of *laches* on his part; (2) a meritorious defense. An inspection of the court's findings of fact in this case shows that the defendant has not brought himself within the rule in either particular.

1. The petitioner must move for the writ of *recordari* at the earliest moment, and his failure to do so will defeat his right thereto. *Boing v. R. R.,* 88 N.C. 62; *Hahn v. Guilford,* 87 N.C. 172.

2. The petitioner has not shown a meritorious defense. *Tedder v. Deaton,* 167 N.C. 479; *Hunter v. R. R.,* 161 N.C. 503; *Marler v. Clothing Co.,* 150 N.C. 519; *Pritchard v. Sanderson,* 92 N.C. 41.

It is true that the defendants allege in general terms that they have a meritorious defense, but they do not set forth sufficient facts to justify the court in so holding.

The defendants contend that C.S. 660, provides: "If the appellant shall fail to have his appeal docketed as required by law, the appellee may, at the term of court next succeeding the term to which the appeal is taken, have the case placed upon the docket, and upon motion the judgment of the justice shall be affirmed," and argues that failure to do so is a waiver of objection on the grount that the appellants failed to docket the appeal at the first term of the court beginning more than 10 days after the judgment was taken before the justice of the peace. But this Court has often held that this remedy, like that of docketing and dismissing appeals to this Court

under Rule 17, is optional with the appellee, and that a failure to exercise such right cannot avail an appellant who has not brought up his appeal in apt time. *Davenport v. Grissom*, 113 N.C. 38, and other cases cited under C.S. 660.

It is absolutely necessary that there should be a regular order of procedure within the courts. The right to appeal is not an absolute right, but dependent upon the observance of prescribed regulations. If that were not so, at least half of the time which the courts can apply to the trial upon their merits of appeals which have been brought up by those diligent to observe the procedure of the court will be devoted to the consideration of excuses by those who have not been careful to do so.

The defendants further contend that C.S. 660, provides that the writ of *recordari* may issue in cases heretofore allowed by law, but those cases are "where the party has lost his right to appeal otherwise than by his own fault." *Marsh v. Cohen*, 68 N.C. 283.
See instances cited under C.S. 630, under heading *"Re-* (781)
cordari."

The motion for *recordari* was properly denied. *Barnes v. Saleeby*, 177 N.C. 256, and cases there cited.

Affirmed.

ADAMS, J., did not sit.

Cited: Electric Co. v. Motor Lines, 229 N.C. 91.

STATE v. HENRY JONES.

(Filed 14 September, 1921.)

1. Appeal and Error—Assignments of Error — Record — Objections and Exceptions.

An assignment of error must be upon exceptions appearing of record duly taken, though exceptions to the general charge, or refusal to instruct, or giving instructions prayed for, may be taken after the trial, they also must be properly assigned and appear in the record, and an assignment of error otherwise taken will not be considered on appeal.

2. Appeal and Error—Presumptions—Record—Burden of Proof.

On appeal to this Court, the presumption is in favor of the correctness of the trial in the Superior Court, and the appellant must show error by the record and an assignment of error, which, if it does not so appear, will not be considered.

3. Same—Instructions—Homicide.

Where it appears in the record on appeal that a trial for a homicide was conducted on both sides upon the question of the defendant being guilty of murder in the second degree or his acquittal, and it is stated in the case that the trial judge, at the conclusion of the argument, charged the jury at length with respect to the case, and stated fully the contentions of the State and the defendant, to which there was no exception, the defendant's assignment of error that the judge failed to charge the jury upon the question of manslaughter, or there being no evidence of it, will be disallowed as contradicting the case.

4. Appeal and Error—Reversible Error—Trials—Instructions—Homicide.

The judge's charge, upon a trial for a homicide, that the jury must be convinced "to a moral certainty" of the defendant's guilt, and that they should return a verdict of guilty if they so found beyond a reasonable doubt is not reversible error.

5. Appeal and Error—Homicide—Instructions—Record—Harmless Error.

Where the charge of the court to the jury is not set out on appeal in full, in a trial for a homicide, and it is stated in the record that the judge charged the jury that their verdict would be "guilty" if they found beyond a reasonable doubt that the defendant committed the homicide, though the part of the charge so appearing may be somewhat brief and general, it will be considered in connection with the statement appearing of record that the court correctly charged the jury, and will not, therefore, be held for reversible error, as this Court cannot see that, when the charge is construed as a whole, it was not correct.

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

Where the charge of the court is not set out in the record on appeal, the presumption is in favor of its correctness, and that the appellant would otherwise have excepted, and especially so when it is stated that the judge charged the jury at length concerning the case.

7. Appeal and Error—Instructions, How Construed.

On appeal to the Supreme Court the charge of the trial judge to the jury must be construed as one connected whole, and not by detached portions.

THE defendant, with others, was indicted in the court
(782) below for the murder of James Smith, and was convicted of murder in the second degree. The solicitor for the State withdrew the charge of murder in the first degree. There was no suggestion from defendant's counsel that the question of manslaughter was involved, or that there was any evidence of the same. No instruction was requested on that subject, and no reference to manslaughter made by defendant until the defendant, after verdict and judgment, filed his exceptions, and upon them based his assignments of error, in which he made his first reference to manslaughter, when he excepted because the court failed to charge as to manslaughter.

The substance of the record on this point is as follows: The case was fully argued by both the State and the defendant, neither the State nor the defendant's counsel discussing any question except the guilt or innocence of the defendants on the charge of murder in the second degree. No allusion was made in the course of the argument by either the solicitor or associate counsel for the State, or by any counsel for either of the defendants, to the guilt or innocence of the defendants of any crime except murder in the second degree, and specifically no contention was made either by the State or the defense that the defendant was guilty of either murder in the first degree or manslaughter. The only question argued being whether the defendants were guilty or innocent of the charge of murder in the second degree. During the course of the argument for the defendant, the defendant's counsel read the statute defining the crime of murder in the second degree to the jury, and argued to the jury the punishment that was permissible upon a conviction under the same, and told the jury that if the defendants were convicted they would be punished by imprisonment from two to thirty years, in the discretion of the court. The solicitor likewise admitted to the jury that the statute had been correctly read, and that the punishment suggested by the defendants' counsel was possible upon a conviction, but argued to the jury that the matter of punishment was not for their determination, but should and could be left to the court to administer in justice and mercy. At the conclu- (783)
sion of the argument, the court charged the jury at length with respect to the case, stating fully the contentions of both the State and the defendants, to all of which there was no exception.

There was testimony to the effect that one of the witnesses had heard the defendant fighting the deceased the night of the homicide, and that, before the homicide, he had heard him threaten to kill him. There was evidence tending to show that McArthur and Smith were killed with a heavy single-tree, made of solid oak and having iron bands at each end of it, and which was a deadly weapon. The indentations in the skull of McArthur corresponded with the shape of the ends of this single-tree. The dead bodies of McArthur and Smith were hauled in a cart belonging to John Jones (which was borrowed by defendant, Henry Jones) to the canal near Henry's home, and thrown into the canal, Henry having said that he wanted the cart to carry the boys (McArthur and Smith) to the canal and "chunk them in." There was evidence that blood stains were found on Henry's kitchen floor, and the single-tree in the bottom of the cart. There was other evidence tending to identify the defendant as the one who committed the homicide in addition to his admission in jail that he and his wife had killed the boys, and that he intended

to "put it on Dad," and also his threat to kill Smith because of some real or fancied grievance.

The jury, under the evidence and the charge of the court, convicted the defendant of murder in the second degree, and from the judgment upon the verdict he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Daniel & Carter, Clifton Bell, and Mann & Mann for defendant.

WALKER, J., after stating the case: The principal exception of the defendant is that the court failed to define manslaughter, or to charge that the jury could find the defendant guilty of manslaughter or murder in the second degree. The full charge is not in the record. We will first consider, therefore, whether it appears from the record that the court failed to give any such instruction. We are governed, in this respect, entirely by the record, which cannot be altered by a mere exception or assignment of error. Exceptions must be confined to something alleged as error which appears in the record, and an assignment of error must ordinarily be based upon an exception duly taken. Errors in the charge may, of course, be assigned the first time in the case on appeal, but the error must appear in the record and not only in the assignment. This is necessarily true, because
(784) if the showing of error depended upon the mere allegation of it, when the error did not appear in the record, it would be useless to consider the record, but only the assignment, as to the ruling of the court. Of course this would not do, and could not for a moment be accepted as a principle in the law of appellate procedure. The law is the other way, as we do not presume error was committed, but the opposite, and he who alleges that there was error must show it by the record and not by assertion only, an assignment being of no avail unless it rests upon matter appearing in the record or case on appeal. *Wilson v. Wilson*, 174 N.C. 755; *In re Smith's Will*, 163 N.C. 466; *Todd v. Mackie*, 160 N.C. 352; *Allred v. Kirkman, ib.*, 392; *Worley v. Logging Co.*, 157 N.C. 490. So in this case we must presume the correctness of the trial below, because we cannot see any such error in it as is alleged, as it has not been made to appear. The defendant assigned as error that the judge failed to charge the jury as to manslaughter. Not only does this not appear in the record, as the full charge is not here, but what does appear contradicts it, as the record states that Allen, J., who presided at the trial, "at the conclusion of the argument, charged the jury, at length, with respect to the case, and stated fully the contentions of the State and the de-

fendant, to all of which there was no exception." And this disposes of the assignment as to manslaughter, as it excludes the idea that there was no instruction as to it, the statement in the record being sufficient to show that the charge embraced every phase of the case. If so, there can be no error in the charge, even if there was evidence to support the contention as to manslaughter. The appellant has not, therefore, shown that there was no instruction as to manslaughter, and as was held in the above cited cases and *Powers v. City of Wilmington,* 177 N.C. 361, "Appellant must show error; we will not presume it, but he must make it appear plainly for the presumption (as to the correctness of the trial) is against him," citing *In re Smith's Will, supra.* The same was said in *Baggett v. Lanier,* 178 N.C. 129, the language in that case, at p. 131, being: "The burden of showing error is upon him, for in the absence of anything to the contrary, we presume that the ruling of the court was correct." And the following, which was said in *Bell v. Harrison,* 179 N.C. 190, at p. 198, is also pertinent and analogous to the question here: "A party cannot complain of an instruction given at his own request; nor will an assignment of error be sustained which conflicts with the statement of the case upon the question whether the instruction was so given. The judge's statement as to what was done must stand, in the absence of any correction of the record by *certiorari* or otherwise." As held in *S. v. Harris,* 181 N.C. 600: "The statement of the case on an appeal imports absolute verity." We must, therefore, accept it as we find it, and can add nothing to it nor can we take anything from it. The appeal must stand or fall by (785) what we find in the case, without regard to any assignment of error, unless supported by it.

As the whole of the charge is not here, we are unable to know what it was, or whether what is not here embraced a sufficient charge as to manslaughter. We only know that defendant deemed it adequate, as he did not ask for any further instruction. We are not permitted to draw an inference favorable to the defendant merely because the record is silent as to a part of the charge. We should presume to the contrary, as the burden is upon the defendant to show any error. The fact that counsel for defendant chose to narrow the discussion and confine his argument to second degree murder does not alter the case. That is their act and not that of the court. They may have thought, and perhaps rightly so, that the evidence as to manslaughter, if there was any at all, was entirely too conjectural and would not lead the jury to adopt that view. It was hardly as substantial or probative in character as was the evidence in *Byrd v. Express Co.,* 139 N.C. 273.

We have discussed this exception upon the assumption that there was evidence of manslaughter, which is exceedingly doubtful, as all the evidence tends to show that defendant was the aggressor, and, if there was a quarrel that he brought it on and killed the deceased with malice, and not in hot blood, during a sudden quarrel, or upon legal provocation.

The exception and assignment of error are not, therefore, sustainable, and must be overruled.

All that we have said is based on the assumption that if there was evidence of manslaughter it was the duty of the judge to give a proper instruction in regard to it, whether he was asked to do so or not. This was decided in *S. v. Merrick,* 171 N.C. 788, where we held, as shown by the third head-note: "Upon a trial for murder a verdict for a less grade of crime is permitted, and where the indictment is for murder, and there are facts in evidence tending to reduce the crime to manslaughter, it is reversible error for the trial judge not to submit this phase to the jury, under a proper charge, though not requested by the defendant to do so, and although he has offered to submit to a verdict of murder in the second degree, which has been refused," citing Rev. 535.

The exception to the judge's charge on reasonable doubt is untenable. He did say that the jury must be convinced "to a moral certainty," but he added: "If you find from the evidence that the defendants, or either of them, committed the homicide, and you so find beyond a reasonable doubt, you will return a verdict of guilty as to the one or ones whom you so find." This was stating the rule generally, but there was no request to state it more definitely, and in the absence of such a request the error, if any, is not available to the defendant. *Simmons v. Davenport,* 140 N.C. 407.

(786) There is no special formula of the law for charging upon the doctrine of reasonable doubt. It was said in *S. v. Adams,* 138 N.C. 688, 695: "There is no particular formula by which the court must charge the jury upon the intensity of proof. All that the law requires is that the jury shall be clearly instructed that unless, after due consideration of all the evidence, they are 'fully satisfied,' or 'entirely convinced,' or 'satisfied beyond a reasonable doubt' of the guilt of the defendant, it is their duty to acquit, and every attempt on the part of the courts to lay down a 'formula' for the instruction of the jury, by which to 'gauge' the degrees of conviction, has resulted in no good. We reproduce these words from the opinion delivered by Pearson, C.J., in *S. v. Parker,* 61 N.C. 473, as they present in a clear and forcible manner the true principle of law upon the subject. The expressions we sometimes find in the books as to

the degree of proof required for a conviction are not formulas prescribed by the law, but mere illustrations. *S. v. Sears*, 61 N.C. 146; *S. v. Knox, ib.*, 312; *S. v. Norwood*, 74 N.C. 247. The law requires only that the jury shall be fully satisfied of the truth of the charge, due regard being had to the presumption of innocence and to the consequent rule as to the burden of proof," citing *S. v. Knox, supra.* The dictionaries define "moral certainty" as "a very high degree of probability, although not demonstrable as a certainty; a probability of so high a degree that it can be confidently acted upon in the affairs of life; as that there is a *moral certainty* of his guilt." This expression that the evidence must produce a moral certainty of guilt was not in any degree prejudicial to the defendant, especially when it was immediately followed by what was said as to reasonable doubt, giving the prisoner the full benefit of that doctrine. As the full charge is not before us, it may be that the learned judge further elucidated the doctrine, and we would not impute error upon mere conjecture that he did not do so, even if this part of the charge which is before us was not precisely correct. But we see no substantial error in it as it stands.

The charge that if the jury found beyond a reasonable doubt the defendant committed the homicide, the verdict should be guilty was somewhat too brief and general, but not so when considered in connection with the statement in the record that the judge charged the jury at length as to the case, and stated fully the contentions of the parties, to which there was no exception. In other words, he charged the jury correctly as to the case or counsel would have excepted. It is the fair presumption that they would have excepted if there was error in the charge. We could not well presume otherwise with such able counsel as the defendant had to protect his interests, and it is a fair and reasonable inference from this statement in the record that the charge covered the whole range of questions involved in it, including, of course, instructions as to murder in the second degree, manslaughter, and excusable homicide, and that the (787) verdict should designate the particular degree of homicide if the jury found defendant guilty of either one below murder in the first degree, which had been eliminated. As we have shown, the presumption is that the court instructed the jury correctly. When the charge is thus considered as an entirety, we cannot conclude that the jury misunderstood or disobeyed explicit instructions given to them. That the charge must be construed as one connected whole, and not by detached portions, has grown into an axiom of the law. *S. v. Exum*, 138 N.C. 599; *Kornegay v. R. R.*, 154 N.C. 389; *In re Will of Hinton*, 180 N.C. 206, 216; *Haggard v. Mitchell, ib.*, 255,

258; *S. v. Chambers, ib.*, 705, 708, and the many other intervening cases where the principle has been approved. If the charge is read under this rule with the proper presumption in favor of its correctness constantly kept in mind, we can have no doubt that the jury fully understood what they were trying, and were not led into the error of supposing that the mere commission of the homicide would justify them in returning a verdict of murder in the second degree, or even for manslaughter. The course of the trial, as it appears by the case on appeal and the verdict, shows that the jury clearly understood the case and the law "arising thereon." We do not see how they could have decided otherwise than they did. If they have found a wrong verdict, it was not the fault of the judge. Great stress was laid upon second degree murder by counsel in argument, in the hope and belief, perhaps, that the jury would be more apt to choose to acquit as between a verdict for the higher felony and one of "not guilty," than they would as between manslaughter and acquittal, and to those acquainted with court trials, this was a shrewd, and to a trained lawyer a not unusual view to take of the matter.

The defendant was no doubt most ably defended in the court below, and we know that Mr. Carter made an exceptionally strong defense of him before us.

The other exceptions, not specially discussed, by us, although not mentioned in the defendant's brief, have been fully considered and found to be without any merit.

We find no error in the case or the record.

No error.

Cited: *S. v. Beam,* 184 N.C. 744; *Stevens v. R. R.,* 187 N.C. 531; *Milling Co. v. Hwy. Com.,* 190 N.C. 697; *Emery v. Ins. Co.,* 228 N.C. 534; *S. v. White,* 232 N.C. 386.

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(788)

STATE v. YOUNG PRINCE.

(Filed 21 September, 1921.)

1. Spirituous Liquor—Intoxicating Liquor — Manufacture — Evidence — Questions of Law—Nonsuit—Trials.

The legal sufficiency of evidence to be submitted to the jury to convict the defendant of the illicit manufacture of intoxicating liquor is a question for the court to first determine; and where it raises only a mere conjecture, or shows only a bare possibility of guilt, the burden of proof beyond a reasonable doubt being on the State, it is insufficient; and defendant's motion to nonsuit thereon should be granted.

2. Same.

Evidence that a still operated on a path leading to a public road which passed defendant's dwelling, but was not on his premises, and indications that at a remote period spirituous liquor has been manufactured in that vicinity, without evidence that it had been made on his lands and that nothing was found on his premises to indicate his violation of the law, and there being no other evidence that he was operating the still, is merely conjectural and insufficient to show the defendant's guilt in the unlawful manufacture of spirituous liquor, and his motion to nonsuit thereon, under the statute, was properly granted.

APPEAL by defendant from *Lyon, J.*, at the May Term, 1921, of CHATHAM.

Defendant was convicted of manufacturing spirituous liquor, and, being sentenced to eighteen months on the roads, he appealed.

The only question is whether there was any evidence of his guilt, and this was raised by his motion to nonsuit the State.

The evidence substantially was that three officers had searched near defendant's premises on 10 May, 1921, and about one-half or three-quarters of a mile from his house they found a distillery that was being operated, and the materials were there for making whiskey. There was a path leading from the distillery up a hill about 150 yards to a road, which was intersected by the railroad, and led to the defendant's house, but the road passed his house and extended to the neighborhood beyond, and in the direction of Raleigh. There was a path from the house of the defendant to a spring about 200 yards away, and a path led from the spring to an old place where a distillery furnace had once been "which showed no signs of recent use." A pile of sawdust was found some distance beyond this spring, and beyond this sawdust there was evidence of a distillery furnace having been operated some time in the past, but which had not been recently used. They found an old still-worm in the edge of the woods and back of defendant's garden, but there was nothing to indicate any recent use of it, and it apparently had been lying there, exposed to the weather for quite a while. Not far from this old and unused distillery-worm, a jug of something, having the (789) appearance of tomato beer, was found. It resembled something found at the distillery, three-quarters of a mile away, which they took to be tomato beer.

The defendant was not at home, and they did not see him on this raid or search; his premises and house were searched without objection by his wife, who assured them before they went in that they would find nothing, and they found nothing there, as she had stated. In the barn or granery of the defendant there was found a barrel containing a few gallons of molasses, estimated to be not over five

gallons. Following the road past the defendant's house from the direction of the distillery going directly west into the woods, something like 300 yards from the defendant's home and about 35 or 40 yards from the road, two five-gallon jugs were found sitting behind a log and were in guano sacks; but were unstopped, one of them was empty and the other one contained about a cupful of something that had the odor of whiskey.

All the witnesses admitted that nothing was found in the home of the defendant to arouse the least suspicion that whiskey was being stored or kept there. Each witness stated he knew not whether the land belonged to the defendant where the still sites were found, and none of these witnesses knew whether the still-worm, or jug of tomato beer, or any jugs, were on the premises of defendant; that the defendant was not seen in connection with either the distillery, the empty jugs, or the still-worm, and was not at home on this occasion.

The witness Ferguson, who lived in Prince's neighborhood, testified that the path leading from the distillery in the direction of the defendant's home had been used as a school path for a number of years.

Motion to nonsuit, submitted at the close of all the evidence, which is above set forth, was overruled. Defendant excepted, and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

A. C. Ray for defendant.

WALKER, J. We have examined the evidence with close scrutiny, and can find none upon which a verdict of guilty can reasonably be based, if there is any, upon which to raise even a well founded suspicion. All of the circumstances upon which the State solely relies may exist, and yet the defendant be innocent. Either singly or in combination they produce no assurance of guilt, but, as most, only a mere conjecture or surmise of it, which is certainly not sufficient as evidence. *Byrd v. Express Co.*, 139 N.C. 273. In *S. v. Vinson*, 63 N.C. 335, this Court thus states the rule: "We may say with certainty that evidence which merely shows it possible for the
(790) fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury." And in *Brown v. Kinsey*, 81 N.C. 245, it is said: "The rule is well settled that if there be no evidence, or if the evidence be so slight as not reasonably to warrant

the inference of the fact in issue, or furnish more than material for a mere conjecture, the court will not leave the issue to be passed on by the jury." In the later case of *Young v. R. R.*, 116 N.C. 932, the Court says: "Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character as that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence." *Cobb v. Fogalman*, 23 N.C. 440; *Wittkowsky v. Wasson*, 71 N.C. 451; *Sutton v. Madre*, 47 N.C. 320; *Pettiford v. Mayo*, 117 N.C. 27; *Lewis v. Steamship Co.*, 132 N.C. 904. It all comes to this, that there must be legal evidence of the fact in issue and not merely such as raises a suspicion or conjecture in regard to it. The State must do more than show the possible liability of the defendant for the crime. It must go further and offer at least some evidence which reasonably tends to prove every fact essential to its success. This has not been done in the case now before us.

We may say generally that evidence should raise more than a mere conjecture as to the existence of the fact to be proved. The legal sufficiency of proof and the moral weight of legally sufficient proof are very distinct in the conception of the law. The first lies within the province of the court, the last within that of the jury. Applying the maxim, *de minimis non curat lex*, when we say that there is no evidence to go to the jury, we do not mean that there is literally and absolutely none, for as to this there could be no room for any controversy, but there is none which ought reasonably to satisfy the jury that the fact sought to be proved is established, though there is no practical or logical difference between no evidence and evidence without legal weight or probative force. The sufficiency of evidence in law to go to the jury does not depend upon the doctrine of chances. However confidently one, in his own affairs, may base his judgment on mere probability as to a past event, when he assumes the burden of establishing such event as a proposition of fact and as a basis for the judgment of a court, he must adduce evidence other than a majority of chances that the fact to be proved does exist. It must be more than sufficient for a mere guess, and must be such as tends to actual proof. But the province of the jury should not be invaded in any case, and when reasonable minds, acting within the limitations prescribed by the rules of law, might reach different conclusions, the evidence must be submitted to the jury. *Campbell v. Everhart*, 139 N.C. 516; *Lewis v. Steamship Co.*, 132 N.C. 904; *Wheeler v. Schroeder*, 4 R.I. (791) 383; *Offutt v. Col. Exposition*, 175 Ill. 472; *Day v. Rail-*

road, 96 Me. 207; *Catlett v. Railway,* 57 Ark. 461; *Railroad v. Stebbing,* 62 Md. 504.

The principle is well stated in *Spruill v. Ins. Co.,* 120 N.C., at p. 147, that where the action of the judge in directing a verdict or granting a nonsuit or dismissal of the action can be sustained only under the doctrine, firmly established in this State, that where there is no evidence, or a mere scintilla of evidence, or the evidence is not sufficient, in a just and reasonable view of it, to warrant an inference of any fact in issue, the court should not leave the issue to be passed upon by the jury, but should direct a verdict against the party upon whom the burden of proof rests. And Gaston, J., thus stated the rule in *Cobb v. Fogalman,* 23 N.C. 440: "Although the boundary between a defect of evidence and evidence confessedly slight be not easily drawn in practice, yet it cannot be doubted that what raises a possibility or conjecture (as to the existence) of a fact never can amount to evidence of it." *Crenshaw v. R. R.,* 144 N.C. 320; *Wittskowsky v. Wasson, supra; S. v. Powell,* 94 N.C. 968; *S. v. Satterfield,* 121 N.C. 558; *Jewell v. Parr,* 13 C.B. (76 E.C.L.) 916; *Ryder v. Wombwell,* L.R., 4 Exch. 32. This rule is not intended, as said by Douglas, J., in *Spruill v. Ins. Co., supra,* to interfere with the rightful province of the jury to pass upon the weight of the evidence, but it assumes that the determination of its "character and legal effect" belongs to the court, and requires that this preliminary question be first decided before the evidence is submitted to the jury. The sufficiency of proof in law is for the court — the moral weight of legally sufficient proof is for the jury. The rule as to the legal sufficiency of evidence is not only well established, but of practically universal application, and under it we cannot perceive how any evidence was produced by the State in this case to convict the defendant. There was circumstantial evidence, it is true, that somebody was illegally operating a still at a place between one-half and three-quarters of a mile from defendant's home, but not on his premises. Old and unused stills and a still-worm were found in the neighborhood, and a jug with a cupful of liquor in it was discovered some distance from his house, but none of the witnesses did, or could, state that any one of the said articles was on defendant's land. There was a path leading from the still to a road, which was intersected by the railroad, and the road passed near the defendant's home, but both path and road were used by the public generally. The few other circumstances do not add anything to the probative force of the testimony. No connection or relation whatever was shown between the operation of the still and the circumstances, or any of them, to which we have referred. We are left to

guess or speculate as to whether the defendant was, in fact, running the still, or assisting in the operation of it. There (792) is absolutely no legal evidence to prove that fact, which, of course, must be established by the State before he can be convicted. We considered a case somewhat like this one at this term, and affirmed the conviction, but there other proof was introduced, which tended to identify the defendant as the guilty person, or one of those who operated the still. As we said in *Foy v. Lumber Co.*, 152 N.C., at p. 598: "The evidence is too vague and uncertain, and lacks the probative force which entitles it to be considered by the jury."

The testimony in *S. v. Brackville*, 106 N.C. 701, was much stronger than that to be found in this case, and pointed to the defendant as the guilty person, with far more certainty than does the testimony here, and yet the Court held that it fell short of legal proof of the alleged crime, and should not have been submitted to the jury.

The case of S. v. Turner, 171 N.C. 803, in some of its features was similar to the one in hand, though there was additional positive and direct testimony of guilt, and the Court held that but for the latter kind of evidence the other would not be legally sufficient as the basis of a verdict.

The isolated facts as to the finding of the still and still-worm and jug with the cupful of liquor in it, and the tomato beer, all off the defendant's premises, were really collateral to the issue, being distinct and independent offenses, not connected with the principal charge (even if there was any evidence that defendant was responsible for the articles being where they were), and are not regarded by the law as evidence of defendant's guilt. *S. v. Jeffries*, 117 N.C. 727. Quite a different question was involved in *S. v. McMillan*, 180 N.C. 741, and it is therefore not at all pertinent to this case. We have referred to the last two cases because they were cited by counsel, and to exclude the inference that they were overlooked.

The result is that the learned judge who presided at the trial should have granted the motion to nonsuit under the statute, and there was error in refusing to do so.

Reversed.

Cited: *S. v. Clark*, 183 N.C. 734; *S. v. Sigmon*, 190 N.C. 689; *Jordan v. R. R.*, 192 N.C. 376; *Hoggard v. Brown*, 192 N.C. 497; *S. v. Swinson*, 196 N.C. 103; *S. v. Lawrence*, 196 N.C. 574; *Burnett v. Williams*, 196 N.C. 621; *S. v. Weston*, 197 N.C. 29; *S. v. Johnson*, 199 N.C. 431; *S. v. Shipman*, 202 N.C. 536; *S. v. Carter*, 204 N.C. 305; *S. v. Woodell*, 211 N.C. 636; *Smith v. Sink*, 211 N.C. 727; *Hildebrand v. Furniture Co.*, 212 N.C. 111; *Kirby v. Reynolds*, 212

N.C. 280; *S. v. Ray,* 212 N.C. 731; *S. v. Shu,* 218 N.C. 389; *Mercer v. Powell,* 218 N.C. 649; *S. v. Penry,* 220 N.C. 249; *S. v. Oxendine,* 223 N.C. 661; *S. v. Watts,* 224 N.C. 773; *S. v. Harvey,* 228 N.C. 65; *S. v. Coffey,* 228 N.C. 128; *S. v. Robinson,* 229 N.C. 649; *Lunsford v. Marshall,* 230 N.C. 612; *Strigas v. Ins. Co.,* 236 N.C. 738; *S. v. Smith,* 236 N.C. 750; *S. v. Grainger,* 238 N.C. 741; *S. v. Simmons,* 240 N.C. 785; *S. v. Rhodes,* 252 N.C. 440; *S. v. Rogers,* 252 N.C. 504; *Powell v. Cross,* 263 N.C. 768.

(793)

STATE v. DAVID FALKNER.

(Filed 19 October, 1921.)

1. Criminal Law—Abandonment of Wife—Husband and Wife—Statutes—Strict Construction.

C.S. 4447, making it a misdemeanor for a husband to willfully abandon his wife without providing for her support and that of the children of the marriage, should be strictly construed, and its terms may not be extended to include, by implication, cases not clearly within its meaning.

2. Same—Burden of Proof—Defenses.

The willful abandonment of the wife is an essential element of the offense made criminal by C.S. 1447, and the prosecutrix is required to show beyond a reasonable doubt, upon the issue of defendant's guilt, that he had willfully abandoned her without providing adequate support, from which the jury may infer, if so satisfied, that it had been done intentionally, without just cause or legal excuse.

3. Same—Statutes in Pari Materia.

C.S. 4448, by specifying certain circumstances under which the failure of the husband to provide an adequate support for his wife and children, shall be presumptive evidence that such abandonment and neglect was willful, construed with the preceding section 4447, making his willful abandonment a misdemeanor, evidences that the legislative intent was well considered, and that not the mere abandonment, but the willful abandonment was the criminal act contemplated.

4. Same—Evidence.

In order for the jury to acquit a defendant tried for the willful abandonment of his wife it is not required that he introduce evidence in his defense, nor is his failure to have done so to be taken against him, and the burden of the issue remains on the State throughout the trial. C.S. 4447.

5. Same—Wife's Unchastity.

Upon the trial of the husband for abandonment, C.S. 4447, the wife's unchastity is a defense, which he may put in issue by cross-examination

or otherwise, with the burden remaining on the State to show his guilt beyond a reasonable doubt.

6. Same—Burden to Produce—Evidence.

Upon the trial of the husband for the willful abandonment of his wife, C.S. 4447, the burden of producing evidence of the wife's unchastity is not upon the husband, or within the rule applicable when the facts and circumstances are peculiarly within the knowledge of the party relying upon them.

7. Criminal Law—Abandonment—Defense — Evidence — Facts Admitted or Established—Statutes.

Where the nonsupport and abandonment of the husband are both established or admitted, C.S. 4448, it may be necessary for the defendant to come forward with his evidence and proof to avoid the risk of an adverse verdict.

8. Criminal Law—Husband and Wife—Abandonment—Civil Remedies — Statutes.

Requiring the State to show the husband's willful abandonment of his wife, etc., beyond a reasonable doubt, C.S. 4447, does not deprive the wife of her civil remedies under the provisions of section 1667.

9. Appeal and Error—Instructions—Conflicting Instructions — Reversible Error.

Where the judge's charge to the jury is conflicting as to the law material to the answer of the issue, it is reversible error.

10. Same—Husband and Wife—Abandonment—Statutes—Criminal Law.

Where there is evidence that the husband indicted for the willful abandonment of his wife, etc., under C.S. 4447, was occasioned by her unchastity, it raises the question of his criminal intent therein, and it is reversible error for the court to charge the jury that the burden was on the defendant to satisfy them by the greater weight of the evidence of the fact of her unchastity, though he has charged them that the burden was on the State to show guilt beyond a reasonable doubt.

CLARK, C.J., dissenting.

APPEAL by defendant from *Cranmer, J.*, at March Term, 1921, of VANCE. (794)

Criminal prosecution, tried upon an indictment under C.S. 4447, charging the defendant with willfully abandoning his wife without providing for her adequate support as required by law.

The prosecutrix and defendant were married 2 June, 1918. The defendant enlisted in the Navy three days later, and while stationed in Norfolk, Va., his wife spent some time with him there. He was discharged in January, 1919, and returned to his home in Henderson, where he lived with his wife until July, 1920. Defendant testified that he left the prosecutrix on account of her infidelity, and because she had infected him with a venereal disease. There are no

living children of the marriage. Upon the question of the wife's adultery, the evidence was conflicting.

The defendant's principal exception is directed to the following portion of his Honor's charge, dealing with the burden of proof:

"If you shall find the defendant abandoned his wife without providing adequate support for her, and that such abandonment and failure were provoked and caused by the infidelity of the wife of the defendant, or for any just cause he had abandoned his wife, then in either case you would acquit the defendant.

"The burden being upon the defendant to satisfy you of the adultery of the wife, not beyond a reasonable doubt, nor by the greater weight of the evidence, but simply to your satisfaction. You will consider and pass upon all the evidence in the case in making up your verdict, and determine what weight you will give to it."

(795) The court subsequently charged the jury as stated in the record: "That the burden was on the State to satisfy them from all the evidence beyond a reasonable doubt that the defendant willfully abandoned his wife without providing adequate support for her, and that if they were so satisfied they would find defendant guilty, but if they were not so satisfied they would find the defendant not guilty."

There was a verdict of guilty, and from a judgment of eighteen months on the roads pronounced thereon the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. H. Bridgers for defendant.

STACY, J. C.S. 4447, under which the defendant is indicted, provides as follows: "If any husband shall willfully abandon his wife without providing adequate support for such wife, and the children which he may have begotten upon her, he shall be guilty of a misdemeanor."

It will be observed that a *willful* abandonment is the conduct which is condemned by this enactment of the Legislature. Being a penal statute, we must apply the rule of strict construction, and we are not at liberty to extend its terms, by implication, to include cases not clearly within its meaning. *S. v. Colonial Club,* 154 N.C. 177; *S. v. R. R.,* 122 N.C. 1052. Willfulness is an essential element of the crime, and this must be found by the jury. The issue, upon an indictment for a violation of the present law, is the alleged guilt of the defendant. He enters on the trial with the common-law presumption of innocence in his favor. When the State has shown an abandonment and the defendant's failure to provide adequate sup-

port, the jury may infer from these facts, together with the attendant circumstances, and they would be warranted in finding, if they are so satisfied beyond a reasonable doubt, that it had been done intentionally, without just cause or legal excuse, *i. e., willfully. S. v. Taylor,* 175 N.C. 833.

The position just stated has been approved by us in a number of carefully considered decisions. "The abandonment must be willful, that is, without just cause or excuse — unjustifiable and wrongful." *S. v. Smith,* 164 N.C. 475. Again, in *S. v. Morgan,* 136 N.C. 628, Mr. Justice Walker, speaking for a unanimous Court, says: "If the act may be innocent or not according to the intent with which it is done, or if its criminality depends upon the intent, it is incumbent on the State to show the intent or to show the facts and circumstances from which the intent may be inferred by the jury, and it is necessary that the jury should find the intent as a fact before the defendant charged with the commission of the act can be adjudged guilty of a crime," citing *S. v. McDonald,* 133 N.C. 680. (796) Unless the willfulness of the defendant's conduct is established, the offense is not made out; and this is a question of fact for the jury, under all the evidence, and not for the court. *S. v. King,* 86 N.C. 603; *S. v. Wolf,* 122 N.C. 1079; *S. v. Martin,* 141 N.C. 832.

In this connection it may be well to observe that the next section, C.S. 4448, dealing with what shall be deemed presumptive evidence of a willful abandonment, requires the showing of something more than a mere separation and failure to provide adequate support. These circumstances having been established, "then the fact that such husband neglects applying himself to some honest calling for the support of himself and family, and is found sauntering about, endeavoring to maintain himself by gambling or other undue means, or is a common frequenter of drinking houses, or is a known common drunkard, shall be presumptive evidence that such abandonment and neglect is willful." Thus it would appear that the Legislature selected the words of the statute, under which the defendant is indicted, with studied care and deliberation, and with a full appreciation of their meaning.

The defendant is not required to offer any evidence, and his failure to do so is not to be taken against him. *S. v. Smith, supra.* Hence, upon the question of his wife's alleged infidelity, or unfaithfulness, the burden of proving the issue, as distinguished from the duty of going forward with the evidence, is not shifted to the defendant. He may put the question of her chastity in issue, by cross-examination or otherwise, but this does not reverse the position of himself and that of his wife and make him the prosecutor and his wife the

defendant. She is not on trial. The burden is still with the State, under all the evidence, to satisfy the jury, beyond a reasonable doubt, of the defendant's guilt. *S. v. Woodly,* 47 N.C. 276; *S. v. Wilbourne,* 87 N.C. 529; *S. v. Hopkins,* 130 N.C. 647; *S. v. Connor,* 142 N.C. 700; *S. v. Leeper,* 146 N.C. 655, and *S. v. R. R.,* 149 N.C. 470.

It is sometimes said that the burden of producing evidence rests upon the party best able to sustain it, because of facts and circumstances peculiarly within his knowledge. Thus it was held in *Farrell v. State,* 32 Ala. 557, that the existence of a license being a fact peculiarly within the knowledge of the party accused, it was incumbent upon him to show the license, even though the nonexistence thereof was the gravamen of the offense charged. To like effect, and for the same reason, are our own decisions. *S. v. Morrison,* 14 N.C. 299; *S. v. Smith,* 117 N.C. 809; *S. v. Emery,* 98 N.C. 670; *S. v. Glenn,* 118 N.C. 1194; *S. v. Holmes,* 120 N.C. 576. But in the instant case the alleged adultery of the defendant's wife is not a fact peculiarly within the defendant's own knowledge. Indeed, if
(797) this rule is to be invoked here — and we do not think it is — it might well be said that such is undoubtedly within the knowledge of the prosecutrix. At any rate, we hold that the raising of this question does not shift the burden of the issue to the defendant. *Govan v. Cushing,* 111 N.C. 458. On the other hand, in a case like the one at bar, where the husband is indicted for a willful abandonment and nonsupport, there is no presumption of law or of fact against the wife's virtue. She not being on trial, the matter is left at large, and it is an open question, just like any other question of fact, to be determined by the jury. Certainly there is no presumption that she has committed adultery, or that she has been unfaithful to her marriage vow.

The position here taken, with respect to the burden of the issue, has been approved in a long line of decisions, and is nowhere better stated than by Ruffin, J., in *S. v. Winbourne,* 87 N.C. 529, as follows: "The general rule most undoubtedly is that the truth of every averment, whether it be affirmative or negative, which is necessary to constitute the offense charged, must be established by the prosecutor. The rule itself is but another form of stating the proposition that every man charged with a criminal violation of the law is presumed to be innocent until shown to be guilty, and it is founded, it is said, upon principles of natural justice; and so forcibly has it commended itself, by its wisdom and humanity, to the consideration of this Court that it has never felt willing, whatever circumstances of difficulty might attend any given case, to disregard it."

Of course, where an abandonment and nonsupport are both estab-

lished or admitted, it may be necessary for the defendant to come forward with his evidence and proof, or else run the risk of an adverse verdict. But where there is no opposite presumption sufficient to overcome the presumption of innocence, the most that can be required of him, under our system of jurisprudence, is explanation, not exculpation. The defendant is not required to show his innocence. The State must establish his guilt beyond a reasonable doubt, and the burden of this ultimate issue never shifts. The laboring oar upon the question of guilt is constantly with the prosecution. *S. v. Wilkerson,* 164 N.C. 432.

In *Shepard v. Tel. Co.,* 143 N.C. 244, the present Chief Justice, speaking for a unanimous Court, states the rule as follows: "In criminal cases, where a homicide with a deadly weapon is proved or admitted, there is a presumption of law that the killing is murder, and the burden is on the prisoner to prove all matters in mitigation or excuse to the satisfaction of the jury, *S. v. Matthews,* 142 N.C. 621; and when a totally independent defense is set up, as insanity, which is really another issue, *S. v. Haywood,* 94 N.C. 847, the burden of that issue is on the prisoner. But the burden of the issue as to the guilt of the prisoner, except where the law raises a presumption of law as distinguished from a presumption of (798) fact, remains on the State throughout, and when evidence is offered to rebut the presumption of fact raised by the evidence, the burden is still on the State to satisfy the jury of the guilt of the prisoner upon the whole evidence. Notably, when the prisoner offers proof of an *alibi,* for example, which goes to the proof of the act. *S. v. Josey,* 64 N.C. 56." This case has been approved in a number of later decisions. See *Cox v. R. R.,* 149 N.C. 117; *Winslow v. Hardware Co.,* 147 N.C. 275, and Shepard's N. C. Citations.

"The rule as to the burden of proof is important and indispensable in the administration of justice, and constitutes a substantial right of the party upon whose adversary the burden rests. It should, therefore, be jealously guarded and rigidly enforced by the courts." 22 C.J. 69; *Hughes v. R. R. Co.,* 85 N.J.L. 212; Wigmore on Evidence, sec. 2483 *et seq.*

The case of *S. v. Schweitzer,* 57 Conn. 532, while apparently an opposite persuasive authority in support of his Honor's charge, must be read in connection with the Connecticut statute which in terms is different from ours. Section 6416, General Statutes of Connecticut, provides: "Every person who shall unlawfully neglect or refuse to support his wife or children shall, upon conviction, be deemed guilty of a felony, and shall be imprisoned not more than one year, unless he shall show to the court before which the trial is had that,

owing to physical incapacity or other good cause, he is unable to furnish such support," etc.

It will be noted that the word "unlawfully" is used in the Connecticut statute, while in ours the word "willfully" is employed. An unlawful act is not necessarily willful. *S. v. Morgan,* 136 N.C. 628.

"The word 'willful,' used in a statute creating a criminal offense, means something more than an intention to do a thing. It implies the doing the act purposely and deliberately, indicating a purpose to do it, without authority — careless whether he has the right or not — in violation of law, and it is this which makes the criminal intent, without which one cannot be brought within the meaning of a criminal statute." *S. v. Whitener,* 93 N.C. 590. The term *unlawfully* implies that an act is done, or not done, as the law allows, or requires; while the term *willfully* implies that the act is done knowingly and of stubborn purpose. *S. v. Massey,* 97 N.C. 465. *Schweitzer's* case is thus distinguishable from the one at bar, for, under the Connecticut statute, the State is not required to show a willful neglect in order to make out its case; while with us such is a prerequisite according to the express terms of the statute.

The case of *S. v. Hopkins,* 130 N.C. 647, must be overruled if his Honor's charge in the instant case is to be upheld; and this would carry with it a reversal of *S. v. Smith,* 164 N.C. 475, and *S. v. Taylor,* 175 N.C. 833. But it is said that, in these cases, the
(799) Court, by "judicial legislation," has engrafted something into the statute without authority and contrary to the expressed intention of the Legislature. It is even suggested that adultery on the part of a wife is no excuse for the husband's abandonment and failure to provide for her support. Though we have declared otherwise, it is said in criticism that these decisions belong to another day and to another age, and that we should now advance from such a "barbarism." After mature reflection and earnest consideration, we are unwilling to overrule these cases. We think they correctly state the law on the subject of the burden of proof as it obtains in this jurisdiction. The decision in *S. v. Hopkins, supra,* was rendered nearly twenty years ago, and the numerous Legislatures which have assembled since that time, have not seen fit to amend or to make any change in the present statute. That a husband may not be convicted for abandoning an adulterous or unfaithful wife is a position so well fortified by every reasonable consideration, and by the force of its own righteousness, as to meet with the approval of the common judgment of men. To argue otherwise is but to complain at the standard of human conduct, established in accordance with the eternal fitness of things and in keeping with the

everlasting verities. So far as our investigation discloses, no court has ever held to the contrary; and we are confident that our present construction is entirely permissible, and we think entirely correct, under the use of the words in the statute of "willfully abandon."

It may not be amiss to remark that the defendant is not to be released or discharged; he is to be tried again. Furthermore, his wife is not without the civil remedies which are vouchsafed to her by the law. See C.S. 1667, and cases cited thereunder.

Upon a careful perusal of the record, we think the charge as applied to the defendant was misleading in its effect; and while the court's general charge, in other sections, placed the burden of proof upon the State in proper form, yet this specific instruction with respect to the wife's alleged adultery was calculated to mislead, and in all probability did mislead the jury. *S. v. Morgan*, 136 N.C. 628. It is well settled that where there are conflicting instructions with respect to a material matter, a new trial must be granted, as the jury are not supposed to know which one of the two states the law correctly, and we cannot say they did not follow the erroneous instruction. *Edwards v. R. R.*, 132 N.C. 99; *Williams v. Haid*, 118 N.C. 481; *Tillett v. R. R.*, 115 N.C. 662.

The evidence offered by the defendant was in reply to the necessary allegation that his conduct had been willful, but the law does not cast upon him the burden of disproving the criminal intent. This is a fact which the State must establish, not only to the satisfaction of the jury, but beyond a reasonable doubt, before a verdict of guilty can be rendered against him. The in- (800)
struction of his Honor was equivalent to saying that, upon the question of intent, the burden was on the defendant to satisfy the jury that he had not acted willfully. It is true the instruction related to a specific fact, to wit, the alleged adultery of the wife; but this circumstance, and all the testimony bearing upon it, was competent only on the question of intent. In no other view was the evidence material and relevant.

For the error in the charge, as indicated, in placing too heavy a burden on the defendant, we are of opinion that the cause must be submitted to another jury, and it is so ordered.

New trial.

CLARK, C.J. dissenting: The defendant is indicted under C.S. 447, which provides: "If any husband shall willfully abandon his wife, without providing adequate support for such wife and the children which he may have gotten upon her, he shall be guilty of a misdemeanor." There is no proviso or exception in the statute.

The defendant testified that he had left his wife, and defiantly added that he had not contributed to her support, and does not intend to do so, nor to live with her. His contention is that though he has abandoned his wife and is not giving her any support — which are the acts which the statute makes a misdemeanor — he cannot be convicted unless his wife shall show beyond a reasonable doubt that he has no excuse for doing so, and that the burden is on her to show beyond a reasonable doubt that she has not committed adultery or done any other act which would justify him in procuring a divorce from her!

Such a proposition is not authorized by the statute, and cannot be sustained in reason or by precedent, save in an obiter expression in *S. v. Hopkins,* 130 N.C., at p. 649, and some cases based thereon.

If the wife has done anything which will justify releasing the defendant from the marriage, the burden is on him to bring such action, and by preponderance of proof to satisfy the jury of the truth of his allegations, and even that will not release him from the obligation under this statute to support his innocent children, for in *S. v. Kerby,* 110 N.C. 558, it is held that "the failure by the father to provide for the support of the children is as much of a violation of this statute as the failure to provide support for the wife." And while a divorce would release him from liability for her support, it would not relieve him of the moral and legal obligation to support his children.

The contention of the defendant that when notwithstanding he is proven, or admits (as in this case) that he has abandoned his wife and does not support her, that she is presumed beyond a reasonable doubt to be guilty of adultery or some other cause that
(801) will justify him in such conduct, and that the burden is upon her to show to the contrary beyond a reasonable doubt, if it were well founded would simply relieve him of the expense and burden of proof in proving her misconduct in an action to sever the marriage tie; and that if she fails to prove beyond a reasonable doubt that he is not entitled to a divorce he is discharged from such liability as fully as if there had been a divorce granted. This turns this proceeding practically into an action for divorce, but throws the burden of proof upon the wife.

The whole case, therefore, turns upon an inadvertent construction placed upon the word "wilful" in *S. v. Hopkins,* 130 N.C. 649, which says that *wilful* means "without a cause to justify him in doing so." This certainly cannot be sustained by anything in the statute, and is contrary to every definition of the word in all the dictionaries and is unjust, for it puts upon the woman the burden of

disproving everything that the plaintiff is required to prove in bringing an action for divorce. A reference to that case will show that it was as the judge said: "A remarkable case," but not in the sense that the writer of that opinion intended (which was by a divided Court), and was more a criticism of the trial judge than a decision of the case upon the merits as a matter of law. The statement therein that the trial judge had made the case "a trial of the wife for adultery" was the very thing which that opinion requires, for if followed it will make every trial for abandonment primarily a trial for divorce, the entire burden being thrown, contrary to law, upon the wife to disprove the charge of any and all conceivable misconduct.

The word *"wilful"* is defined in "Webster's International Dictionary" as "voluntary, intentional, purposely." In almost the same words is the definition given by the "Century," "Worcester," "Standard," "Funk & Wagnall," and all the other dictionaries. It is the simple adjective of the plain Anglo Saxon word "will," which all men understand, and which is not dependent upon whether an act is excusable or not. It is "wilful" if done purposely and intentionally. On reference to 4 Words & Phrases, in the multitude of cases defining the word "willful" set out in pages 1293-1310, there is no such definition given to the word "wilful" as meaning "without cause to justify him in so doing," as was held in *S. v. Hopkins, supra*, as to any case of abandonment, and only three or four cases use it as to other matters, and then only by reason of additional words which do not appear in our abandonment statute.

With that exception all the cases collected in Words & Phrases, *supra,* from all the states define the word "wilful" just as it is defined in all dictionaries — as an act done "intentionally," "by design," "with set purpose," etc. They all hold that wilful means "intentionally and not accidentally." And in some cases that it means "with deliberation or design, or knowingly," and (802) "not negligently"; that it means "purposely."

The obiter expression in *S. v. Hopkins, supra*, imported into the word "wilful" as "being without cause," a meaning that it has never borne in the courts or in the dictionaries, or in common parlance. This is in effect judicial legislation amending the statute to mean what the Legislature did not intend for it to mean. It creates a presumption unknown in the decisions of any court in any other state or country elsewhere, that when a man is charged with wilful failure to discharge his duty to support his wife and children, which he owes under the laws of God and man, beyond a reasonable doubt his wife has been guilty of adultery or some other grievous offense

that would justify him in leaving her — which is equivalent to turning the trial into an action of divorce for adultery, or any other ground, with the burden upon the wife and not upon the man. And that even in this case, though the defendant has admitted he has done the act which the statute makes a misdemeanor, the judge must tell the jury that they cannot find the defendant guilty unless the wife has proven beyond a reasonable doubt that she has not committed adultery or any other act that would justify him in leaving her and the children without support.

There are cases in which the statute uses other words in addition to the word "wilful," or sets up *provisos* which withdraw the case from the operation of the statute or makes an exception or a defense. In those cases it has been held that the burden of the defense is upon the defendant, but it need only be proven to the satisfaction of the jury, and not beyond a reasonable doubt, and that unless on the whole case the jury is satisfied beyond a reasonable doubt they should acquit.

Those precedents cannot in reason apply to this statute, which prescribes only two things to make the defendant guilty, and that is the wilful abandonment of his wife, without providing for her adequate support, and in this case both these facts were definitely admitted by the defendant. There is no proviso nor exception nor defense in this statute.

As long as the marriage relation exists the burden is upon the defendant to support his wife. He cannot, without procuring a divorce, decide in his own behalf, without judge or jury, that he is entitled to a divorce and walk off without making any provision for the support of his wife and children, and then when charged with the abandonment, which he admits, coolly throw upon his wife the burden of proving beyond a reasonable doubt that if he had sued for a divorce he would have been entitled to it. This is cruel injustice to wife and children, the most defenseless persons who ask justice at the hands of a court. It cannot be supported in reason. It has no foundation in the statute and derives no authority from the definition of the word "wilful" in any dictionary or in the courts of any other state than this.

(803) In reference to the offense of abandonment and nonsupport, the law is thus summed up in 21 Cyc. 1614: "The burden is on the State to prove every element of the offense; while the defendant bears the burden of proving his affirmative defenses. Any evidence which tends to prove or to disprove these matters is therefore admissible. The State must prove its case beyond

a reasonable doubt; but an affirmative defense may be established by a preponderance of the evidence."

S. v. Schweitzer, 57 Conn. 543; *S. c.,* 6 L.R.A. 128, is a case exactly in point. The Court said: "The defendant is charged with having unlawfully neglected and refused to support his wife. There was evidence tending to prove marriage, and the refusal to support was not denied. The burden of proof to show the unlawfulness of the neglect was upon the State as fully as to show the neglect itself. Ordinarily the conduct of married women is such that when any husband neglects or refuses to support his wife the law itself presumes such neglect to be unlawful. Having shown the marriage and the neglect to support, the attorney for the State could safely rest upon the presumption. The unlawfulness was deemed to be true *prima facie.* And when the defendant interposed a defense based upon such misconduct of his wife as made it lawful for him to refuse to support her, it was incumbent upon him to prove such misconduct as he set up, that is, her adultery, and to prove it, as before stated, by preponderance of evidence."

In the same case the Court lays down the universal doctrine as follows: "All authorities agree that the burden is upon the State to make out its accusation in a criminal case beyond all reasonable doubt. It seems to be agreed with substantially the same unanimity that when a defendant desires to set up a distinct defense, such as is above mentioned, he must bring it to the attention of the court. In other words, he must prove it. A fact controverted before any tribunal can hardly be said to be proved at all unless there is more evidence in its support than there is against it — that is, the defense must be proven by preponderance of the evidence." The charge in this case did not err in favor of the prosecution. The defendant cannot complain.

The court charged as follows: "There must both be an abandonment of the wife without providing adequate support, and such abandonment and failure to so provide must both be wilful — and by wilful is meant without just cause or excuse — wrongful, and unjustifiable. In this case, among other evidence the defendant has offered evidence tending to show that the wife was unfaithful, and that she communicated an infectious disease to him, and there was evidence in contradiction. You are the sole judges of this, and of all the evidence in this case, and its credibility and what weight you will give it." The jury found that the defense of the misconduct of the wife was untrue.

It is true that in the Connecticut statute the word "unlawfully" is used, but that distinction is against the defend- (804)

ant in this case, for in *S. v. Massey,* 97 N.C. 465, it is said: "The term *unlawfully* implies that an act is done, or not done, as the law allows or requires, while the term *wilfully* is "done knowingly and of stubborn purpose." In this case the act of abandonment and leaving the wife without provision was admitted by the defendant to have been done knowingly and of his stubborn purpose.

The defendant contends, however, that such burden to excuse himself does not devolve upon the defendant, but that upon all the evidence, if the jury are in doubt about it the defendant should be found not guilty, and relies upon the instance of an *alibi,* citing *S. v. Josey,* 64 N.C. 56, but the court put that defense of an alibi entirely upon the ground that it is incumbent upon the State to prove the identity of the defendant, and if upon the whole case and considering the evidence for the defendant there is a reasonable doubt whether the defendant was the person who committed the crime or not, he should be found not guilty.

Here there is no doubt as to the identity of the defendant or of his having left his wife without adequate support, and there is nothing in the statute in the nature of an exception which the State must disprove. When the defendant relies upon the alleged misconduct of his wife, the burden is upon him to prove the truth of the defense by reason of which he would take himself from under the statute. As the judge told the jury, it was not incumbent upon the defendant to prove such defense beyond a reasonable doubt, but merely to the satisfaction of the jury.

Where insanity is pleaded, the burden of proof is upon the defendant to establish such defense to the satisfaction of the jury. *S. v. Terry,* 173 N.C. 766; *S. v. Hancock,* 151 N.C. 699; *S. v Brandon,* 53 N.C. 468; *S. v. Starling,* 51 N.C. 366.

The defendant also relies upon the proposition that on an indictment for "the slander of an innocent woman" the burden is upon the State to prove the innocence of the woman, but the gist of the indictment in that case rests upon the prosecutrix being a virtuous woman, and this must of course be proven as an essential ingredient of the offense.

If an indictment were allowable simply for the "slander of a woman," then the truth of the charge might be pleaded in defense, and even then the burden would be upon the defendant to prove this to the satisfaction of the jury, but the statute authorizing an indictment only for the slander of "an innocent woman" makes her innocence an essential element of the crime, and the State undertakes that burden in instituting the proceeding.

The lawful power has not thought proper to make it indictable

to abandon an "innocent" wife without adequate support. It would be a great hardship, unauthorized by statute, to require the State to prove that the wife was virtuous and free of fault, (805) in every case where the husband has left her without adequate support. On the contrary, the offense guarded against by the statute is the abandonment by the husband, "wilfully," that is, "purposely," of his wife without adequate support for her and the children. Though the court has permitted him to exempt himself from the statute by showing that the wife has committed adultery, there is no such exception in the statute, and the court should permit him to avail himself of such defense only upon his alleging and proving it to the satisfaction of the jury. He cannot merely set up such defense and throw upon the State the burden of proving his wife is a virtuous woman.

The reasonable presumption is that if she is not virtuous he would avail himself of that fact by an action for divorce. It is for him to show any excuse for the intentional abandonment of his wife without adequate support.

To sustain the defendant's contention the court must necessarily hold it to be a *presumption of law* that when a wife has been abandoned by a husband, beyond a reasonable doubt she has been guilty of adultery, since it holds that the burden is upon the State to prove beyond a reasonable doubt that she is not guilty thereof. There is nothing in this statute which requires this to be proven. There is nothing in the statute which authorizes it.

The defendant relies upon *S. v. Hopkins,* 130 N.C. 647, in which case the learned judge was seeking to create the defense that if a wife has been guilty of adultery the husband should not be held liable for abandoning her. But in the absence of any such provision in the statute he endeavored in some way to annex this defense or excuse to the word "wilful," with which it had no connection. The statute attached "wilful" to the abandonment in contradistinction to instances in which the husband had separated himself from his wife otherwise than wilfully, as, for instance, where he might be incarcerated in an asylum for the insane. At most, if the proposition should be laid down that where the wife has been guilty of adultery it makes him excusable, the burden should be upon him to prove this as a defense. Even that cannot be sustained as to the children "which he may have gotten upon her," for the wife's misconduct will not justify his failure to provide support for them. *S. v. Kerby, supra.*

The rule as to the burden of proof to be deduced from the cases is this: "If the State's evidence, if true, shows a complete crime of

purposely and wilfully abandoning without providing adequate support for her, then the burden is upon the defendant to show matters and facts which will excuse his wilfully leaving his wife
(806) without adequate support as the law requires." *S. v. Wilbourne*, 87 N.C. 529, and *S. v. Connor*, 142 N.C. 700.

There is not only no requirement in the statute that the State must allege or prove the virtue of the wife, but there is not even a *proviso* withdrawing the husband from liability in case of the wife's misconduct. It is for the defendant to allege and prove it as a defense. When the State has shown, and here the defendant has admitted it, that his wife has been abandoned by him without support if he may withdraw himself from criminal liability therefor, he should show, if he can, that she has not been a virtuous woman since her marriage. This is a matter of defense, not a part of the offense, and the burden of proof is upon the defendant. This has been the uniform ruling of this Court, when there has been a *proviso* (and there is none here) which withdraws the defendant, upon a certain state of facts, from liability under the broad, general terms of the statute creating the offense. *S. v. Norman*, 13 N.C. 222; *S. v. Call*, 121 N.C. 649; *S. v. Welch*, 129 N.C. 580. A very similar case to this was *S. v. George*, 93 N.C. 570, "for abduction of a child," in which the Court held that the words of the proviso, "without the consent and against the will of the father," was not a part of the description of the offense, and must be proven by the defendant.

In an indictment for embezzlement, C.S. 4268, "not being an apprentice or other person under 16 years of age," must be charged, but the defendant must show that he is under 16, *S. v. Blackley*, 138 N.C. 622, and cases there cited. Under the former law, in prosecutions for retailing spirituous liquor, Rev. 3529, the bill must have charged that it was done "without license," but the burden was upon the defendant to show that he had license, *S. v. Emery*, 98 N.C. 668; *S. v. Smith*, 117 N.C. 809; *S. v. Holmes*, 120 N.C. 576, and a long line of authorities.

In an indictment for fornication and adultery, C.S. 4343, the bill must allege, "not being married to each other," but the burden is on the defendants to show that they are married as a matter of defense, *S. v. McDuffie*, 107 N.C. 888; *S. v. Peeples*, 108 N.C. 769; *S. v. Cutshall*, 109 N.C. 769.

In an indictment for entering upon land without license, C.S. 4305, though the bill must allege that the entry was "without license," the burden is on the defendant to prove license, *S. v. Glenn*, 118 N.C. 1194.

The statute under which the defendant is indicted does not re-

quire allegation or proof that the wife was a virtuous woman, nor is there any *proviso* withdrawing the husband from liability if the wife has committed adultery. It is solely a matter of excuse, which he must allege and prove, for there is no presumption of her guilt. In other states the courts hold that even when the statute, unlike ours, makes the chastity of the woman a part of the description of the offense of abduction, there is a presumption (807) in favor of female virtue, and hence, when the state has shown that the defendant has abducted or eloped with the wife of another man, the burden is on him to show that she was unchaste as a matter of defense. In the absence of proof, the courts elsewhere will not presume that a woman, who is shown to have been abducted, was unchaste. *Bradshaw v. People,* 153 Ill. 159; *Slocumb v. People,* 90 Ill. 281; *Griffin v. State,* 109 Tenn. 32; *People v. Brewer,* 27 N.C. Mich. 138; *Andre v. State,* 5 Iowa 389; *S. v. Higdon,* 32 Iowa 264.

The sole answer vouchsafed to all these settled precedents and principles is that the burden must be put upon the wife of proving beyond a reasonable doubt (before she can force her husband to support her and her children whom he admits he has left) that she has not been guilty of adultery or any other misconduct, because it is said in *S. v. Hopkins, supra,* that the word "wilful" meant not only what the statute said and the dictionaries hold, but it further means, in this particular matter, "without just cause," and, therefore, the burden is upon her to disprove that beyond all reasonable doubt.

When a precedent is so patently wrong and unjust to wives and children, and without warrant in any statute, or in any reason, it is creditable and proper to overrule it that it may no longer be a hindrance in executing the law and doing justice. It is true the Legislature has not interfered and told the Court that they had misconstrued the meaning of the word. That is a matter for the Court to correct, and it should do so now. The Legislature used the word "wilful" in the ordinary acceptation of the word, and as defined in all the dictionaries and in the decisions of all the courts, and there is nothing for the Legislature to amend. It used the word "wilful" and no other, and the Court should apply and use the settled meaning attached to that word. There is no proviso or defense which in the statute would withdraw the act of leaving the wife and children without support from the penalty provided by the statute.

There is no superstitious sanctity attaching to a precedent. It is proper that precedents should not be lightly changed or without sufficient cause. But they should not be adhered to when an opinion has clearly misconstrued a statute or is otherwise palpably erroneous.

This Court has never held that it was infallible, nor has any other Court. We have repeatedly overruled our own decisions, and a large pamphlet was issued some years ago containing a list of such cases, and a similar compilation now would be two or three times as large. The same is true of the U. S. Supreme Court, and all other courts. Men and nations may

> "Rise on stepping stones of their dead selves
> To higher things."

(808) Courts can only maintain their authority by correcting their errors to accord with justice, and the advance and progress of each age. They should slough off that which is obsolete and correct whatever is erroneous or contrary to the enlightenment and sense of justice of the age, and to the spirit of new legislation.

While the courts are properly slow to change decisions unless justice requires it (as it so loudly does in this case), there are two classes of cases in which there should be close adherence to decisions:

1. When a decision has become a rule of property. In such case the correction should be left to legislation, which speaks prospectively.

2. As to matters of practice, which, being founded not on principle, but are more or less arbitrary rules. These should be left till there is a change either in the rules of the Court or by legislation. But this case does not involve a rule of property, nor is it merely a question of practice not involving a denial of justice or discrimination.

Even in such an important matter as *"Hoke v. Henderson,"* 15 N.C. 1, which was decided by one of the ablest courts we ever had, and which was affirmed no less than 62 times, it was properly and justly overruled by this Court in *Mial v. Ellington,* 134 N.C. 136, notwithstanding it had been held for law for more than 70 years. The Court felt itself strong enough, and under a duty, to correct that erroneous decision. The courts do not claim infallibility. This Court not infrequently overrules the court below, and in turn, on writs of error our decisions have been overruled by the U. S. Supreme Court. That Court has corrected its own errors to the extent that it has overruled a large number of its own decisions. Some years ago it held invalid a statute of the State of New York, which protected working men from working more than 10 hours per day in a temperature of more than 120 degrees. Since then that Court has advanced and has held valid the "Adamson Law," which pro-

tects working men in the open air from more than 8 hours labor a day. The Court advanced with the age. It has overruled many other important cases. And when it has not done so, the public have done so by constitutional amendments, notably, by the XI, the XVI, and other amendments.

In this State two of our most eminent judges held, in *S. v. Black,* 60 N.C. 262, and *S. v. Rhodes,* 61 N.C. 455, speaking for unanimous courts, that a husband had a right to thrash his wife, even without any provocation, with the restriction only that he could not permanently injure her. In less than ten years thereafter, in *S. v. Oliver,* 70 N.C. 60, while both those judges were still on the bench and counsel, as shown by his brief printed in the report of the case, relied upon those (then) recent decisions, Judge Settle, speaking for a unanimous Court, curtly said (with their approval), without deigning to argue the question: *"We have advanced from that barbarism."*

In *S. v. Edens,* 95 N.C. 696 (as late as 1886), the Court reverted to the former ruling that a husband was not liable (809) for beating his wife "unless the battery is so great and excessive as to put life and limb in peril or permanent injury is inflicted," and for this reason deduced the ruling that where the husband in that case had married a young wife, who refused to live in the same house with his mistress, but left him and thereupon he circulated the vilest slanders against her, without any foundation in fact, and held that he was not liable under the statute which made it indictable to "attempt to wantonly and maliciously injure and destroy the reputation of an innocent and virtuous woman," on the ground that the slanderer was her husband, though this was an aggravation and not a defense. *This* barbarism was also overruled, *S. v. Fulton,* 149 N.C. 485.

In *S. v. Hopkins, supra,* the decision is even more barbarous, if possible, holding, without authority in any statute or in reason, and by a *dictum* originating in that case (which gave to the word "wilful" a meaning which it does not have in the dictionaries, or in any other Court) that a wife, asking for legal support, is presumed to be guilty of adultery or other misconduct, and that "beyond a reasonable doubt" she must prove that she is not. Surely it is time that we had advanced "from *that* barbarism" also, and should place ourselves in line with all the other courts, which hold that there is no presumption against the virtue of women, just as there is none against the honesty of men, and that he who asserts the contrary must prove it, and when it is set up as a defense it must be shown by the defendant and at least to the satisfaction of the jury.

No presumption that a wife has committed adultery, and that she must disprove this beyond a reasonable doubt, can arise merely because she asks that the courts make her husband give her and her children the support which the law requires him to give, and when he admits (as in this case), or is proven, to have left them without such support.

Cited: *McDearman v. Morris*, 183 N.C. 78; *S. v. Singleton*, 183 N.C. 739; *S. v. Bell*, 184 N.C. 718; *S. v. Steen*, 185 N.C. 782; *Byrd v. Hicks*, 186 N.C. 244; *Tobacco Growers Asso. v. Moss*, 187 N.C. 422; *Adams v. Caudle*, 188 N.C. 185; *Speas v. Bank*, 188 N.C. 527; *S. v. Hammond*, 188 N.C. 607; *S. v. Redditt*, 189 N.C. 178; *S. v. Simmerson*, 191 N.C. 616; *S. v. Johnson*, 194 N.C. 380; *May v. Grove*, 195 N.C. 237; *S. v. Gibson*, 196 N.C. 394; *S. v. Roberts*, 197 N.C. 663; *Coe v. Loan Co.*, 197 N.C. 691; *S. v. Crawford*, 198 N.C. 524; *West v. West*, 199 N.C. 15; *In re Will of Brown*, 200 N.C. 441; *S. v. Lancaster*, 202 N.C. 210; *S. v. Rawls*, 202 N.C. 399; *S. v. Shipman*, 202 N.C. 540; *Hubbard v. R. R.*, 203 N.C. 679; *In re Hege*, 205 N.C. 630; *S. v. Calhoon*, 206 N.C. 393; *S. v. Cook*, 207 N.C. 262; *S. v. Hinson*, 209 N.C. 190; *S. v. Carver*, 213 N.C. 152; *S. v. Bracy*, 215 N.C. 258; *S. v. Dickens*, 215 N.C. 305; *Fisher v. Jackson*, 216 N.C. 304; *Templeton v. Kelley*, 217 N.C. 166; *Coach Co. v. Lee*, 218 N.C. 326; *S. v. Starnes*, 220 N.C. 386; *S. v. McMahon*, 224 N.C. 477; *S. v. Carson*, 228 N.C. 153; *S. v. Campo*, 233 N.C. 81; *S. v. Clark*, 234 N.C. 194; *S. v. Cash*, 234 N.C. 293; *Tippite v. R. R.*, 234 N.C. 644; *In re Adoption of Hoose*, 243 N.C. 594; *S. v. Bryant*, 245 N.C. 648; *Watt v. Crew*, 261 N.C. 148; *S. v. Holloway*, 262 N.C. 755.

STATE v. THOMAS K. MEARES.

(Filed 19 October, 1921.)

1. Seduction—Promise of Marriage—Supporting Evidence—Statutes.

Evidence that the defendant, indicted for seduction under the promise of marriage, was engaged to the prosecutrix at the time of the alleged offense, and so held himself out and as such had gone with her, is sufficient supporting evidence of the testimony of the prosecutrix that he had seduced her under promise of marriage to be submitted to the jury.

2. Same—Inferences for Jury.

The acts and conduct of the defendant, tried under the statute for seducing the prosecutrix under promise of marriage, may be sufficient for

the jury to infer the promise independently of the testimony of the prosecutrix thereto, and are *held* sufficient under the whole evidence in this case.

3. Same—Instructions.

Where, under the evidence, the court has instructed the jury that the State must show the guilt of the defendant, tried for seduction under a breach of promise of marriage, beyond a reasonable doubt, and properly upon the other elements of the offense, a further charge, upon the evidence, that the promise must be either express or implied, is not erroneous, taken in connection with his charge that the promise must have been the sole inducement to the act without "other motive."

4. Trials—Remarks of Counsel—Seduction—Improper Remarks—Appeal and Error.

Where an attorney has been arguing to the jury for the conviction of the defendant on trial for seduction under a breach of promise of marriage, in conformity with the evidence in the case, he is within his rights in generalizing upon the enormity of the offense, and the necessity of protecting the virtue of our women from designs and practices of this character upon them.

WALKER and STACY, JJ., dissenting.

APPEAL by defendant from *Kerr, J.*, at April Term, 1921, of BRUNSWICK. (810)

This was an indictment for the seduction of an innocent and virtuous woman, and from the verdict and judgment the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

John D. Bellamy & Sons, C. Ed. Taylor, and Lorenzo Medlin for defendant.

CLARK, C.J. This appeal presents, we think, but two exceptions that require consideration.

The court, after instructing the jury fully and correctly as to the nature of the offense with which the defendant was charged, and explaining to the jury the bill of indictment and instructed them as to the contentions of both the State and the defendant, and that before the defendant could be convicted the State must prove beyond a reasonable doubt that: (1) The prosecuting witness was seduced by the defendant; and (2) that at the time of her seduction she was then and before that time had been an innocent and virtuous woman, adding "that the State must also prove beyond a reasonable doubt that the seduction by the defendant was under a promise of marri-

age, either express or implied by the acts and conduct of
(811) the defendant." And said further, "And if the State had failed to satisfy the jury beyond a reasonable doubt of either of these essential facts, then the jury should acquit the defendant."

The court also told the jury that they could not convict the defendant upon the unsupported testimony of the prosecutrix, and further charged the jury: "And so, gentlemen of the jury, are you satisfied from the evidence that the defendant seduced the prosecutrix, and at the time she was an innocent and virtuous woman, and that the seduction was induced by a *promise* upon the part of the defendant to marry her, either expressed to her or implied by his acts, and his relationship to her? These facts gentlemen of the jury, are to be determined by you from the evidence, and if you are so satisfied, then you should find him guilty. If you are not so satisfied, gentlemen of the jury, then you should return the verdict of not guilty. If the prosecuting witness willingly surrendered her chastity, prompted by her own lustful passion, or *by any other motive* than that produced by a promise of marriage, then the court charges you that the defendant would not be guilty, and you should acquit him."

The court further charged the jury: "The burden of proof is upon the State of North Carolina to satisfy you beyond a reasonable doubt of the guilt of the defendant, and it must satisfy you of the criminal act, and it must satisfy you beyond a reasonable doubt that the prosecuting witness, Etta Beck, was seduced by the defendant; that at the time of her seduction she was an innocent and virtuous woman, and that the seduction was made under *a promise* of marriage, and unless the State has so satisfied you, you should return a verdict of not guilty. If the State has so satisfied you beyond a reasonable doubt of the three essential elements which, as I have explained to you, constitute the crime, then you should return a verdict of guilty."

The jury found that there was no reasonable doubt that the defendant was guilty. The charge was very full and complete and carefully expressed. The defendant excepts to the paragraphs above set out in quotation, because the court charged that the promise must be either "expressed to her or implied by his acts and his relationship to her." But it will be seen by reading all the charge bearing upon that point that the court throughout instructed the jury that they could not convict unless they were satisfied beyond a doubt of the three essential matters: (1) that the defendant seduced Etta Beck; (2) that she was and had been an innocent and virtuous woman; and that (3) the seduction was procured upon a promise by

the defendant to marry her, but that "if the prosecuting witness willingly surrendered her chastity, prompted by her own lustful passion, *or for any other motive than that produced by promise of marriage,* then the court charges you that the defendant would be not guilty, and you should acquit him."

The evidence on the part of the State, if believed by the jury, was amply sufficient to satisfy them beyond a reason- (812) able doubt that he seduction was procured by such promise of marriage. The prosecuting witness testified unequivocally to the promise of marriage, and that it was the sole inducement which procured her seduction; that he had been going with her since she was 16 years old, and that they were engaged then; that in 1918 he joined the Navy, and while in service of the Government she received letters from him every week; that on his return he came to see her and renewed his promise of marriage, and that she told her mother that they were engaged, and her mother and sister both testified that the defendant told them that he was engaged to marry the prosecutrix. The court properly charged that they could not convict the defendant unless they believed the corroborating evidence.

The prosecuting witness also testified that when she discovered that she was to become a mother she told the defendant, who said that it would be all right; that he would marry her the next week; this promise he put off from time to time, and finally left in October and went to Mullins, S. C., but wrote her that he would meet her in the city of Wilmington at a time named, but did not do so; that while in South Carolina he wrote and asked her to destroy all his letters that she had received from him. It was also in evidence that while in Mullins he wrote to a witness in Wilmington, telling him to inform the prosecutrix that he was in Galveston, Texas, and not to let her know where he was. The evidence was very full and complete and its credibility was for the jury.

It will be seen that the court instructed the jury fully and completely that unless they were satisfied beyond a reasonable doubt that the sole inducement to the seduction was the promise of marriage, and "induced by no other motive," to acquit. The words "promise, expressed or implied by the acts and conduct of the defendant," which is the sole ground of this exception, would be harmless as there was evidence, corroborated by the mother and sister, of the promise of marriage, but if it were otherwise, the language of the judge, taken with the repeated instruction that they must be satisfied beyond a reasonable doubt that the seduction was procured "by the inducement of a promise of marriage and no other motive," could have no other meaning than that there was an expressed prom-

ise or such acts and conduct on the part of the defendant that was unequivocal and would satisfy the jury beyond a reasonable doubt that such acts and conduct was the full equivalent of an express promise, and not a mere inference which the prosecuting witness might draw. "Acts speak louder than words," and the conduct of the defendant which might amount to an implied promise must have been such under the charge of the judge that it would convince the jury beyond a reasonable doubt that such promise was the sole inducement which procured the seduction. The jury were not
(813) misled by the charge of the judge, which was explicit that there must have been a "promise," and that, whether expressed or implied by his acts, such promise was the sole inducement which caused the seduction.

In *S. v. Ring,* 142 N.C. 599, it was said by Walker, J.: "It is not necessary to a conviction under this law that the State should show the defendant directly and expressly promised the prosecutrix to marry her if she would submit to his embraces. It is quite sufficient if the jury from the evidence can fairly infer that the seduction was accomplished by reason of the promise, giving to the defendant the benefit of any reasonable doubt."

In *S. v. Raynor,* 145 N.C. 475, it is said, quoting *S. v. Ring, supra:* "Such conduct is the legal equivalent of an express promise to marry if she would submit to his lecherous solicitations, provides the jury found, as they did, that it had the effect of alluring her from the path of virtue."

In *S. v. Malonee,* 154 N.C. 203, it is again said by Walker, J.: "We said in *S. v. Ring, supra,* that it is sufficient if the jury can fairly infer from the evidence that the seduction was accomplished by reason of the promise of marriage, giving to the defendant the benefit of any reasonable doubt, and that no set form of words is necessary to show the causal relation between the promise and the act of sexual intercourse."

In *S. v. Fulcher,* 176 N.C. 727, it is said: "As to the seduction by reason of the promise, the defendant admitted the engagement to other witnesses, and his assiduous attentions to the girl at the time when she alleged they committed the act, which with other circumstances already related, tended to support her testimony that he had promised to marry her, and she was thereby persuaded, after hesitation, to yield to his wishes. The woman could not easily be supported in any other way, for the man is not apt to admit his own guilt, though there are witnesses of it. *S. v. Pace,* 159 N.C. 462; *S. v. Whitley,* 141 N.C. 823; *S. v. Kincaid,* 142 N.C. 657; *S. v. Moody,* 172 N.C. 967. It is said in Underhill on Cr. Evidence, sec. 388: 'The conduct and

relations of the parties after, as well as before, the date of the alleged seduction may be shown, such evidence being relevant to prove that consent was obtained by promise and inducements, and of what they consisted.' This is cited with approval in *S. v. Moody,* 172 N.C. 971."

In *S. v. Cooke,* 176 N.C. 735, it was said: "There was unqualified evidence of the promise of marriage, though in *S. v. Ring,* 142 N.C. 596, it was held that it was sufficient if this could be reasonably inferred from the evidence; there was evidence of the good character of the girl, which was held sufficient supporting testimony in *S. v. Horton,* 100 N.C. 448, and *S. v. Malonee,* 154 N.C. 202; there was evidence that she told her mother and father of the engagement and the conduct of the defendant, which was held sufficient as supporting testimony in *S. v. Moody,* 172 N.C. 967, and (814) numerous cases there cited by Walker, J., from this and other states. The testimony of the mother that the daughter told her of her engagement and of the conduct of the defendant was also held sufficient in *S. v. Whitley,* 141 N.C. 823, and *S. v. Kincaid,* 142 N.C. 657."

In 24 R.C.L., p. 746, the law is thus summed up as to the promise of marriage: "In many States, though not in all, seduction is punishable as a crime only when accomplished under a promise of marriage. When such promise is a necessary element of the crime, it need not be shown that the defendant directly and expressly promised the prosecutrix to marry her if she would submit to his embraces, and it is sufficient if the jury, under the evidence, can fairly infer that the seduction was accomplished by reason of the promise, giving to the defendant the benefit of any reasonable doubt. But it must appear that the prosecutrix yielded her virtue in consequence of such promise, and not to gratify her curiosity or lustful passion."

The learned judge charged exactly in accord with the law as stated in the above extract, and in our own cases above quoted.

One of the counsel for the prosecution in closing his speech to the jury said: "The time has come when the decent people in North Carolina should stand up and defend the virtue and integrity of the fireside and home against the vicious assaults of human vultures and wolves." He was interrupted by one of the counsel for the defendant, who asked the court to order the counsel to desist. The court refused to stop counsel in his argument, who then said: "Regardless of what the counsel says, the Supreme Court has said, I propose to defend the womanhood of Brunswick County and the virtue of the

prosecutrix in this case." The court remarked that the counsel for the State was within his rights, and the defendant excepted.

We cannot see that the defendant was in anywise prejudiced by the statement of counsel for the prosecution. He was endeavoring to convince the jury that the defendant was guilty of the crime charged. In so arguing upon the evidence he was strictly within his rights, and in his generalization that those who committed such offenses were "human vultures and wolves," he certainly was not doing any prejudice to the defendant that would compare with his argument that upon the facts the jury should be satisfied beyond a reasonable doubt that the defendant had committed that offense. It was to decide that question that the jury had been impaneled and that this trial was had.

It is only when counsel goes beyond the evidence in the case, and makes charges against the defendant which are not a reasonable and just inference from the evidence, that the Court will grant a new trial if the presiding judge does not stop counsel and in-
(815) struct the jury to disregard what he said. *S. v. Surles*, 117 N.C. 724.

The prosecution could and did claim this case was an effort "on behalf of the decent people of the State to stand up and defend the virtue and integrity of the fireside," and the counsel was arguing that upon the evidence the defendant had been guilty of that offense. This is what the trial was to determine, and counsel had the right to argue that the State had done so, according to the evidence. It was not error, therefore, for the learned judge to hold that the counsel was within his rights in stating that this offense was a most heinous one, and that the public was interested in its being punished. This was a generalization, indeed a truism, to which every one must agree. The statute makes it a felony. This Court has said: "There is no crime more despicable than this. It is committed in secret, by lust and lying, by deception and the stronger taking advantage of the weaker." *S. v. Cooke*, 176 N.C. 735. So far from the remark being prejudicial, it put the jury on guard as to the importance of the offense, and was the statement of a legal and moral truth.

Upon consideration of all the exceptions, we find

No error.

WALKER and STACY, JJ., dissent.

STATE v. JOHN HAYWOOD.

(Filed 19 October, 1921.)

1. **Spirituous Liquor—Intoxicating Liquor — Unlawfully Keeping Liquor for Sale—Evidence—Indictment—Counts.**

Where the trial is upon an indictment with two counts, one for the unlawful sale of spirituous liquors, and the other for unlawfully keeping it for sale, evidence of the sale to various persons not named in the bill is competent upon the second count.

2. **Appeal and Error—Evidence—Verdict.**

Held, in this action for violating the prohibition law, an exception of defendant relating to the credibility of defendant's witness is untenable, and could not have any possible relation to the verdict of the jury; or were it otherwise, it appears that he received the full benefit hereof in the course of the trial, and this is sufficient.

3. **Witness—General Reputation—Evidence—Spirituous Liquors—Intoxicating Liquors.**

A defendant in an action for violating the prohibition law may not show the general reputation of a witness who has testified in his favor, under contradictory evidence, by another witness who says he does not know it.

4. **Spirituous Liquor — Intoxicating Liquor — Sales Through Another — Evidence.**

Upon the count in the indictment that the defendant unlawfully kept spirituous liquor for sale, evidence that it was sold by defendant to a certain person through another who went for it and paid the price is competent thereon, though it may not be upon a separate count alleging the unlawful selling of spirituous liquor by the defendant.

5. **Appeal and Error—Objections and Exceptions—Change of Ground of Exception—Different Theories.**

The appellant may not, on appeal, change the ground of his exception taken in the Superior Court, or change his theory of the case in the Supreme Court.

APPEAL by defendant from *Kerr, J.*, at the August Term, 1921, of CUMBERLAND. (816)

This is a criminal action, in which the defendant was charged, in two counts of the indictment, with, first, unlawfully selling liquor to A. T. Cooper, and second, with unlawfully keeping liquor for sale, contrary to the statutes in such cases made and provided. He was convicted on the first two counts for selling and for having liquor for sale, and from the judgment he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

E. G. Davis and Murray Allen for defendant.

WALKER, J., after stating the case: There was ample evidence to support the conviction of the defendant, who reserved several exceptions to the rulings of the court upon the evidence.

The first four exceptions were directed to sales made to other persons than A. T. Cooper, the person named in the first count of the indictment, as the particular one to whom the sale was made. This testimony was competent and relevant as applicable to the second count, which charges the keeping of liquor for sale. The allegation therein could hardly be proven in any other way. Sales indiscriminately to any and every person who would buy is evidence, of course, of keeping liquor for sale. The defendant was thereby doing just what any man who is engaged in the forbidden act of keeping liquor for sale would do. He was the proprietor of a "grog shop," one of the great evils intended to be prohibited by the statute as demoralizing to the community and the prolific source of crime, and many other evils.

The testimony offered by defendant, and the subject of his exceptions numbers five and six, were clearly irrelevant. The verdict of the jury could have no possible relation to the credibility of the witness, but if so, the defendant got the benefit of it, as
(817) the witness testified that the verdict was contrary to his testimony in the case.

Exceptions, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, and 19 were to statements by witnesses of prior declarations of another witness while on the stand, which were corroborative of that witness, and was so restricted by the court, or concerning sales of liquor to one Godwin, and this evidence was confined in its application to the second count as to keeping liquor for sale. It was manifestly competent, and very relevant for that purpose.

The exception No. 20 is entirely untenable. Irvin Simmons, a witness for the defendant, had testified substantially in contradiction of the State's witness, A. T. Cooper, as to the purchase of liquor by him from the defendant, and the latter attempted to support him by proving his good character, but this he failed in law to do, as the witness H. M. McKethan, whom he offered for this purpose, did not know Simmons' general reputation, and his Honor correctly held that he had not, therefore, been qualified to testify about it. *S. v. Perkins*, 66 N.C. 126; *S. v. Gee*, 92 N.C. 756.

It can make no difference whether the defendant sold the liquor directly to Cooper, or indirectly through an agent, or "go-between." The one act is just as bad as the other morally and legally. It comes most certainly within the prohibition of the statute. When Cooper stated, "I had another man to go and get it," he was testifying apparently to a fact within his own knowledge — a thing done by him-

self, and it was competent for him to do so. It was just as illegal for the defendant to sell to the witness's agent for him as to sell directly to the witness. *S. v. Burchfield,* 149 N.C. 537. But the specified ground of objection, upon his motion to strike out the answer above quoted, was that testimony of other sales of liquor by defendant was incompetent, but this, as we have said, is not the law so far as the second count of the indictment is concerned. It is contended by the defendant that this was evidence of a distinct substantive offense, and he cites *S. v. Shuford,* 69 N.C. 486, as an authority directly in point, but it does not apply, as the evidence was not offered on the first count, for the sale, but on the second count, charging that he kept liquor for sale, and as to that count it was competent and admissible. An appellant is confined to the ground of objection to evidence which he first stated. He must abide in the Court of appeal by the ground of objection which was assigned below at the trial and not shift his ground, or change his theory of the case. *Bank v. Pack,* 178 N.C. 388, and cases cited at p. 390. This point of law decided in that case is not stated in the official headnote.

The testimony of Lacy Godwin was competent beyond any question. He was testifying that his father had sent him to defendant to buy liquor for him, and that he went and actually bought the liquor for his father. One of his answers was: "I went (818) for the liquor twice at my father's request. I never bought it for myself, but for my father." He then stated, "It worked out that I paid him for it, and I did give him money — five dollars — and I got a quart of whiskey." Learned counsel for the defendant contended in his brief that this testimony was prejudicial, and it was, but, nevertheless, was competent.

This is a case where the statute was palpably violated, in any view of the facts, and notwithstanding the very able and ingenious argument of the defendant's counsel, Mr. Davis, we are compelled to declare that no error was committed at the trial.

No error.

Cited: *S. v. Steen,* 185 N.C. 778; *S. v. Colson,* 193 N.C. 239; *S. v. Smoak,* 213 N.C. 94; *S. v. McClain,* 240 N.C. 175.

STATE v. J. M. JENKINS.

(Filed 26 October, 1921.)

1. Criminal Law—Newly Discovered Evidence—New Trial.

The court will not grant a new trial after verdict for newly discovered evidence in a criminal case.

2. Criminal Law—Recent Possession—Trials — Evidence — Questions for Jury—Statutes.

Where the prosecutor's goods have been stolen two days before, they are found in the defendant's possession, with conflicting evidence upon the question of his having stolen them, the case can only be determined by the jury, and the defendant's motion to dismiss, C.S. 4643, must be denied.

3. Criminal Law—Instructions—Newly Discovered Evidence—Presumptions—Appeal and Error.

Where the defendant was being tried for larceny, and the question of "recent possession" had arisen, a mere technical error in the use of an expression as to the burden being upon the defendant of explaining his possession of the stolen articles will not be held reversible error when the court placed upon the State the burden of showing the defendant's guilt beyond a reasonable doubt, and emphasized this part of the charge.

APPEAL by defendant from *Cranmer, J.*, at the April Term, 1921, of NORTHAMPTON.

The following is the bill of indictment: "The jurors for the State upon their oath present, that J. M. Jenkins, late of the county of Northampton, on 5 March, 1921, with force and arms, in said county a lot of bacon meat of the value of $25, the goods and chattels of G. B. Warren then and there being found, then and there did feloniously steal, take and carry away, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

"And the jurors aforesaid, upon their oath aforesaid,
(819) do further present, that on the day and year aforesaid, in said county, the said J. M. Jenkins a lot of bacon meat of the value of $25, the goods and chattels of G. B. Warren, then and there being found, feloniously did have and receive, well knowing the same to have been feloniously stolen, taken and carried away, contrary to the statute in such case made and provided, and against the peace and dignity of the State."

The defendant upon conviction appealed to this Court.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Stanley Winborne, Lloyd J. Lawrence, and Brown Shepherd for defendant.

ADAMS, J. When the case was called for argument the defendant's counsel filed a motion for a new trial upon the ground of newly discovered evidence. The motion must be denied. In numerous decisions this Court has held that a new trial will not be awarded in a criminal action for newly discovered evidence; and in *S. v. Lilliston*, 141 N.C. 857, the Chief Justice said: "So the point is settled, if the uniform practice of this Court and its repeated and uniform decisions to the same effect can settle anything." *S. v. Register*, 133 N.C. 747; *S. v. Turner*, 143 N.C. 641; *S. v. Ice Co.*, 166 N.C. 403.

The defendant in apt time made a motion to dismiss the action as in case of nonsuit. C.S. 4643. Recapitulation of the testimony would serve no useful purpose, for it is plain that the controversy could be determined only by the verdict of the jury. At the trial there was evidence tending to show that on the night of 5 March, some one had broken into the prosecutor's smokehouse and had stolen six hams and six shoulders, which, on 7 March, were found in possession of the defendant; also evidence of various other circumstances tending to connect the defendant with the offense charged. The defendant testified, and introduced several witnesses in his behalf. An issue of fact was thus joined between the State and the defendant, and the court properly submitted to the jury the question of the defendant's guilt. In *S. v. Carlson*, 171 N.C. 823, it is said: "The motion to nonsuit requires that we should ascertain merely whether there is evidence to sustain the allegations in the indictment. The same rule applies as in civil cases, and the evidence must receive the most favorable construction in favor of the State for the purpose of determining its legal sufficiency to convict, leaving its weight to be passed upon by the jury."

There is an exception to the charge. The record contains this statement: "The court further charged the jury that one found in possession of stolen property recently after the commission of the theft is presumed to be the thief, but that this is a (820) presumption of fact and not of law, and is weak or strong according to the facts and circumstances of the case; that one found in possession of goods recently stolen was called upon to account for or explain his possession by the evidence in the case and circumstances, but that this presumption arising from the possession of goods recently stolen could be rebutted and explained, and the burden was on the defendant to show to the satisfaction of the jury, if they found from the evidence beyond a reasonable doubt that the defendant was in the possession of the stolen meat, how he came into its possession; but he would not have to show it beyond a reasonable doubt nor by a preponderance of evidence, but merely to the satisfaction of the jury; and if the evidence in the case in explanation of

such possession, or any evidence or circumstances, raised a reasonable doubt in the minds of the jury as to the guilt of the defendant that they would return a verdict of not guilty; and the court further charged the jury that before they could consider any presumption arising from what it called recent possession the jury would have to be satisfied from the evidence beyond a reasonable doubt that the meat found in the smokehouse of the defendant was the meat in question of the prosecuting witness, and that it had been stolen.

"The court further charged the jury that the defendant was presumed to be innocent, and that this presumption of innocence continued throughout the entire case, and that before they could convict the defendant they must be satisfied from the evidence beyond a reasonable doubt of his guilt, and that if they were so satisfied they would find him guilty, but if they were not so satisfied they should return a verdict of not guilty."

The court instructed the jury in effect that the prosecution was begun with a presumption of innocence in favor of the defendant, and throughout the trial the burden remained with the State to satisfy the jury beyond a reasonable doubt that the defendant was guilty of the offense charged in the indictment. That portion of the charge which imposed upon the defendant the burden of explaining possession of the stolen property to the satisfaction of the jury, considered alone, was technically incorrect. If, after they had considered all the evidence, the jury entertained a reasonable doubt of his guilt, the defendant was entitled to an acquittal; and such reasonable doubt may have existed although the jury may not have been satisfied with the defendant's particular explanation. However, by considering the charge in its entirety, "in the connected way in which it was given" (*S. v. Exum,* 138 N.C. 599), we observe that his Honor, after saying that the burden was on the State to satisfy the jury beyond a reasonable doubt of the defendant's guilt, gave the additional instruction that if the evidence in explanation of the defendant's possession of the property, or any evidence or circum-
(821) stances, raised a reasonable doubt as to the guilt of the defendant, the verdict should be not guilty. Upon consideration of the record we find no reversible error.

No error.

Cited: S. v. Whisnant, 185 N.C. 611; *S. v. Williams,* 185 N.C. 664; *S. v. Potter,* 185 N.C. 743; *S. v. Hartsfield,* 188 N.C. 358; *Lee v. Ins. Co.,* 188 N.C. 543; *S. v. Judd,* 188 N.C. 831; *S. v. Griffin,* 190 N.C. 135; *Milling Co. v. Hwy. Comm.,* 190 N.C. 697; *S. v. Flood,*

190 N.C. 848; *S. v. Jackson*, 199 N.C. 326; *S. v. Casey*, 201 N.C. 625; *S. v. Mozingo*, 207 N.C. 249.

STATE v. HILLIARD BYNUM.

(Filed 26 October, 1921.)

Appeal and Error — Weight of Evidence — Objections and Exceptions — Court's Discretion.

Where the indictment, verdict, and judgment appealed from are formally correct, objection that the trial court should have set aside the verdict as contrary to the weight of the evidence, is to the exercise of his sound discretion, and not reviewable.

APPEAL by defendant from *Daniels, J.*, at September Term, 1921, of ORANGE.

Indictment for perjury. Defendant was convicted, and from sentence on the roads of Orange County for four months, appealed to this Court, assigning for error:

1. For that his Honor declined to set aside the verdict as contrary to the weight of the evidence.
2. For that his Honor entered judgment on the verdict.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

R. O. Everett for defendant.

HOKE, J. The bill of indictment, the verdict, and judgment are formally correct, and the only exception to the validity of the trial being on a matter in the sound discretion of the court, we must affirm the judgment. The defendant was without the benefit of counsel in the court below, and for the seasons stated, we are not at liberty to consider the positions so forcibly urged in his behalf in the argument here.

On the record, while it was entirely proper to submit the case to the jury, we find very little in the testimony to justify a conviction of willful and corrupt perjury, and we deem it no impropriety to suggest that the facts as now presented to us would seem to justify a petition for executive clemency. We are confirmed in the view by the further fact that the careful, considerate, and able judge who tried the cause has imposed the minimum punishment allowed by the law for an offense of this kind.

No error.

(822)

STATE v. HENRY DUDLEY.

(Filed 26 October, 1921.)

1. **Constitutional Law—Legislature—Delegated Authority — Administrative Board—Municipal Corporations—Criminal Law.**

While the Legislature may not delegate to a duly legalized administrative board power to make rules and regulations and prescribe a criminal punishment for their violation, it has the power to delegate to such a board the power to establish the pertinent facts or conditions upon the violation of which the statute itself imposes the punishment; and the principles upon which this power to delegate may not be exercised only in case of municipal corporations when in the exercise of governmental functions on local matters, have no application.

2. **Same—Fish Commission.**

It is within the power of the Legislature to create a board of fish commissioners and delegate to it the authority to make rules and regulations as to the time, manner, and place of fishing, in the various waters of this State, and make it an offense punishable as a misdemeanor for the violation of such regulations, when well defined and sufficiently advertised and the offense established according to law.

3. **Indictment—Form—Fish Commission—Statutes.**

Where the indictment sufficiently sets forth the facts under which the defendant is charged with the offense of violating the regulations of the board of fish commissioners, passed at various times, contrary to the form thereof, it is sufficient to sustain a conviction, though in better form had it added "contrary to the statute in such case made and provided," but this is not required under the provisions of C.S. 4625.

4. **Fish Commission—Jurisdiction—"Waters of the State"—Specific Localities—Statutes—Interpretation.**

The jurisdiction of the board of fish commissioners over "the several waters of the State" is not confined to those specifically mentioned in C.S. 1878, for they are only mentioned because the Legislature thought it desirable or necessary to make special provision for those places.

5. **Fish Commission—Jurisdiction — Escallops — Words and Phrases — Statutes.**

The taking of escallops from the "several waters of the State" expressly comes within the authority conferred by statute on the board of fish commissioners, and is also likewise included in the expression "mollusca," being "of the species pectinidae." C.S. 1865 to 2078.

APPEAL by defendant from *Horton, J.*, at March Term, 1921, of CARTERET.

Criminal action. Defendant was convicted under the following bill of indictment:

"The jurors for the State upon their oath present: That Henry Dudley, late of the county of Carteret, on 28 December, 1920, did

willfully, unlawfully and feloniously take escallops with drags or scrapes in that territory in Bogue Sound lying between Spooner's Point and Brant Island, the same being that ter- (823) ritory designated as unlawful or forbidden grounds, in violation of orders, rules, regulations, etc., of the Fisheries Commission Board at meeting held 7 October, 1919, and known as Regulation No. 13, contrary to the form of regulations of said commission board and against the peace and dignity of the State. And the jurors for the State upon their oaths aforesaid do further present: did willfully, unlawfully and feloniously violate Regulation 5 of the orders, rules and regulations of the Fisheries Commission Board, passed at various meetings held from 29 April, 1915, to 5 July, 1920, contrary to the form of the regulations of said Fisheries Commission Board."

From judgment on the verdict, the defendant appealed, assigning for errors chiefly: the refusal to quash the bill for that same did not state a criminal offense; refusal to instruct the jury that on the entire evidence if accepted by the jury no criminal offense has been established.

Thomas W. Bickett, Attorney General Manning, and Assistant Attorney-General Nash for the State.

E. H. Gorham, C. R. Wheatley, O. H. Guion, Charles L. Abernathy for defendant.

HOKE, J. In recognition of the great importance of fish and fishing industries connected therewith in the public waters of the State as a source of food supply to the people and of the impelling necessity for authoritative and intelligent regulation concerning them, the General Assembly has made elaborate statutory provisions on these subjects, the same, general and special, appearing principally in Consolidated Statutes, ch. 37, secs. 1865 to 2078, inclusive. And recognizing further that it is impossible in a fixed and formal statute to foresee and provide for all the administrative details sure to be required under such extended and ever varying conditions, the legislation referred to creates a commission to be termed the "Fisheries Commission Board," giving it the general control of the subjects and in addition to other special provisions, conferring general powers in terms as follows:

"The Fisheries Commission Board is hereby authorized to regulate, prohibit, or restrict in time, place, character, or dimensions, the use of nets, appliances, apparatus, or means employed in taking or killing fish; to regulate the seasons at which the various species of fish may be taken in the several waters of the State, and to prescribe the minimum sizes of fish which may be taken in the said

several waters of the State, or which may be bought, sold, or held in possession by any person, firm, or corporation in the State; and such regulations, prohibitions, restrictions and prescriptions, after due publication, which shall be construed to be once a week for four consecutive weeks in some newspaper in North Carolina,
(824) shall be of equal force and effect with the provisions of this act; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, upon conviction, shall be fined or imprisoned, at the discretion of the court."

And in further enforcement of the law, sec. 1901 makes provision as follows:

"Upon failure of any person, firm, or corporation to comply with any of the provisions of this article, or any of the fisheries laws, any license issued to any such person, firm or corporation may be revoked by the fisheries commission, and upon satisfactory settlement may be reinstated, with the consent of the board. All such persons violating the provisions of this article or of the fisheries law shall be guilty of a misdemeanor."

Under the powers so conferred and in promotion of the general purposes of the statute, the Fisheries Commission Board made and established a formal rule or regulation, which prohibited the taking of escallops with drags or scrapes in a certain portion of Bogue Sound between Spooner's Point and Brant Island, and designating such locality as unlawful and forbidden territory. And on the trial there was evidence of the State tending to show that at the time specified, the ground having been properly staked off as forbidden ground, defendant was employed in taking escallops in the manner prohibited, and on this evidence, accepted by the jury, defendant was duly convicted of the offense charged in the bill, and from judgment on the verdict, has appealed.

It was chiefly and very earnestly contended before us that this conviction cannot be sustained because it presents an unwarranted attempt to delegate legislative power. It is well recognized that except in the case of municipal corporations when in the exercise of governmental functions on local matters, legislative power may not be delegated. But if it be conceded that the board in question here, the Fisheries Commission Board, as a mere administrative board does not come within the exception stated, it is firmly established in this jurisdiction and fully recognized in authoritative cases elsewhere that, though legislative powers may not be in strictness delegated to a board of that character, it is fully competent for the Legislature to delegate to such a board the power to "establish the pertinent facts or conditions upon which a statute makes its own action

depend." This statement of the principle taken from 8 Cyc., p. 830, was directly approved and applied in *S. v. R. R.*, 141 N.C. 846-851, a decision upholding the conviction of defendant for violation of the administrative regulations of our Department of Agriculture. And a forcible and striking illustration in approval of the same position is presented in the recent case of *S. v. Hodges*, 180 N.C. 751, sustaining regulations of the same department in reference to eradication of cattle ticks.

It has been applied also in reference to regulations of the Health Department as in the case of compulsory vac- (825) cination. *Morgan v. Stewart*, 144 N.C. 424, citing *S. v. Hay*, 126 N.C. 999; *Hutchins v. Durham*, 137 N.C. 68; *Morris v. Columbus*, 102 Ga. 792.

And in *Express Co. v. R. R.*, 111 N.C. 463, it was fully recognized as justifying the Legislature in delegating to the Corporation Commission the power to establish transportation rates, etc. Similar decisions resting upon the same principle appear in *U. S. v. Grimand*, 220 U.S. 506; *Isenhour v. The State*, 157 Ind. 417, and in many other authoritative cases, and may be considered as the generally accepted rule on the subject.

In the *Grimand* case, *supra*, it was held, among other things, "That Congress cannot delegate legislative power (citing *Field v. Clark*, 143 U.S. 692), but the authority to make administrative rules is not a delegation of legislative power, and such rules do not become legislation, because violations thereof are punished as "public offenses." And so it is here. The commission, as stated, under authority conferred, have established the regulation that these escallops shall not be taken in drags in certain designated localities. And the statutes referred to enact that to take these fish or mollusca, contrary to this administrative rule shall constitute a misdemeanor, and it is on this that the conviction is lawfully made to rest.

It is argued in support of the defendant's position that the indictment is for violating the rule and not otherwise, but the suggestion is without merit. It may have been the better form to have added to the bill that the alleged default was also "contrary to the statute in such case made and provided," but this if it be a defect is one cured in express terms by our statute of jeofails, C.S. 4625.

It is further insisted for defendant that the locality to which this regulation applies is nowhere mentioned or designated in the law and the same is not therefore included in the powers conferred upon the board. But a perusal of the statute and more particularly section 1878, which appertains more directly to the question, will disclose that the jurisdiction of the board extends to all the public

waters of the State or over which it has control. "The several waters of the State" is the precise language of the section referred to, and the numerous portions of the law in which places are expressly mentioned are not in restriction of the general words of the principal section, but these places are only mentioned because special provision is made as being desirable or necessary for those places, and this objection also must be overruled.

It cannot for a moment be maintained that escallops, the subject-matter of the inquiry are not within the powers conferred. In the portion of the statute defining the terms and subjects of the chapter in question, the word "fish" is made to include "porpoises,
(826) and other marine mammals, fishes, mollusca, and crustaceans." Not only do escallops come within this comprehensive definition, being a "mollusca of the species pectinidæ," but in a later part of the chapter, they are expressly mentioned as being within its provisions. This objection therefore is overruled.

We have given the case most careful consideration and owing to the very great importance of this industry to the State and its people, it is gratifying that the conviction can be upheld in accord with accepted principles of constitutional and statutory construction. It is a subject that has deservedly received the fullest consideration of our Legislatures and under the capable, courageous, and impartial enforcement of the law that has prevailed for the past several years, there is reason to believe that substantial and ever increasing benefits may be expected.

There is no error and the judgment below is affirmed.

No error.

Cited: Provision Co. v. Daves, 190 N.C. 13; *S. v. Maultsby,* 191 N.C. 484; *Lilly & Co. v. Saunders,* 216 N.C. 186; *In re Annexation Ordinances,* 253 N.C. 649.

STATE v. HUDY DORSETT ET AL.

(Filed 2 November, 1921.)

Criminal Law—Robbery—Felonious Assault—Evidence — Trials — Questions for Jury.

Under the conflicting evidence in this case and upon a trial free from prejudicial error, the verdict and judgment are upheld on appeal, finding the three defendants guilty of robbing the prosecuting witness and his wife at their home, and one of them also guilty of a criminal assault on him with a pistol.

STATE *v.* DORSETT.

APPEAL by defendant from *Long, J.*, at August Term, 1921, of ROCKINGHAM.

Criminal prosecution tried upon an indictment charging all three of the defendants with robbery, and the defendant, Coford, with a felonious assault.

On Sunday night, 6 June, 1921, F. H. Finney, an elderly man, was called from his home by the defendant, Coford, and another man in company with him. Just as the prosecuting witness opened the front door, the two men grabbed him and jerked him out into the yard. They both had pistols. Finney testified: "The unknown man went into the house while Coford held me at the door. While they were robbing my wife, just about the time they got through and the shooting was over, a car came up to my hog pen just below the house and these two men, Coford and the unknown man, went down, got in it and left. I didn't know who the men in the car were. I didn't see them, just heard them talking. They took $13.00 (827) from me and $35.00 from my wife. I was shot in the leg, had to go to the hospital, have my leg split to the bone and the ball taken out. When the men started to the car they gave me back $3.00 and my knife."

There was much evidence pro and con as to whether Coford was the real assailant and as to whether Dorsett and Kirkman were present, aiding, abetting, and assisting in the perpetration of the crime.

The defendants denied having anything to do with the affair; and upon their evidence, if believed, the jury undoubtedly would have returned a verdict of acquittal.

The three defendants were convicted of robbery and the defendant, Coford, was also found guilty of an assault with a deadly weapon.

From a judgment of two years imprisonment, with assignment to work upon the public roads, the defendants appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. M. Sharp and Glidewell & Mayberry for defendants.

STACY, J. The record discloses a serious and aggravated breach of the criminal law. The prosecuting witness was called from his home in the night-time, assaulted, robbed, and shot. There was ample evidence, offered by the State tending to show that the defendants were the guilty parties. On the other hand, there was much evidence offered by the defendants, in support of their defense, which tended to establish their innocence. But upon the controverted

questions of fact, and the ultimate issue of guilt, the verdict of the jury was adverse to the appellants.

There are a number of exceptions appearing on the record, relating to the admission and exclusion of evidence and to his Honor's charge, but we have failed to discover any prejudicial or reversible error. The case apparently has been tried in substantial conformity to our decisions on the subject; and, after a careful consideration of all the material questions presented, we find no error, and this will be certified to the Superior Court.

No error.

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(828)

STATE v. TOM LEMONS.

(Filed 2 November, 1921.)

1. **Spirituous Liquors—Intoxicating Liquors—Return in Kind—Barter—Payments—Evidence—Appeal and Error—Harmless Error.**

A loan of intoxicating liquor upon a promise that it should be returned in kind is a violation of our prohibition law, and where there is further evidence that the buyer had promised to pay in money, rejection of testimony as to whether the defendant had eventually been paid is immaterial, either the barter or the promise to pay being sufficient. C.S. 3378.

2. **Criminal Law—Indictment—Spirituous Liquors—Intoxicating Liquors—Statutes.**

The validity of an indictment for the unlawful sale of intoxicating liquors does not depend upon a charge of a sale to any particular person or to persons unknown. C.S. 3383.

3. **Same—Jurisdiction—Courts.**

When it appears that the court has jurisdiction of the offense charged against the defendant of violating our prohibition law, it is not necessary for conviction for that indictment should charge the date of the transaction or that the offense was committed in that county. C.S. 4625.

4. **Same—Waiver.**

Where an indictment for the violation of our prohibition law has been found by the grand jury of the county, the defendant, as to jurisdiction, waives the omission of the indictment to charge that the offense had been committed in that county, by failing to enter a plea in abatement at the trial.

5. **Same—Statutes.**

A motion in arrest of judgment will not be allowed after conviction for omission of the bill of indictment to charge the date of the offense or its failure to show the venue thereof. C.S. 4623, 4625.

STATE *v.* LEMONS.

6. Criminal Law—Verdict—Jurors — Explanation — Recommendation of Clemency.

The verdict in a criminal case should either be "guilty" or "not guilty," and the trial judge should properly see that it is so rendered, it being in his discretion to hear the jurors state their reasons for their verdict of guilty; and a recommendation for clemency is but surplusage.

APPEAL by defendant from *Long, J.*, August Term, 1921, of ROCKINGHAM.

This was an indictment for violation of the prohibition law, setting out four counts, the first of which alleged an unlawful sale of spirituous liquors and the second for having spirituous liquors in possession for the purpose of sale. The defendant introduced no evidence. Verdict of guilty. When the foreman began giving the reasons for the verdict the court told him that the jury must find for their verdict "guilty" or "not guilty," and thereupon the jury returned a verdict of guilty with a recommendation for mercy. (829) Judgment and appeal by defendant.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. R. Joyce, W. Leland Stanford for defendant.

CLARK, C.J. The witness Price testified that the defendant let him have three ½ pints of whiskey which was loaned to him; that he did not buy it, but that he agreed to return it, and told the defendant that he did not know when he would get the whiskey to return, and afterwards offered to pay him.

The defendant excepted to the refusal to let the witness Price answer the question whether he afterwards paid the defendant. The question was immaterial and irrelevant, for a sale on credit, or a loan of liquor to be returned, comes within the statute. In *S. v. Mitchell*, 156 N.C. 659, the Court held: "When one lends spirituous liquor with the understanding that it shall be returned in kind, the title to the liquor passes absolutely on the consideration of its being replaced, and the transaction is a barter or exchange and comes within the meaning of the word 'sale,' and therefore is a violation of the said prohibition law." Brown, J., at p. 662, very appropriately said: "In adopting the prohibition statute enacted by the General Assembly, our voters had in view the prevention of the traffic in intoxicating liquors in the State. If it were allowable to carry on an exchange or barter in whiskey, the law would be rendered practically worthless and incapable of enforcement. Whenever a person was

charged with any illicit sale of liquor the defense in most cases doubtless would be that the transaction was only an exchange or barter."

The defendant introduced no evidence but contented himself with demurring to the evidence of the State, which was properly submitted to the jury. The exceptions to the charge do not require discussion.

The defendant moved here in arrest of judgment on the ground:

1. That the bill of indictment does not allege a sale to any particular person or to a person or persons to the jurors unknown. Laws 1913, ch. 44, sec. 6, now C.S. 3383, prescribes that in an indictment for this offense "It shall not be necessary to allege a sale to a particular person, and the violation of law be proved by circumstantial evidence as well as by direct evidence." This section was sustained in *S. v. Brown,* 170 N.C. 714.

2. That the offense is not alleged to have been committed in Rockingham County, and also argued that the date of the transaction was not set out in the indictment. C.S. 4625, which was previously Rev. 3255, and Code 1181, provides that no judgment can be stayed or reversed (among other things) for failure to
(830) state the time or stating an impossible time of the commission of the offense when time, as in this case, is not of the essence of the offense, *S. v. Williams,* 117 N.C. 755, nor for want of a proper and perfect venue when the courts shall appear to have had jurisdiction of the offense.

The heading of the indictment was probably "North Carolina — Rockingham County," and the indictment merely recites that the offense occurred on ..... May, 1921 "at and in the county aforesaid." But whether there was such heading or not, the indictment was found by the grand jury of Rockingham which had jurisdiction of the offense, and if the offense had not been committed in that county the defendant waived the objection by not pleading in abatement. *S. v. Lewis,* 142 N.C. 636. The authorities that a motion in arrest of judgment will not be allowed after conviction for the omission of the date or failure to state the venue of the offenses are collected in *S. v. Francis,* 157 N.C. 612; *S. v. White,* 146 N.C. 609, and *S. v. Lancaster,* 169 N.C. 284.

C.S. 4623 provides that no bill or warrant shall be quashed for informality: "Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible and explicit manner, and the same shall not be quashed nor judgment thereon stayed by reason of any informality or refinement, if in the bill or proceeding sufficient matter appears to en-

able the court to proceed to judgment." This and C.S. 4625, are our principal statutes of jeofails, which have been frequently cited, see citations thereto in the Consolidated Statutes under the above sections.

Chief Justice Ruffin, with his strong common sense in the administration of the law quotes the above words from the act of 1811, ch. 809, and says: "This law was certainly designed to uphold the execution of public justice, by freeing the courts from those fetters of form, technicality and refinement, which do not concern the substance of the charge, and the proof to support it. Many of the sages of the law have before called nice objections of this sort a disease of the law, and a reproach to the bench and lament that they were bound down to strict and precise precedents, neither more brief, plain, nor perspicuous than that which they were constrained to reject. In all indictments, and especially those for felonies, exceptions extremely refined and often going to form only, have been, though reluctantly, entertained. We think the Legislature meant to disallow the whole of them and only requires the substance, that is a direct averment of those facts and circumstances which constitute the crime to be set forth. It is to be remarked that the act directs the court to proceed to judgment without regard to two things — the one, form, the other, refinement." These clear expressions by this eminent judge have been often quoted since in the opinions of (831) this Court.

The requirement of the judge that the jury should find the defendant "guilty" or "not guilty" was eminently proper. *S. v. Godwin*, 138 N.C. 586, and without that there would have been no sufficient verdict. It was his duty to see that the verdict was returned and recorded in proper form. *S. v. Whitaker*, 89 N.C. 472; *S. v. Whitson*, 111 N.C. 697, and cases there cited. How far the court should permit the jury to give their reasons was a matter within his discretion which is not subject to review by us, nor does it appear how far he allowed them to explain their verdict, beyond the fact that they did make a recommendation for clemency — which is mere surplusage and does not vitiate the verdict. *S. v. McKay*, 150 N.C. 816.

No error.

Cited: *S. v. Saleeby*, 183 N.C. 741; *S. v. Brame*, 185 N.C. 633; *S. v. Snipes*, 185 N.C. 746; *S. v. Efird*, 186 N.C. 484; *S. v. Ray*, 209 N.C. 775; *S. v. Perry*, 225 N.C. 177.

STATE v. JAMES VANHOOK.

(Filed 2 November, 1921.)

1. Constitutional Law—Police Powers.

The police power is one inherent in the State as an attribute of government, and is not a grant derived from the written organic law.

2. Same—Statutes—Municipal Corporations — Cities and Towns — Delegated Powers.

The General Assembly has the authority to delegate legislative power to municipal corporations of limited or local character, relating to their governmental functions, or other proper and legitimate purposes.

3. Same—Dance Halls—Statutes.

Cities have power, among other things, to license, prohibit, and regulate dance halls, by express provision of C.S. 2787, and in the interest of public morals provide for the revocation of such license, as a valid exercise of the State's inherent police power, made applicable to cities and towns generally. C.S. 2786, art. 15.

4. Same—Sound Discretion—Limited Powers.

An ordinance requiring the consent of the board of directors of the city before keeping a dance hall therein is not objectionable as an arbitrary exercise of power, or as being at the pleasure of the board, but comes within its limited legal discretion, which the courts will not permit it to abuse, or will disturb in the absence of its abusive use.

CRIMINAL action, tried before *Horton, J.*, at May Term, 1921, of DURHAM.

The warrant issued by the recorder is as follows: "G. W. Proctor, being duly sworn on information, says that James Vanhook on or about 26 May, 1919, with force and arms, at and in the
(832) county aforesaid, and within Durham Township, did willfully, maliciously, and unlawfully conduct the business of dance hall at which an admission fee was charged; he the said Vanhook not having a permit for said dance from the board of aldermen against the statute in such cases made and provided, and against the peace and dignity of the State."

On 7 May, 1919, the board of aldermen of the city of Durham adopted the following ordinance: "Be it ordained by the board of aldermen of the city of Durham that no person, firm, corporation, club or organization shall give, conduct or hold any dance, or conduct or maintain any dance hall within the city of Durham for which a charge shall be made to those attending, which charge is either in the form of admission or entrance dues paid to the person, firm, corporation, club or organization giving or holding the said dance or conducting the said hall or club room, without first having obtained the consent of the board of aldermen."

After this ordinance was adopted the defendant applied to the board for a license to conduct a dance hall in the city, and the license was refused. There was evidence for the defendant tending to show that he was "the social leader of the colored people of the city"; that he had "cultivated the fine art of dancing;" that he had "let them (aldermen) know he was a man of good character"; and that the board passed upon each application and granted or refused license in their discretion. There was evidence for the State tending to show that there had been "disturbing elements" in the defendant's dance hall — "fights and cursing"; and that some arrests had been made there. The defendant kept the hall open without a license. On appeal from the recorder's court he was convicted in the Superior Court, and after judgment was pronounced, he excepted and appealed. The only question presented is whether the ordinance is valid exercise of the police power.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

R. O. Everett for defendant.

ADAMS, J. It is conceded that the police power, regarded as an attribute of government, is inherent in the states, and is not a grant derived from the written organic law. The difficulty of drawing the boundary line which divides the police power from the other functions of government has often been recognized, but Judge Cooley's definition of the police power of a state has met the approval of many courts. He says that this expression "embraces the whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which (833) are calculated to prevent a conflict of right, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others." The police power has been described as the law of necessity, and as the power of self-protection on the part of the community. 6 R.C.L. 186. Upon the proper exercise of this power depend the life, safety, health, morals, and comfort of the citizen, the enjoyment of private and social life, the beneficial use of property, and the security of social order. *Slaughterhouse* cases, 16 Wall 62. In *Pearsall v. R. R.*, 161 U.S. 666, it is said: "And so important is this power and so necessary to the public safety and health, that it cannot be bargained away by the Legislature, and hence it has been held that charters for purposes inconsistent with a due regard for the public health or

public morals may be abrogated in the interests of a more enlightened public opinion."

The legal right of the General Assembly to delegate legislative power to municipal corporations is well settled, when the power granted is such as relates to the exercise of governmental functions of limited or local character, or to other legitimate and proper municipal purposes. *S. v. Austin,* 114 N.C. 857; *S. v. Dudley, ante,* 822.

Chapter 56 of the Consolidated Statutes is divided into three subchapters. The first deals with regulations which are independent of the act of 1917; the second, with the Municipal Corporation Act of 1917; and the third with the Municipal Finance Act. By sec. 2623(7), in the first subchapter, a city or town is authorized to provide for the municipal government of its inhabitants in the manner required by law, and by sec. 2673, the commissioners are empowered to make ordinances, rules, and regulations for the better government of the town, not inconsistent with the law of the land. By sec. 2786, which is in the second subchapter, the provisions of Art. 15 are made applicable to all cities and towns whether or not they have adopted the plan of government, and the powers therein granted are declared to be in addition to and not in substitution of the existing powers of cities and towns. Section 2787 provides that in addition to and coördinate with the power granted to cities in subchapter 1, and any acts affecting such cities, all cities shall have power "to license, prohibit, and regulate pool and billiard rooms and dance halls, and in the interest of public morals provide for the revocation of such licenses." The ordinance in question was enacted in pursuance of this authority, and is clearly a valid exercise of the police power of the State. Instances of a similar exercise of the police power may be found in ordinances which prohibit disorderly conduct, or abusive or indecent language, or the entrance of an unmarried minor into a saloon, or the pursuit of one's ordinary business on Sun-
(834) day; or which regulate the weighing of cotton, or the running at large of bird dogs during the closed season for quail, or vaccination for the public health, or which deal with various other situations affecting the health, comfort, morals, and safety of the people. *S. v. Sherrard,* 117 N.C. 717; *S. v. Earnhardt,* 107 N.C. 789; *S. v. Austin,* 114 N.C. 855; *S. v. Tyson,* 111 N.C. 687; *S. v. Hay,* 126 N.C. 999; *S. v. Blake,* 157 N.C. 609; *S. v. Burbage,* 172 N.C. 876.

The counsel for the defendant contends that the ordinance confers upon the board of aldermen unlimited discretion in granting or refusing license, that it prescribes no uniform rule by which the board shall be guided, and that the aldermen consequently pass upon each application "according to their own pleasure." But the board

is not clothed with arbitrary or unlimited discretion. Whether a license shall be granted upon application is a matter within the limited legal discretion of the board. It is true that in the absence of abuse such discretion cannot be controlled by the courts, but the ordinance is not for that reason void. *Brodnax v. Groom*, 64 N.C. 244; *Key v. Bd. of Education*, 170 N.C. 125. Of course uniformity of operation upon all alike is essential, but this requirement is met by the express language of the ordinance.

In view of the evidence tending to show the "disturbing elements" in the defendant's hall, the "fighting and cursing," and the arrests that had been made there, we must assume that due regard for the public welfare impelled the aldermen in the exercise of their limited legal discretion to refuse the license.

The defendant's counsel relies chiefly on *S. v. Tenant*, 110 N.C. 609. In that case it appears that the city of Asheville had enacted the following ordinance: "That no person, firm, or corporation shall build or erect within the limits of the city any house or building of any kind or character, or otherwise add to, build upon, or generally improve or change any house or building, without having first applied to the aldermen and obtained a permission for such purpose." This ordinance was held void on the ground that it was an unwarranted interference with the ordinary incidents of ownership at the arbitrary will of the board of aldermen without valid reason, and that it had no reasonable relation to the exercise of the police powers vested in the board for the well ordering of the city. This objection cannot avail the defendant in the case before this Court. *Brunswick-Balke Co. v. Mecklenburg*, 181 N.C. 388.

No error.

Cited: *S. v. Weddington*, 188 N.C. 644; *S. v. Denson*, 189 N.C. 176; *Bd. of Ed. v. Comrs.*, 189 N.C. 652; *Moore v. Greensboro*, 191 N.C. 593; *Bizzell v. Goldsboro*, 192 N.C. 355, 360; *Harden v. Raleigh*, 192 N.C. 398; *S. v. Yarboro*, 194 N.C. 503; *S. v. Lockey*, 198 N.C. 555; *Wake Forest v. Medlin*, 199 N.C. 85; *Elizabeth City v. Aydlett*, 201 N.C. 605; *Roach v. Durham*, 204 N.C. 591; *In re Appeal of Parker*, 214 N.C. 55; *Shuford v. Waynesville*, 214 N.C. 138; *S. v. McGee*, 237 N.C. 642; *S. v. Towery*, 239 N.C. 278.

(835)

STATE v. S. W. CROUSE.

(Filed 2 November, 1921.)

1. Criminal Law—Evidence—Motions—Nonsuit.

Defendant's motion to dismiss a criminal action as in case of nonsuit upon the evidence will be denied when the State's evidence, taken alone or with the other evidence in the case, is sufficient in law for a conviction.

2. Same—Circumstantial Evidence — Inferences — Questions for Jury — Trials.

Where there is absence of direct proof of the defendant's guilt on the trial of a criminal action, the jury may not only find the basic facts, but make the permissible inferences therefrom in determining the question of the defendant's guilt or innocence, which enters into the consideration of the court upon defendant's motion to dismiss as in case of nonsuit.

3. Spirituous Liquor—Intoxicating Liquor—Nonsuit—Motions—Evidence —Questions for Jury.

Evidence tending to show that a furnace for a still had been found in the vicinity of the defendant's home, from which the still had been removed, but found nearer defendant's residence, with other evidence that spirituous liquor had been made and found there, and also found at defendant's home to which was a pathway, with the other evidence in this case: *Held*, sufficient to sustain a verdict of the defendant's guilt in unlawfully manufacturing spirituous liquor and having it in possession for the purposes of sale.

4. Same—Instructions—Expression of Opinion — Statutes — Appeal and Error.

Where there is evidence sufficient to convict the defendant for unlawfully manufacturing spirituous liquor and keeping it on his premises for sale, the giving of a requested instruction that the jury should consider the fact that the still was not on the defendant's premises as tending to show his innocence, would be an expression of the judge's opinion upon the weight and effect of the evidence, and is properly refused.

5. Spirituous Liquor—Intoxicating Liquor—Evidence—Scienter — Correlated Facts—Intent.

Where there is evidence that the still and liquor were found in the possession of the defendant, charged with the unlawful manufacture and sale of intoxicants, and under his control, the question of his intent or purpose becomes both relevant and material, and it may be shown as throwing light on that question, but not as a separate offense, that about ninety days before the trial a still was found near the defendant's house, giving indication that it had been operated the preceding night.

APPEAL by defendant from *Long, J.*, and a jury, at July Term, 1921, of FORSYTH.

Criminal action. The defendant was convicted of manufacturing spirituous liquor and having it in possession for the purpose of sale in violation of law. At the close of the State's evidence, and, again

at the close of all the evidence, the defendant moved to dismiss the action as in case of nonsuit. The motion was overruled. Defendant excepted. Other exceptions appear in the record. (836)

Attorney-General Manning and Assistant Attorney-General Nash for the State.

John D. Slawter, Swink & Hutchins, and O. O. Efird for defendant.

ADAMS, J. The defendant's motion to dismiss the action must be determined by the question whether the evidence, when construed most favorably for the State, is legally sufficient to convict. If it is, or if there is any evidence in the record to sustain the counts on which the defendant was convicted, the exception must be overruled. *S. v. Carmon,* 145 N.C. 482; *S. v. Walker,* 149 N.C. 528; *S. v. Carlson,* 171 N.C. 823. In the absence of direct and positive proof, the State is often required to rely upon circumstantial evidence; and when a fact is to be proved by such evidence, the finding of the jury is not dependent entirely upon belief in the truth of the testimony, since the jurors must not only believe the witnesses, but must also draw from their testimony the inferences arising from the facts proved. *Snowden v. Bell,* 159 N.C. 500. All the circumstances disclosed by the evidence, taken in their entirety, must be considered and weighed by the jury in drawing such inferences, and in determining the guilt or innocence of the defendant.

There was evidence for the State tending to show that on 24 June, 1921, Newsome, Pulliam, Scott, Flynn, Wooten, and Dunnigan, deputies of the sheriff, went to the defendant's home with a search warrant; that Newsome went down the branch on the right of the defendant's home and found a furnace under which there had been a fire; that a few hundred yards away he found tubs in a thicket, and a place from which a still had been removed; that 25 or 30 steps nearer the defendant's home and about 200 yards therefrom he saw a still (which meantime had been discovered by Pulliam), under which fire had recently been burning, and tubs in which there had been a quantity of beer; that there was a path leading from the still house toward the defendant's dwelling; that two kegs and several fruit jars, which contained liquor, were found — one of the kegs containing two or three gallons and the other about five; that after two of the officers had gone to the defendant's house, they saw the defendant's wife go into a room and put under the bed a fruit jar, which contained more than a quart of whiskey, while an-

other found a small quantity in the cellar; that the jars found in the house corresponded in size with those found in the field. There was evidence tending to show that the defendant's character was bad as to the manufacture of liquor, and there were various other circumstances tending to show his guilt. This evidence was clearly
(837) of sufficient probative force to require its submission to the jury on each count, and on a motion to dismiss, the defendant's evidence in rebuttal need not be considered. *S. v. McMillan,* 180 N.C. 742; *S. v. Bush,* 177 N.C. 551; *S. v. Horner,* 174 N.C. 789. *S. v. Prince, ante,* 788, is easily distinguishable in that there was an absence of evidence which could reasonably be construed as connecting the defendant in that case with the offense charged. The motion to nonsuit, and the defendant's prayer that if the jury believed the evidence they should acquit the defendant, and that there was no evidence tending to show that the defendant aided another in the unlawful enterprise, were properly declined.

His Honor could not have granted the defendant's request to instruct the jury that the location of the distillery on the land of another should be considered as tending to show that the defendant was not guilty on either count, without invading the province of the jury, and expressing an opinion upon the weight and effect of the evidence.

Newsome, a witness for the State, was permitted to testify, over the defendant's objection, that about ninety days before the trial, or possibly in the preceding September, he found a still at night about 800 yards from the defendant's house, and that it had been in operation during the night. It will be borne in mind that the defendant was convicted of the manufacture of liquor, and of having it in possession for the purpose of sale. If he owned or controlled or had in possession the still or the liquor, the question of his purpose or intent at once became both relevant and material. Evidence of circumstances sufficiently connected with the main charge are competent to show purpose or intent. They are regarded as part of a series of circumstances which, when connected and correlated, are deemed to be competent in proof of the main fact. This principle is illustrated by the opinion in *S. v. Stancill,* 178 N.C. 686, in which it was held that proof of the commission of other like offenses to show the *scienter,* intent, or notice is generally competent when the crimes are so connected or associated that such evidence will throw light upon that question. A discussion of the authorities may be found in *S. v. Simons,* 178 N.C. 679, in which the same principle is stated with clearness by the Chief Justice.

The defendant's exceptions to questions propounded by the so-

licitor to the witness Dean on cross-examination manifestly constitute no ground for a new trial. If the evidence elicited was immaterial it was also harmless. We have examined the defendant's objections to the testimony of the witness Swain, and find them to be without merit. Upon the whole record we find

No error.

Cited: *S. v. Mills,* 184 N.C. 698; *S. v. Presley,* 188 N.C. 814; *S. v. Payne,* 213 N.C. 724; *S. v. Colson,* 222 N.C. 29; *S. v. Medlin,* 230 N.C. 303; *S. v. Grainger,* 238 N.C. 740; *S. v. Harrison,* 239 N.C. 663; *S. v. McClain,* 240 N.C. 175; *S. v. Bell,* 249 N.C. 382.
(838)

STATE v. WILLIAM REID PANNIL, GARLAND WATT, AND CHARLES W. CURRIE.

(Filed 2 November, 1921.)

1. Criminal Law—Larceny and Receiving—Severance—Motions—Court's Discretion—Appeal and Error.

Where the indictment charges several defendants with larceny or receiving goods from the warehouse of the prosecutor in a connected manner, a motion to sever the trials is addressed to the sound discretion of the trial judge and his refusal of the motion is not reviewable on appeal.

2. Criminal Law—Larceny and Receiving—Evidence — Intent — Knowledge.

Where there is evidence that the warehouse of the prosecutor was broken into in the night and a large quantity of oats was taken therefrom, as charged in the bill of indictment, and wagon tracks led therefrom to the barns of the several defendants, wherein bags of oats were found early the next morning, with marks thereon tending to identify them as the property of the prosecutor, evidence that bags of "sweet feed" were also found there with identifying marks is competent as tending to show ownership of the goods and knowledge and intent upon the two counts in the bill of indictment of larceny and receiving of the oats.

3. Appeal and Error—Objections and Exceptions—Instructions—Recital of Evidence.

The recital of the testimony in the case in the summing up by the judge to the jury is an appeal to their recollection of the evidence, and where a party to the action thinks that this has inaccurately been done, he is deemed to have waived his right to except after the case has been submitted to the jury, and he has failed to call the matter to the attention of the judge at the time, and when thereafter the exception has been taken, it will not be considered on appeal.

4. Appeal and Error — Objections and Exceptions — "Broadside Exceptions."

A general or "broadside" exception to the charge of the judge to the jury will not be considered on appeal.

APPEAL by defendant from *Webb, J.*, at the May Term, 1921, of ROCKINGHAM.

The defendants were convicted of larceny of a large quantity of oats, the property of Nello Teer, and from the judgment upon such conviction appealed to this Court.

Exceptions seven and nine were directed to the judge's refusal to give judgment as of nonsuit at the conclusion of the State's evidence, and again at the conclusion of all the evidence.

The prosecuting witness, Nello Teer, was a contractor working upon the public roads of Rockingham County, and owning a number of mules and horses used in this work. He kept a warehouse in the town of Reidsville in which he stored a large quantity of oats and sweet feed for his stock, and had missed oats for some time,
(839) about 300 bushels. Besides the ordinary fastenings, he nailed up the windows to the warehouse, and put a bar across the door. On the night of 11 December, 1920, the warehouse was broken into and fourteen five-bushel bags of oats were taken out. About 7 o'clock next morning he discovered the loss and secured two policemen of the town to accompany him with a search warrant in his attempt to follow the trail of the thief or thieves. A one-horse wagon had been backed up to the platform, and though it had rained the night of the theft, they followed the track of this wagon along a devious course, and first to the barn of the defendant Currie. There they found a box of oats, and certain sweet feed bags which had Teer's name on them. The box of oats contained ten or fifteen bushels, and empty bags were hanging up on a wire across the corner of the feed room. There were a dozen or more sweet feed bags with Teer's name upon them, and eight or more oat bags with his stock number on them. His stock number was Z-72, the 72 indicating the grade of the oats, and the Z, it is contended, the point to which they were shipped. The wagon track was then followed from Currie's barn to the barn in which the other two defendants kept their horses. All of the defendants ran drays in the town of Reidsville. He found in Garland Watt's feed-room three full bags and one half-full of oats. The bags had the stock number Z-72 on them. In another department in the barn there was a box that had ten bushels or more of oats in it. Several empty bags were found on that box which contained also the stock number. He saw Garland Watt's horse after Garland was arrested; observed the horse's track, and

it was very much like the track made by the horse attached to the wagon: "So much like it that I thought it was the same track made by the shoe."

The defendant Pannill occupied one of the departments of a barn, in which Garland Watt had another. There were ten or twelve bushels of these oats in Will Pannill's department. Will's father, Tom Pannill, and another man had horses in this barn also. None of the defendants had worked for Teer, and he had sold no oats or sweet feed to any of them. When his oat bags were emptied, he bundled them up and shipped them to T. A. Jennings & Sons, Lynchburg, Va.

The defendants claimed that they had bought these oats from one Will, or Brer, Garland. The defendant Currie testified that Will Garland sold him two bags of sweet feed at $2.50 a bag. He did not see Will Garland any more, but when he went in the barn the morning of the search the barn was filled with the oats and the sacks were hanging where he had other sacks hung. He knew that the price of sweet feed on the market was from $3.40 to $3.60. He did not pay Will Garland for oats or sweet feed. Garland Watt claims that he bought two bags of sweet feed and one bag of oats from Will Garland on the same day that Currie claimed to have bought his. For the three bags he was to pay Will Garland $7.50. (840) The oats were put in his barn that night, without his knowledge. Will Pannill also claimed to have bought two bags of oats, at $2.50 a bag, from Will Garland, and found them in the barn the next morning, the morning of the search, when he went to feed. He did not pay Will Garland for them. It seems from the testimony that Will Garland had disappeared.

Defendants appealed from the judgment upon the verdict of guilty.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. M. Sharp and J. R. Joyce for defendants.

WALKER, J., after stating the case: If we follow the rule that only the State's testimony, with so much of the defendant's sustaining it, is to be considered, on a motion for judgment as of nonsuit, we are of the opinion that the evidence is amply sufficient to sustain the verdict, and the motion for a nonsuit was properly overruled.

Exception one was directed to the judge's refusal to sever the trials of the three defendants. This, however, was in the sound discretion of the court. *S. v. Southerland,* 178 N.C. 676, where it was said to have 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, citing *S. v. Dixon,* 78 N.C. 558; *S. v. Parrish,* 104 N.C. 689; *S. v. Hastings,* 86 N.C. 597; *S. v. Haney,* 19 N.C. 390; *S. v. Murphy,* 84 N.C. 742. See, also, *S. v. Finley,* 118 N.C. 1161; *S. v. Oxendine,* 107 N.C. 783; *S. v. Gooch,* 94 N.C. 982. There was manifestly no abuse of discretion by the judge.

Exceptions two, three, four, five, and eight were directed to the testimony as to the sweet feed lost and the sweet feed bags with Teer's name, or number, on them in the barns of defendants. This evidence, however, tended to show knowledge and intent upon both the counts in the bill of indictment. The Court has recently discussed this question very fully in *S. v. Simons,* 178 N.C. 679, and in *S. v. Stancill, ib.,* 683, citing all the cases. It was held in *S. v. Adams,* 138 N.C. 693: "True it is that evidence as to one offense is not admissible against a defendant to prove that he is also guilty of another and distinct crime, the two having no relation to or connection with each other. But there are well defined exceptions to this rule.
(841) Proof of another offense is competent to show identity, intent, or *scienter,* and for other purposes," citing *S. v. Murphy,* 84 N.C. 742; *S. v. Parish,* 104 N.C. 692; *S. v. Weaver,* 104 N.C. 761; *S. v. Walton,* 114 N.C. 783, and *S. v. Graham,* 121 N.C. 623. So, in *S. v. Stancill,* 178 N.C. 686, where there is a full discussion of the subject, with citation of the authorities, it is said there, at least substantially, that the testimony as to theft of the Wilkinson tobacco was offered merely to show the felonious intent with which the defendants stole this tobacco, and not to prove the accusation substantially. It was sufficiently connected with the main charge to render it competent for this purpose. It was all taken to Raymond Stancill's, the common storehouse for the loot of these defendants. It was but a part of a series of transactions carried out in pursuance of the original design, and it was contemplated by them in the beginning, that they should plunder the tobacco barns in the neighborhood, and this was one of them. The jury might well have inferred this common purpose from the evidence. Robbing Wilkinson was a part of the common design, and done in furtherance of it. Proof of the commission of other like offenses to show the *scienter,* intent, or motive is generally competent when the crimes are so connected or associated that this evidence will throw light upon that question.

So it is with the oats and sweet feed in this instance, the two cases being alike.

The one inference to be drawn from the evidence is that defendants stole the oats and sweet feed in the night time under the cover of darkness, as the theft was discovered early in the morning, and the warehouse was locked and bolted the night before. The jury did not believe the story about the defendant's buying the goods at a greatly reduced price from Will Garland, for, if they had believed it, they would have convicted the defendants upon the second count in the indictment for receiving the goods knowing them to have been stolen, there being ample evidence to warrant it, because the dealing with Garland being necessarily in the night time, and the price asked being considerably below the market quotation, cast grave suspicion on the whole transaction. It was an incredible story at the best, and the jurors were not in a credulous mood. But they concluded that Garland was a mythical man, and their story about him a pure fabrication, and consequently convicted them of the principal felony, which verdict is abundantly supported by the testimony.

Exceptions ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, and seventeen were addressed to the judge's recital of the evidence. If there was any error or shortcomings in it, his attention should have been called to it at the time. A misrecital of the testimony by a judge in his summing up to the jury is no ground of new trial; such summing up being an appeal to their recollection. It is the right of counsel, in a proper manner and at a proper time, (842) to correct such mistake by calling the attention of the judge to it, in the presence of the jury, before the cause is finally committed to them; and a failure then to make the correction is a waiver of all right to make it thereafter. *Wheeler v. Schroeder,* 4 R. I. Reports (vol. 1) 383.

Exception eighteen relates to the following clause in the judge's charge: "And they admit, that is, Currie and Pannil, that they purchased some oats from Garland the afternoon before." As a matter of fact, Pannil and Watt admitted that they purchased oats from Garland the afternoon before. "Currie denied that he bought any oats, but claimed to have bought two bags of sweet feed from Garland." This, however, was a lapse of the tongue, and an error in the recital of the testimony, which should have been brought immediately to the attention of the court. The judge told the jury expressly that "You will try this case solely upon the evidence," and the judge himself, in the very next sentence, corrects his error in regard to Currie. After reciting the contentions of the State and of the defendants, he said to the jury, "When you go out to consider your verdict,

you will discard everything except the evidence in this case." This exception is covered fully by what has been said above, in regard to exception four, and including two to five and eight, and the authorities there cited are applicable here.

Exceptions nineteen and twenty were directed to the recital of the State's contentions, while twenty-one and twenty-two relate to the recital of the defendant's contentions. In the state of the record these cannot be assigned as errors here, and what we have said above as to exceptions ten to seventeen, and the authorities there cited, apply equally in this instance.

Exception twenty-three has been sufficiently considered in our discussion of exceptions seven and nine.

Exception twenty-four was directed to what was a clear and accurate statement by the judge of the reasons why the evidence, in regard to sweet feed and the bags, was admissible, and at the same time a warning to the jury, that defendants were not indicted for stealing bags of sweet feed, but bags of oats. The evidence was admitted simply as a circumstance to be considered by the jury when weighing the evidence as to whether or not the defendants were guilty of the larceny of oats or guilty of receiving them, knowing at the time that they were stolen.

Exception twenty-five was a general or "broadside" exception to the charge, and as such will not be considered by this Court.

This was a bold robbery, done with deliberation, but the defendants were so hurried in its commission, or for some other reason, they failed to conceal or remove the marks of identification on the bags, and it makes little difference whether they were oat
(843) bags or sweet feed bags. Those that were marked were found with other bags of a kind taken from the warehouse. They were there the night of the robbery, and they were not there the next morning when it was first discovered that the house had been entered and rifled of a part of its contents. The marked bags identified those unmarked, because (*noscitur a sociis*) they are known by their companions as a man is said to be known by the company he keeps. What difference does it make whether the mark on the bags was the prosecutor's name or his stock number, so that it identified the bags as the property which had been stolen from him. The numbers were as sufficient for the purpose as his name, but defendants, if they saw them on the bags, did not appreciate their significance and were thus entrapped by their own ignorance, which not infrequently happens in such cases.

The substantial and pivotal objection to the trial of the case below is based upon a misapprehension concerning the competency

and relevancy of the testimony, as to marks on the sweet feed sacks, which we have shown was clearly admissible. That is sharply made the focus of criticism, and all possible emphasis laid upon it, as not only important but as being prejudicial to the defendants. We have met this objection sufficiently, and no more comment is required.

The other exceptions, including those to the instructions, are without any real merit. The charge was full and fair to both sides, and is not subject to the objections which are made to it. When the judge correctly ruled upon the evidence, the issue became very largely one of fact, and there was an abundance of evidence to support the verdict.

We can find no error in the case or record.

No error.

Cited: *S. v. Ray,* 209 N.C. 776; *S. v. McClain,* 240 N.C. 175.

STATE v. ROY McCANLESS.

(Filed 9 November, 1921.)

Appeal and Error—Objections and Exceptions — Evidence — Self-serving Declarations—Corroborative Evidence.

Upon the trial for larceny of an automobile, a question as to whether the defendant told the deputy sheriff at the time of the arrest that he had bought the car from a certain person is objectionable as tending to draw out a self-serving declaration, and should it thereafter have been competent in corroboration of other evidence, it should have been asked again at the later time; and further, an exception to its exclusion is not available on appeal when it does not appear of record what the answer would have been.

APPEAL by defendant from *Webb, J.*, at the May Term, 1921, of ROCKINGHAM.

Criminal action. The indictment is for larceny of an automobile with a count for receiving same knowing it to have (844) been stolen. Defendant was convicted, and from judgment on the verdict appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Glidewell & Mayberry for defendant.

HOKE, J. We have given the cause most careful consideration and find no reversible error in the record. There was ample evidence for the State to carry the case to the jury, and the issue was submitted in a comprehensive charge by his Honor in which every position favoring the defendant, and arising on the testimony, was sufficiently and fairly presented.

The objections to the rulings of the court on questions of evidence are without merit. The only one at all debatable — the refusal to allow the deputy sheriff, Hobbs, to answer the question whether, when arrested, the defendant did not say he had bought the car from Percy Newman at the time asked — was incompetent as tending to draw out a self-serving declaration, and if it became so later in corroboration of defendant's direct testimony, it was not again offered. And in any event the exception is not available, as the record does not disclose what answer the witness Hobbs would have made.

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

No error.

Cited: *S. v. Ashburn,* 187 N.C. 722.

STATE v. HARRISON SKEEN.

(Filed 9 November, 1921.)

1. Criminal Law—Larceny—Evidence — Nonexpert — Opinion Upon Collective Facts.

Where there is evidence that a witness tracked a stolen automobile to the house of the accused, where he found both him and the car, his further testimony descriptive of the defendant's appearance, that "his clothes were damp, shoes muddy, looked like. Didn't look like they had been unlaced in several days," is not objectionable as opinion evidence of a nonexpert witness, but admissible under the rule that such instantaneous and ordinary conclusion of the mind may be received as a short-hand method of giving the facts as they appeared to the witness, or were presented to his senses at one and the same time.

2. Criminal Law—Larceny—Aiding and Abetting—Accessory—Evidence —Instructions.

Where there is evidence that the defendant stole the automobile of which he was accused, and that his appearance or muddy condition indicated he had been riding therein, and he contends, with his evidence, that some one else had stolen the car and left it in his yard, where it was found, an instruction to the jury is not erroneous that the defendant would be guilty if he had stolen the car or abetted others therein, upon the

principle that one who aids and abets another in the commission of a crime is equally guilty with him.

APPEAL by defendant from *Finley, J.*, at February Term, 1921, of DAVIDSON. (845)

Criminal prosecution, tried upon an indictment charging the defendant with the larceny of a Ford automobile, with a count in the bill charging him with receiving same, knowing it to have been stolen.

The defendant entered a plea of not guilty, and offered evidence tending to establish an alibi, or that, at the time in question, he was some twelve or fifteen miles from the scene of the crime.

Upon the traverse, thus joined, there was a verdict and judgment against the defendant, from which he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Raper & Raper, Hastings & Whicker, and McMichael & Johnson for defendant.

STACY, J. The defendant's first exception is to the admission, over his objection, of the following evidence:

T. A. Sink testified: "Am a neighbor of Mr. Stuart; not related to him. Heard about stolen car about 20 minutes after one; got up and dressed, met them and got in car. Tracked car to Skeen's house, 11 or 12 miles. Skeen's in Abbotts Creek Township. Got out of Nifong's car and tracked car to house. Skeen came out — clothes damp — shoes muddy — looked like. Didn't look like they had been unlaced in several days."

Defendant bases his objection to this evidence upon the ground that the witness should have been confined to a statement of the facts without giving any opinion, or stating what impressions he gathered from the circumstances as they appeared to him at the time. We do not think the testimony of this witness is objectionable as incompetent opinion evidence. He stated the facts leading up to the meeting, and then undertook to describe the defendant's appearance: "His clothes were damp — shoes muddy — looked like. Didn't look like they had been unlaced in several days." This was only a shorthand method of giving the facts as they appeared to the witness. It was proper for him to state "the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts prevented to the senses at one and the same time." McKelvey Ev. 174; *Hudson v. R. R.*, 176 N.C. 488. "It (846)

would be a hopeless task for the most gifted person to clothe in language all the minute particulars, with their necessary accompaniments and qualifications, which have led to the conclusion which he has formed." *Dewitt v. Barley,* 9 N.Y. 371; 22 C.J. 551; *S. v. Spencer,* 176 N.C. 709.

The second exception is to the following portion of his Honor's charge: "If you are satisfied from this testimony beyond a reasonable doubt that the defendant is guilty of stealing the car, either by stealing it himself (or aiding and abetting others in stealing it), you will find him guilty; if not so satisfied, you will find him not guilty."

The defendant objects to the expression in parentheses, "or aiding and abetting others in stealing it," but we are unable to see any error in this statement. The defendant contended that some one else had stolen the car and left it in his yard. This was entirely sufficient to support the charge, especially when coupled with evidence of the defendant's damp clothes and muddy shoes, from which it could reasonably be inferred that he too had been riding. The law is well settled that where two persons aid and abet each other in the commission of a crime, both being present, both are principals and equally guilty. *S. v. Jarrell,* 141 N.C. 722; *S. v. Fox,* 94 N.C. 928.

The other exceptions are without merit; and, upon consideration of the whole case, we conclude that the trial in the Superior Court must be upheld.

No error.

Cited: S. v. Hart, 186 N.C. 585; *Graham v. Power Co.,* 189 N.C. 388; *S. v. Dail,* 191 N.C. 235; *Willis v. New Bern,* 191 N.C. 514; *S. v. Tyndall,* 192 N.C. 561; *S. v. Johnson,* 226 N.C. 674; *Mintz v. R. R.,* 236 N.C. 112.

STATE v. ROBERT L. MARTIN.

(Filed 9 November, 1921.)

1. Evidence—Motions to Dismiss.

A motion to dismiss a criminal action will be denied if the evidence favorable to the State is sufficient to sustain a conviction, without considering that upon which the defendant relies.

2. Criminal Law—Producing Abortion—Evidence — Motion to Dismiss — Statutes.

Where the defendant is tried under C.S. 4226 and 4227, for producing a miscarriage or abortion of a pregnant woman, the action will not be

dismissed upon the evidence if it is sufficient for a conviction upon either count.

3. Same—Questions for Jury—Trials.

Upon the trial in this action, wherein the defendant was indicted for procuring the miscarriage or abortion of a pregnant woman, under the provisions of C.S. 4226 and 4227, testimony of the relation between the defendant and the woman, his paying half of the doctor's fees, and his concern as to the result, is *held* sufficient to sustain the verdict of guilty, taken in connection with the other evidence in the case.

4. Physicians—Evidence—Privilege—Statutes—Compelling Testimony—Court's Discretion.

The principle by which a physician may not be compelled to divulge communications and other matters which have come to his knowledge by observation of his patient is regulated by statute, and under the provisions of our C.S. 1798, the privilege is qualified, and it rests within the discretion of the trial judge, in the administration of justice, to compel the physician, called as a witness, to testify to such matters when relevant to the inquiry.

5. Evidence—Statements—Denials—Criminal Law — Miscarriage — Statutes.

The testimony as to the statement of a woman on whom the defendant was charged with bringing on a miscarriage or abortion, in violation of the provisions of C.S. 4226-4227, that the defendant had paid the physician one-half of the $200 fee he had charged for such services, and uttered in the defendant's presence, is *held* competent with the other evidence in this case; and whether the defendant, under circumstances, was so intoxicated that he did not understand, presented a question for the jury to determine as to whether the woman's statement was made in the hearing as well as in the defendant's presence; whether they were understood by him, or he denied them or remained silent.

APPEAL from *Long, J.*, at July Term, 1921, of FORSYTH.

The defendant was prosecuted for a breach of sections (847) 4226 and 4227 of the Consolidated Statutes, upon the following bill of indictment:

"The jurors for the State upon their oath present: That Robert L. Martin, late of the county of Forsyth, on 28 June, in the year of our Lord one thousand nine hundred and twenty-one, with force and arms, at and in the county aforesaid, unlawfully and willfully and feloniously, did administer to Rosa Yow, a woman pregnant and quick with child, and did prescribe for said Rosa Yow and advised and procured said Rosa Yow to take certain medicines, drugs and other substances, and used and employed other instruments and money with intent to destroy said child, the same not being necessary to preserve the life of the mother, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State.

"And the jurors aforesaid, upon their oath, do further present, that Robert L. Martin, at time aforesaid, with force and arms, at and in county aforesaid, unlawfully, willfully and feloniously did administer to Rosa Yow, a pregnant woman, and prescribe for said pregnant woman, and advise and procure said Rosa Yow to take medicine, drugs and other things, with intent thereby to procure the miscarriage of said Rosa Yow, against the form of the statute in such case made and provided and against the peace and dignity of the State."

(848) The jury convicted the defendant, who, after judgment was pronounced, appealed. He has assigned several errors, among them the refusal of his Honor to dismiss the action as in case of nonsuit. The State introduced only two witnesses, Dr. Mimms, and W. P. Yow, a brother of Rosa. The defendant offered no evidence. The evidence, most favorable to the State, tended to show the facts to be as herein stated. Rosa Yow was 18 or 19 years of age. Several months before the indictment she had married a man named Howard Daye, with whom she lived only a short time. On Saturday she went to her brother's house, which was four or five miles from Winston-Salem, and on the next Monday at three o'clock in the afternoon suffered an abortion, or miscarriage. On Monday night Dr. Mimms was called to see her, and found her in bed slightly bleeding. At the time of the abortion, or miscarriage, she was advanced in pregnancy from two to four months. The defendant accompanied Dr. Mimms on this visit, and told him that another doctor had charged $200 for the operation, one-half of which the defendant had paid by a check which he had destroyed after it was cashed. On this visit Dr. Mimms and the defendant went into Rosa's bedroom, the defendant seating himself on a sofa in one corner of the room. The defendant was drinking, and occasionally "opened up and said something," and Dr. Mimms, while not positive, thought the defendant was awake, and if awake, could hear Rosa's conversation with the witness. In the presence of the defendant Rosa told Dr. Mimms that since becoming pregnant she had desired a miscarriage, and had called on a physician who charged her $200; that the defendant had given her a check for $100, which, with $100 of her own money, she had paid this physician; that the physician when the money was paid took her into a room, laid her on a table, used some kind of instrument in packing something in her womb, and gave her medicine to take. She said this doctor, after getting his money, refused to visit her, and the defendant said he had phoned him to go and he ought to have gone. At one time the defendant paid Dr. Mimms $60. Defendant made another visit with Dr. Mimms. On the second Saturday night next preceding the first visit,

the defendant and Rosa called at Dr. Mimms's office, but left there while he was attending a call; and five or six days before this visit Rosa had come to his office alone. In the presence of others she addressed the defendant in endearing terms, and they were very affectionate. There were other circumstances tending to show their intimate relation.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Wallace & Cohen, and Hastings & Whicker for defendant.

ADAMS, J. The defendant's motion to dismiss the action was based on the conception that the evidence taken as a whole was not sufficient to sustain a conviction; but in deciding this motion we need consider only such evidence as was favorable to the State, without special regard to that on which the defendant relied. The immediate question is whether the evidence, when given a liberal yet reasonable construction, had legal sufficiency to convict. If it was sufficient to support the charge in either count it was not permissible to withdraw it from the jury. Considering the evidence as correctly portraying the circumstances under which the abortion or miscarriage was accomplished, we are of opinion that the verdict of the jury was amply justified, and that his Honor properly denied the defendant's motion. The association of the defendant and the woman, their call at Dr. Mimms's office a week before she went to her brother's home; the defendant's payment of one-half the fee charged by the physician who "packed something in her womb" and prescribed the "black medicine," and his subsequent solicitude in urging this physician to attend her; the defendant's visits to her in company with Dr. Mimms, together with various other circumstances were sufficiently convincing to warrant the jury in connecting the defendant with the unfortunate occurrence. *S. v. Carlson*, 171 N.C. 818; *S. v. Clark*, 173 N.C. 745; *S. v. Bridgers*, 172 N.C. 882. (849)

Dr. Mimms related the circumstances attending his first visit to Rosa Yow, described her physical condition, and testified to certain statements made by her in the defendant's presence tending to implicate the defendant in the commission of the crime. To this evidence the defendant excepted on the ground that it divulged information which the witness had confidentially acquired in his professional capacity.

At common law no privilege existed as to communications between physician and patient. The physician, when called upon to

testify, had no right to decline or refuse to disclose information on the ground that such information had been communicated to him confidentially in the course of his attendance upon or treatment of his patient in a professional capacity. The public interest in the disclosure of all facts relevant to a litigated issue was deemed to be superior to the policy of recognizing, for the benefit of the patient, the inviolability of confidential communications. Hence, statutes have been enacted in practically every jurisdiction making communications between physician and patient privileged from compulsory disclosure. *Fuller v. Knights of Pythias,* 129 N.C. 323; *Smith v. Lumber Co.,* 147 N.C. 63; 28 R.C.L. 517. In some jurisdictions the privilege is absolute, and in others qualified. Our statute is in the latter class. "No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and
(850) which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon: *Provided,* that the presiding judge of a Superior Court may compel such disclosure, if in his opinion the same is necessary to a proper administration of justice." C.S. 1798. In *Smith v. Lumber Co., supra,* this statute has been construed as extending not only to information orally communicated by the patient, but to knowledge obtained by the physician or surgeon through his own observation or examination while attending the patient in a professional capacity, and which was necessary to enable him to prescribe. In that opinion Justice Hoke further said: "And it is further held, uniformly, so far as we have examined, that the privilege established is for the benefit of the patient alone, and that same may be insisted on or waived by him in his discretion, subject to the limitations provided by the statute itself:

"1. That the matter is placed entirely in the control of the presiding judge, who may always direct an answer, when in his opinion same is necessary to a proper administration of justice.

"2. That the privilege only extends to information acquired while attending as physician in a professional capacity, and which information is necessary to enable him to prescribe for such patient as a physician." 14 Wigmore, sec. 2286c. If the privilege is for the benefit of the patient alone, how can the defendant invoke its aid? Even if it be contended that the privilege was available to him on the ground that some of the communications were made in his presence, that Rosa became a party to the crime by consenting to the abortion, that she is living, and the physician's testimony would tend not only to convict him, but to discredit her, and that the evi-

dence objected to was for these reasons incompetent, a complete answer is found in the proviso of the statute and in his Honor's statement that in his discretion he not only permitted but required Dr. Mimms to testify when called as a witness for the State. His Honor no doubt did so because in his opinion the testimony of Dr. Mimms was necessary to a proper administration of justice.

The testimony of this witness as to statements made by the woman in the presence of the defendant was properly admitted. True, the witness said that the defendant had been drinking, and was sitting in a corner of the room when the statements were made; but he testified also that the defendant, while near enough to the woman to hear her remarks, occasionally said something himself, and that the witness, although not positive, thought the defendant was awake. It was the province of the jury to determine from the evidence whether the woman's statements were made in the hearing as well as in the presence of the defendant, whether they were understood by him, and whether he denied them or remained silent. *S. v. Bowman*, 80 N.C. 437; *S. v. Crockett*, 82 N.C. 599; *S. v. Burton*, 94 N.C. 948; *S. v. Randall*, 170 N.C. 762. (851)

We have given due consideration to the remaining exceptions and find them to be without merit. His Honor presented both the law and the evidence in such manner as to enlighten the jury concerning the nature, scope, and merits of all matters in controversy between the State and the defendant. We find no error, and this will be certified to the Superior Court of Forsyth County.

No error.

Cited: *S. v. Butler*, 185 N.C. 626; *Ins. Co. v. Boddie*, 194 N.C. 200; *S. v. Portee*, 200 N.C. 145; *S. v. Wilson*, 205 N.C. 381; *S. v. Moses*, 207 N.C. 141; *Creech v. W. O. W.*, 211 N.C. 662; *S. v. Manning*, 225 N.C. 42; *S. v. Hoover*, 252 N.C. 139; *Capps v. Lynch*, 253 N.C. 21.

STATE v. BUNK HAIRSTON.

(Filed 9 November, 1921.)

1. Homicide—Firearms—Evidence.

Where there is evidence, on the trial of an indictment for homicide, that the defendant and several others were congregated at the place where the shooting occurred, attracting public attention, which caused the sheriff

to go and take two others with him, including the witness, it is competent for this witness to testify that he saw the defendant firing the pistol which resulted in the homicide, both as contradicting the defendant's evidence that he did not have a pistol, and as showing that the witness, who accompanied the sheriff in an attempt to prevent a general row, was rightfully on the premises.

2. Appeal and Error—Harmless Error—Homicide—Flight—Evidence in Explanation—Instructions.

While evidence of flight, after the commission of a homicide, may be taken as a circumstance in connection with the other evidence tending to show his guilt, which he may explain by showing that it was for a different reason, the exclusion of the testimony in explanation is *held* as harmless error on this appeal, it appearing that he had received the full benefit thereof in the subsequent admission of the same testimony and under proper instructions of the court thereon.

APPEAL by defendant from *Finley, J.*, at the Spring Term, 1921, of STOKES.

The defendant was convicted of murder in the second degree and from the judgment upon such conviction appealed to this Court.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

William P. Bynum, McMichael & Johnson, and Folger, Jackson & Folger for defendant.

WALKER, J. The defendant assigns only three errors on this appeal. Exceptions one, two and three. It appears that, on 18 April, 1920, some dozen or fifteen negro men were congregated in
(852) and about a cafe and soft drink stand of Nick Hairston, in the village of Walnut Cove, when the firing of pistols attracted the attention of citizens of the town. Sheriff R. P. Joyce, taking with him Mr. Matthis and the witness Neal, went up to the stand. Neal was asked, "Why did you men go there on this occasion?" Answer: "Well, there was some shooting going on around the back of the building and I walked out to see who was doing the shooting, and it was Billy Covington and Bunk Hairston."

The defendant objected to this question and answer, on the ground that they were immaterial and irrelevant. But the defendant, Bunk Hairston denied that he had a pistol at all on that occasion, and certainly this evidence was material for this reason. Again the same witness, Neal, was asked, "Why did you and Mr. Matthis and Sheriff Joyce come up later?" Answer: "Well, these boys had had their guns out and we saw them and went to take the guns away from them."

It would seem that this evidence was very material, as showing that these parties accompanying the sheriff, in his attempt to prevent a general row, were rightly on the premises. As a matter of fact, both Sheriff Joyce and Mr. Matthis were killed inside the stand by pistol shots, and the defendant was being tried for the killing of the sheriff. There was direct evidence that the defendant, Bunk Hairston, fired the shot which killed the sheriff.

Defendant's exception six, assignment of error three, was taken under the following circumstances: The defendant Bunk Hairston, was on the stand testifying in his own behalf and said that he had no pistol over there, and nothing to do with the killing of Sheriff Joyce or Mr. Matthis. After the killing he seems to have gone off and was arrested about a mile from Walnut Cove. He testified further, "I went home, was fixing to go to church that night, and while standing by the dresser combing my hair, my coat and hat off, a white man came to the window, tapped on it and told me that I had better look out, that a mob was looking for me, and I had better leave." Upon the State's objection, this evidence was stricken out, and defendant excepted. It is quite probable that the defendant was entitled to this testimony, and that the ruling of the judge, standing alone, upon that testimony, may have been error. But it does not stand alone, because he expressly states on his cross-examination: "I was afraid to stay at home. Somebody told me they were hunting for me. I was not at home when arrested." Again, on re-direct examination, "I was afraid because someone told me that they were looking for me; that a mob had been made up and I had better skin out. I heard the crowd and it seemed like about fifty men. I then left. I was arrested about a mile from home." In stating the contentions of defendant on this point, the judge charged the jury that when he left, it was because he was informed that they were looking for him. He left for fear of being lynched, or re- (853) ceiving bodily harm, and not as a result of the consciousness of guilt. Thus the defendant had the full benefit of the evidence stricken out before, and the error, if one was committed at first in excluding the evidence, was corrected by permitting the same evidence to come in afterwards, or at most, the error became harmless.

We have treated the testimony concerning what was said to the defendant at his home when he was preparing to go to church, as in the record, because it is afterwards referred to in the charge. This testimony, the subject of the fourth assignment of error, was offered for the purpose of explaining defendant's flight after the homicide. The defendant's objection to the exclusion of the evidence is based upon the fact that witnesses testified for the State, that the defend-

ant fled immediately after the killing, offering this as some evidence of his guilt, and that he was apprehended near Dr. J. W. Slate's, about a mile from Walnut Cove, a day or two after the killing. In some way this testimony is not set out in the record, though it was offered by defendant and is referred to incidentally in the record and in the charge of the court, while stating the contentions of the State, viz.: "The State contends that after the killing he fled and the next day he was captured." This was a proper reference on the part of his Honor, because of the fact that this was a contention of the State and evidence was offered on that point. The defendant contends that his Honor erred in denying him the right to explain his flight, which, unexplained, has been held by the courts to be some evidence of the defendant's guilt and fit to be considered by the jury. Defendant says it was, therefore, competent for him to state, that after the killing he went home and was preparing to go to church, and that while standing near the dresser he was warned of the approach of a mob, and it was on this account that he fled and not from any realization of his guilt, or fear of a trial.

But we have shown that he had the full benefit of the evidence, the same in substance, and this removes the error, or renders it innocuous. One's flight, wherever and whenever occurring, is generally offered by the State as evidence of guilt, and unexplained is some evidence of it, and was particularly so in this case. The rule is clearly stated in Chamberlayne's Handbook on Evidence, sec. 559, beginning at bottom of page 423 and continuing on page 424, as follows: "Prominent among relevant acts of the accused showing a consciousness of guilt is flight. Where the prosecution can show in a criminal case that the accused has become a fugitive from justice," such a fact can be considered on the question of his guilt. And further: "Where one charged with crime, without good ground, departs from the jurisdiction shortly after the commission of the crime, with which he is charged, the circumstance may often be highly significant.
(854) The law of early times made flight conclusive evidence of guilt. Under the more rational system of later times, the fact of flight is merely a circumstance tending to establish consciousness of guilt. It is settled that the defendant may offer any relevant explanation of his act. The accused may, for example, allege, in explanation of his flight, that he was apprehensive of personal violence. The advice of friends may be assigned as the cause of fleeing from the jurisdiction, and, in all cases, the accused is entitled to prove by his own testimony the actual motive which has influenced his conduct." The author cites the following cases: *Webb v. Com.*, 4 Ky. L. Rep. 436 (1882); *Lewallen v. State*, 33 Tex. Cr. Rep. 412 (S.C. 26

S.W. 832); 2 Chamb. Ev. 1399a, n. 11; *S. v. Phillips,* 24 Mo. 475; *S. v. McDevitt,* 69 Iowa 549 (29 N.W. 459); *S. v. Barham,* 82 Mo. 67; *People v. Cleveland,* 107 Mich. 367 (65 N.W. 216); *Seaweil v. S.,* 76 Ga. 836; 2 Chamb. Ev., sec. 1399a, notes 8 and 9. To these may be added our own case of *S. v. Mallonee,* 154 N.C. 200, at p. 203, and 12 Cyc. 610.

We said in the *Mallonee* case: "While it is true, as contended by the defendant's counsel, that it was a circumstance from which, in connection with other circumstances, the jury might draw an inference of conscious guilt unless explained (12 Cyc. 610), the whole matter is for them to pass upon, and they must decide what weight they will give to the fact of flight, and if there was explanatory evidence, to what extent it affects the probative force of the flight as a fact tending to show guilt. The entire charge is not set forth in the record, and we must assume, therefore, that it correctly stated the law of the case to the jury, in the absence of any showing to the contrary. We cannot condemn it by what was said in one or two detached portions, even if they are erroneous, because they may have been explained and corrected in other parts of the charge," citing *S. v. Kinsauls,* 126 N.C. 1097.

But we need not prolong the discussion as to this feature of the case, for we have already virtually disposed of this assignment of error by showing that while the defendant was entitled to explain his flight, by showing the real cause of it, that it fright, and not a sense of his guilt, upon the theory that the wicked flee when no man pursueth, he had the full benefit of his explanation subsequently, and this is all-sufficient.

We find no error that was committed at the trial, and none in the record.

No error.

Cited: S. v. Beam, 184 N.C. 745; *S. v. Stewart,* 189 N.C. 347; *S. v. Steele,* 190 N.C. 511; *S. v. Mull,* 196 N.C. 353; *S. v. Lawrence,* 196 N.C. 577; *S. v. Lewis,* 209 N.C. 195; *S. v. Payne,* 213 N.C. 723; *S. v. Black,* 230 N.C. 452.

(855)

STATE v. NATHAN McNEILL.

(Filed 16 November, 1921.)

Intoxicating Liquor—Spirituous Liquor—Unlawful Sale—Statutes—Evidence—Reputation.

Where there is substantive evidence tending to show the guilt of the defendant in having spirituous liquor for sale in violation of C.S. 3378, and his defense, supported by his evidence, is that some one else had taken the jugs and bottles of whiskey to his home in his absence, without his knowledge, where the officer had found them, the general bad reputation of the defendant for unlawfully selling whiskey may be shown as a circumstance in corroboration of other evidence tending to show guilt. C.S. 3383.

HOKE and STACY, JJ., dissenting.

APPEAL by defendant from *Ray, J.*, at May Term, 1921, of SCOTLAND.

The defendant was indicted and convicted under a charge of having in his possession spirituous and intoxicating liquors for sale, and from the judgment thereon appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Walter H. Neal for defendant.

CLARK, C.J. The indictment charged that the defendant "unlawfully and willfully did have and keep in his possession, for the purposes of sale, certain spirituous and intoxicating liquors." The evidence for the State was as follows:

Lamar P. Smith, deputy sheriff, testified for the State: "I went up to the defendant's house and I drove up in the yard. There was a man there; there were several in the yard. Lee McNeill and two other fellows, and one woman, I believe, and I noticed one of those fellows go over to some bushes like they wanted to hide something, and I asked him what he hid, and then I walked to where he went and found two quarts of whiskey there where he had stuck it down in the broom straw, and I brought it back and went in the house and found in the kitchen two jugs.

I believe that the man who walked out there to the bushes said his name was McLean, and I went in the house and there was two jugs in there that smelled strong with whiskey, sitting in a little kitchen. They were gallon jugs, and under the table I found a quart pot and funnel that was wet with whiskey, looked like it had just been poured out, and that smelled strong with whiskey, and right

outside the kitchen door, at the bottom of the steps, I found a ten-gallon keg and it was also strong with whiskey, and while I was in the yard I saw a fellow leave the yard and go behind the garden toward the little ditch, and I went around there and (856) found a gallon jug full of whiskey, and I brought it back and there was about a quart of whiskey out of the jug. I was by myself. This was at the defendant's house. I searched his house one other time and found a quart of blockade whiskey in a jug.

Q. Look over these items and jugs and things here and state how much of it you found at Nathan McNeill's house?

A. I found it all there. I found these two bottles and this jug is the one I found in the ditch. These other two jugs were in the kitchen and this funnel and the measuring cups were on the table.

Q. Is that liquor in there? It looks like kerosene.

A. It smells like whiskey. This is the jug I found and it smelled high with whiskey."

The State then introduced in evidence the jugs, bottles, measuring cups, funnel, and other articles and exhibited before the jury.

CROSS-EXAMINATION

This defendant then testified that the diagram then submitted to him was a reasonably correct diagram of the premises and surroundings starting up at Mr. Fairley Patterson's.

I found a part of the liquor in the house. I found in the house what is in these two jugs. They smelled strong of whiskey.

Q. How much is there of it?

A. A quart, maybe.

Q. Between a quart and a pint in both of them. Is there a ditch that runs sorter catty-cornered from Nathan's house? Now will you please indicate on the plat about where the garden is?

A. Right along there (pointing out the ditch on the diagram). I found the glass jug of liquor in the ditch right back of the garden. The whiskey which I found in the briars or bushes was not in that direction at all. It was back on the opposite side of the house. The man who had it was standing in the yard when I drove up, and he walked to the bushes.

I think he said his name was McLean. I do not remember. He was the one who had the two pints of whiskey. I think it was ten or fifteen steps in the briars and about that far from the road where I found the two pints of whiskey. I found it in the briars. I saw him go down there like he wanted to hide something, and when he came back I went to see what he had hid, and that is what I found. Nathan McNeill was not at home. I do not know who carried these

receptacles and jug and the measuring pot and other things to the house, and I do not know who was in charge of the keys of this house. I found these things in the kitchen, and just outside the kitchen there was a wagon standing next to the garage, which had some household goods on it. . . . State rested.

(857) The evidence for the defendant was an attempt to show that the whiskey found in the ditch was not on the defendant's land, but just over the line, and that the whiskey and vessels were carried to the defendant's house that day while he was away.

In rebuttal, the deputy sheriff was asked, "State, if you know, what the general reputation of Nathan McNeill's place is relative to selling whiskey." Over the defendant's objection, the sheriff was allowed to testify, the court adding, "If it has such a general reputation," and the sheriff responded, "Yes; it is bad. It has been bad for several years." On this, the court said: "Gentlemen, that is allowed, not as primary or substantive evidence, but merely to corroborate, if it does corroborate or tend to corroborate this witness in that he found the articles which the State has introduced in evidence here, consisting of two or three bottles of whiskey, jugs, and a keg and measuring pot and funnel, which the State contends, and the witness testifies, smelled of whiskey, if it tends to corroborate him, and is allowed for that purpose only." The court refused a motion to strike out the above question and answer thereto, and defendant excepted.

Another witness, Manly Russell, testified to the same effect that he "knew the general character of Nathan McNeill's place as to the sale of whiskey, that is what the people say about his place, and that it was bad." The defendant objected to the question, and moved to strike it out, and excepted from the refusal to do so, the court saying to the jury: "Gentlemen, this evidence is allowed to corroborate the witness Smith, who went on the stand and testified that he found the liquor offered in evidence here, and is allowed for the purpose of corroborating, if it corroborates or tends to corroborate, and for that purpose only."

These questions were not asked as to the general regutation of the defendant, and would have been incompetent for that purpose, for he had refrained from going upon the stand, but they were admitted in corroboration of the State's evidence, which tended to prove that the whiskey and the vessels being found on the premises of the defendant were in his possession, and the evidence was pertinent and important for that purpose, as tending to show that this place was in effect a well known illicit place for the sale of liquor, and was

competent like evidence of previous transactions of the same kind in corroboration.

C.S. 3378, under which the defendant was indicted, is as follows: "3378. *Handling liquor for gain.* It is unlawful for any person, firm, corporation, or association by whatever name called, to engage in the business of selling, exchanging, bartering, giving away for the purpose of direct or indirect gain, or otherwise handling spirituous, vinous, or malt liquors in the State of North Carolina."

The illicit sale of liquor being done usually clandestinely, secretly, and by resort to many evasions and ingenious de- (858) vices, the law-making power found it necessary to enact C.S. 3383, referring to above section 3378, as follows: "3383. *Indictment and proof.* In indictments for violating the first section of this article (C.S. 3378), it shall not be necessary to allege a sale to a particular person, and the violation of law may be proved by circumstantial evidence as well as by direct evidence." The evidence introduced by the defendant was an attempt to prove that the liquor found at that place was not the property, or under the control of the defendant. The evidence of the general reputation that it was a notorious place used by him for that purpose was therefore properly admitted as "a circumstance" tending to corroborate the inference to be drawn from the testimony of the officer that the defendant is responsible. There was no attempt to convict the defendant by showing the bad reputation of his place as a whiskey resort, but merely to corroborate the inference which would naturally arise that the defendant was responsible for the liquor found on his premises, which inference the defendant had attempted to rebut by evidence tending to show that he was away that day, and that the whiskey, and the jugs and vessels had been brought there without his connivance. The general reputation of the defendant's house as a notorious place for the illicit sale of whiskey was "circumstantial evidence" to corroborate the inference arising upon the testimony of the officer of finding the whiskey and vessels at the defendant's house.

Four other witnesses, Mack Patterson, S. H. Dunlap, C. C. Sneed, and E. P. Covington also testified that they "knew the general reputation of Nathan McNeill's place as to the sale of whiskey, and it was bad, and had the reputation of being a notorious liquor place." The testimony of each of these, when offered, the court admitted over the defendant's exception, but cautioned the jury in each instance: "This evidence is allowed to go to you for the purpose, as I have explained before, of corroborating the witness Smith, and the exhibits offered, if it does corroborate or tend to corroborate them, and is allowed for your consideration for that purpose only."

The court further, in the charge, charged the jury fully as to reasonable doubt, and the burden of proof. He stated fully the defendant's contention that he had no whiskey there — that he was absent from home at work at the time, and only returned afterwards, and added that by reason of the rule laid down in *S. v. Ingram,* 180 N.C. 672, he had "allowed the State to offer for consideration of the jury, the reputation of the home of the defendant as to keeping liquor for sale — the general reputation. This testimony is allowed, not to prove its character other than the day in question, but to corroborate the witness Smith, and to corroborate the amount of
(859) whiskey which the State alleges and contends was found at his place. It is not direct or substantive evidence, but is allowed for the purpose of corroborating, if it does corroborate or tends to corroborate the witness Smith, and to strengthen his testimony and to corroborate by the amount of whiskey that was found there that day, and in evidence as an exhibit, and it is allowed to the jury solely for that purpose and predicated upon the doctrine laid down in *S. v. Ingram, supra,* and to be considered by the jury in that light."

In *S. v. Ingram,* 180 N.C. 673, on an indictment for the sale of intoxicating liquors, the State was allowed to introduce such testimony as the learned judge admitted in this case, this Court saying: "The evidence of drinking in the crowds frequenting the place of business of the defendant was competent in corroboration of the witness Norton, who testified to the sale and whose testimony was impeached. In *S. v. Mostella,* 159 N.C. 459, one of the questions asked the witness was, 'State the character of the people that usually frequent this pool room.' This was asked to show drunkenness about the premises, and was admitted and affirmed on appeal." In the present case the whiskey and jugs and other vessels found on the premises were in proof in corroboration of the testimony of the deputy sheriff and to rebut the defense set up by the defendant's witnesses (the character of some of whom was shown to be bad), that the defendant was absent that day, and that hence there was no presumption against him of possession or responsibility. The State was allowed to show, on the above authority, by at least six witnesses that the defendant's place had the general reputation of being used by him for the sale of whiskey. This was as pertinent as testimony of defendant's absence that day from which he sought to draw an inference that he was not responsible.

In *S. v. Price,* 175 N.C., at p. 807, Walker, J., in a very learned opinion, with full citation of authorities, showed that the reputation of a house is competent on indictments for keeping a house of ill

fame, independent of our statute to that effect, saying: "It is only a circumstance which the jury are permitted to consider in passing upon the defendant's guilt." Neither in that case nor in this would the reputation be sufficient for conviction, and the judge in this case was careful to caution the jury on the admission of the evidence of each of the six witnesses who testified to the bad reputation of this place for the sale of whiskey, and again repeated the caution in his charge, that it could be only considered as a circumstance in corroboration of the inference arising from the evidence of the sheriff as to the whiskey and vessels being found at the defendant's home, which it was sought to contradict by the testimony that others than the defendant owned the whiskey.

The same principle seems to be universally recognized. In 16 Cyc. 1209, it is said: "Reputation is relevant when it (860) arises in a community acquainted with the facts upon subjects in which the general community is interested, and concerning which it has no motive to misrepresent. Where these two conditions are fulfilled, reputation may be more probative than a mere unsworn statement. The fact that the statements on a matter of general interest have been so uniform, reiterated, and dominant against all counter statements as to create a general reputation throughout the community may well give rise to an inference," enumerating as "among them" a long list of subjects concerning which reputation has been held admissible. The scope of the subjects as to which reputation has been held admissible will certainly embrace the general reputation that a place was known generally as one at which liquor was habitually sold upon the circumstances of this case. 16 Cyc. 1209, 1210, quotes in the notes authority that "general reputation is not a form of hearsay, but in itself a relevant circumstance in many instances." On page 1211 it is pointed out that "The elements of relevancy and necessity are prerequisite to the admissibility of reputation as evidence, and hence specific facts of limited general interest cannot be established in that way."

In this case, where the defendant sought to show by the testimony offered that he was away from home when the whiskey and jugs were found there, and by the testimony of other parties to rebut the inference of his ownership or control of the whiskey and jugs it was competent, as corroborating testimony, to show as a circumstance the general reputation that the house was "notorious" as a place for the illegal sale of whiskey. The weight of all the testimony was for the jury.

In McKelvay on Evidence (2 ed.), sec. 126, it is stated that while reputation for a particular act is not general reputation, and

such evidence not admissible on the question of the truth of the charge, general reputation would be legitimate to establish many matters of public interest or notoriety.

On the disputed question at issue, upon the evidence as above stated, the general reputation of the defendant's house as a place notorious for the illicit sale of whiskey was a "circumstance," which, under C.S. 3383, the jury were entitled to consider in corroboration of the State's evidence, it having been restricted by the judge to be strictly in corroboration only if the jury believed it, of the inference the jury could draw from the testimony of the deputy sheriff as to the finding of the liquor, jugs, and other vessels, upon the defendant's premises.

No error.

HOKE and STACY, JJ., dissenting.

Cited: *S. v. Springs,* 184 N.C. 771.

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(861)

STATE EX REL. JAMES S. MANNING, ATTORNEY-GENERAL, v. RAMA RURAL COMMUNITY OF MECKLENBURG COUNTY.

(Filed 30 November, 1921.)

1. Corporations—Rural Communities — Statutes — Secretary of State — Petitions—School Districts—Certificate of Incorporation.

Our statutes providing for the incorporation of rural communities require, among other things, that such communities shall embrace "in area one entire school district," and that allegation to that effect be made as a part of the petition for incorporation; and that the Secretary of State shall issue the certificate if the petition is in proper form: *Held,* where it is admitted by the demurrer to the complaint in an action by the State on the relation of the Attorney-General, that though the certificate was in due form and according to the statute, it misstated the extent of the area sought to be incorporated, or that it embraced parts of three school districts, the false representations as to the statutory requirements is of the substance, and the certificate issued thereon will be declared of no effect. C.S. 7380, 7381.

2. Same—Suits—Actions—Attorney General—Parties.

The right of action is given the Attorney-General, on the relation of the State, to annul a certificate of incorporation of a rural community when the petition upon which the Secretary of State has issued the certificate misrepresents that the area of the community to be incorporated extended only to that of "one entire school district," C.S. 7380, 7381, under the

provisions of section 1187, authorizing the Attorney-General to bring action when a certificate of incorporation has been procured upon "a fraudulent suggestion or concealment of a material fact by the persons incorporated, or by some of them, or with their knowledge or consent," etc.

3. Corporations—Rural Communities—Secretary of State—Certificates—Fraud—Suits—Actions.

Where it is made to appear that a rural community authorized to have been incorporated under the provisions of C.S. 7380-7381, has, contrary to the matter set out in the petition, attempted to incorporate within the area parts of several school districts, it is not necessary in the suit to have the certificate of the Secretary of State declared invalid, that the misrepresentations should have been made with a corrupt purpose or with intent to deceive on the part of the petitioners, for it is sufficient if they have made a false statement of this essential fact, or withheld the correct information with knowledge of its existence, as such would amount to legal fraud in contemplation of the statute.

4. Same—Courts—Jurisdiction.

It is within the jurisdiction of the courts of this State to determine whether the legislative rules and regulations in regard to the incorporation of companies by the Secretary of State have been complied with on the question of whether, as in the case of incorporating rural communities, under C.S. 7380, etc., the procedure has validly been in accordance with the statute, and free from actual fraud, or fraud in law.

CIVIL action, heard on demurrer to complaint before *Ray, J.*, at October Term, 1921, of MECKLENBURG.

The action is instituted by the State on relation of the Attorney-General to annul the charter of the Rama Rural (862) Community on the grounds alleged in the complaint, that the requirements of the statute under which the charter purported to have been issued, C.S. 7380, had not been complied with, and that on the facts presented the alleged charter was not authorized by said statute. The complaint, among others, containing allegations that the petitioners in their written application for the charter had made it appear that he proposed community embraced one entire school district, and had concealed from the Secretary of State the essential fact that it contained parts of three school districts in said county, each of which constituted a separate special school tax district in said county, the said statute providing that a charter of this kind in question may only be issued for territory embracing one entire school district.

Defendants demurred, and for the reasons chiefly: (1) That the courts are without jurisdiction to question the acts of the Secretary of State in issuing the charter, or his findings of fact concerning the same; (2) that relator of plaintiff has no legal right to maintain the action; (3) that the complaint does not contain facts sufficient to

justify the relief sought nor any other relief within the scope of the pleadings, etc.

Judgment overruling the demurrer, and the defendant excepted and appealed.

John M. Robinson, Edgar W. Pharr, and Pharr, Bell & Sparrow for plaintiff.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

T. L. Kirkpatrick, H. L. Taylor, Clarkson, Taliaferro & Clarkson, Thomas W. Alexander, and Jake F. Newell for defendant.

HOKE, J. Chapter 123 provides for incorporation of rural communities on petition of a majority of their registered voters, and when embracing "in area one entire school district." Section 7380, the first of the chapter, requires this allegation as a part of the petition, and section 7381 provides that the Secretary of State, to whom the petition shall be addressed, shall issue the certificate of incorporation if the petition is in due form. It thus appears that this privilege is only conferred upon communities of the kind described, and it being admitted by the demurrer that the defendant, the community in question here, is composed not of one entire school district, but of parts of three different school districts. The petitioners have not brought themselves within the terms of the statute and the certificate of incorporation has been issued without warrant of law.

(863) The position that only communities embracing in area "one entire school district" have the right of incorporation under the law finds full support, if any were needed, from a stipulation in section 7380, that, "After any school district has been incorporated under the provisions of this article, the boundaries of such school district may be changed only in the manner prescribed by law for changing the lines of a special school-tax district except that the county board of education shall proceed to enlarge such boundaries in accordance with law and on written request of a majority of the *school committeemen or trustees of said school district,* and a written request of a majority of the board of directors of the incorporated rural community." Thus, again showing the intent of the Legislature that the territorial boundaries as designated should be considered of the substance and essential to a valid incorporation under the law, a principle of interpretation recognized and approved in an opinion of the Court at the present term, in *Woosley v. Comrs., ante,* 429.

It was chiefly insisted for the defendant that the demurrer should be sustained from lack of authority in the Attorney-General as re-

lator to institute and maintain the action. It was formerly held that the Attorney-General, of his own motion and without legislative sanction, could not bring an action to vacate a legislative charter. Under the present law, however, this authority has been provided for in certain designated instances appearing in C.S. 1187. As appertaining to the question presented here, this power was given in terms as follows: "An action may be brought by the Attorney-General in the name of the State against a corporation for the purpose of annulling its charter upon the ground that it was procured upon a fraudulent suggestion or concealment of a material fact by the persons incorporated or by some of them, or with their knowledge or consent," etc.

Among the other allegations pertinent to the inquiry, the complaint, in section VII, contains the following:

That the said purported certificate of incorporation of the defendant Rama Rural Community of Mecklenburg County, a copy of which is attached hereto as "Exhibit B," is absolutely null and void, and the attempted incorporation of said community is of no effect for the reasons that:

(a) The boundaries of the said Rama Rural Community of Mecklenburg County did not, at the time of the application for or issuance of said certificate, and does not now, embrace in area one entire school district, as provided by law, but, on the contrary, the said boundaries did, and still do, embrace parts of Progress School District, the Sardis School District, and the Oak Grove School District, as stated in paragraph six above, the same being three separate and distinct school districts of Mecklenburg County.

(b) The said certificate of incorporation was procured upon the suggestion of a material fact by the persons pur- (864) porting to be thus incorporated, or by some of them, or with their knowledge and consent, in that it was suggested to the Secretary of State, for the purpose of obtaining said certificate of incorporation, that the boundaries of said Rama Rural Community of Mecklenburg County embraced in area one entire school district, when as a matter of fact the said boundaries, to the knowledge of said incorporators, or some of them, embraced parts of three separate and distinct school districts of Mecklenburg County.

(c) The said certificate of incorporation was procured upon the failure to disclose a material fact by the persons purporting to be incorporated, or by some of them, or with their knowledge and consent, in that the said certificate of incorporation was obtained by a failure to disclose to the Secretary of State the fact that the boundaries of the said Rama Rural Community of Mecklenburg County did not

embrace in area one entire school district, but, on the contrary, embraces parts of three separate and distinct school districts.

(d) By the express provisions of chapter 223 of the Consolidated statutes, under which the said Rama Rural Community purports to have been incorporated, the people of a rural community can be incorporated only upon the condition that said community embraces in area one entire school district, and inasmuch as the purported incorporation of the defendant attempted to incorporate a community which embraced parts of three separate and distinct school districts of Mecklenburg County the said attempted incorporation is utterly irregular, illegal, and null and void.

(e) In obtaining said certificate of incorporation, the signers thereof purported to be incorporating a school district, designated as Rama Rural Community School District, when as a matter of fact there was not and never has been such a school district in Mecklenburg County.

Upon these averments, admitted by the demurrer to be true, it appears that this charter has been obtained upon the false suggestion that the community consisted of one entire school district, and on concealment of the real conditions that in fact and truth it was composed of parts of three separate and distinct school districts of Mecklenburg County, and that these facts were known to the said petitioners, or some of them.

It is not necessary that there should be a corrupt purpose or intent to deceive on the part of the petitioners, but a false statement as of an essential fact or the withholding of essential facts with knowledge of their existence on the part of the petitioners, or some of them, would, in our opinion, constitute a legal fraud within the purview of this statute and justify a maintenance of the action.

(865) The suggestion that the Court is without jurisdiction to examine into and decide the question presented, because the exclusive power over the subject is vested in the Legislature, cannot be maintained. It is true that under our system of government the power to create corporations and to establish proper rules for these regulations and control is with the General Assembly, Clark on Corporations, pp. 33-34, and it is also true that in the exercise of that power they can confer on the courts, and have done so in this instance, authority and jurisdiction to inquire and determine whether in a given instance their rules have been complied with, this last being distinctly and clearly a judicial question. *In re Applicants for License,* 143 N.C. 1-6. There is no error in overruling the demurrer, and the judgment to that effect is

Affirmed.

(866)

STATE ON THE RELATION OF THE ATTORNEY-GENERAL, AND D. H. McCULLOUGH, v. GEORGE D. SCOTT, ET AL., CONSTITUTING THE STATE BOARD OF ACCOUNTANCY.

(Filed 30 November, 1921.)

1. Public Accountants—Accountants—Statutes—Police Powers.

Our statutes creating a State Board of Accountancy and giving them authority to pass upon applications and issue licenses to those qualified as public accountants, are within the exercise of the police powers of the State, in which the public are interested, as well as one to whom a certificate has been issued, and the State is also interested in the requirement that moneys collected and not necessary to the purposes of the act be turned into the State Treasury. C.S. 7008 to 7024, inclusive.

2. Parties—Motions — Appeal and Error — Supreme Court — Attorney-General.

Where an injunction is sought in a suit brought against the State Board of Public Accountancy by a certified public accountant under the provisions of our statute, alleging that the defendant was attempting to do an *ultra vires* act in holding an examination beyond the boundaries of the State, and unlawfully diverting the funds, and exception has been taken in the lower court, that the suit should have also been brought State *ex rel.* the Attorney-General, etc., an amendment to this effect may be allowed in the Supreme Court, so that the case may be heard on its merits, it appearing that the defendant will not thereby be prejudiced. C.S. 7008 to 7024, inclusive.

3. Same.

The Attorney-General may of his own motion, or upon the complaint of a private party, become a party to a suit that seeks to prevent an *ultra vires* act of the misapplication of a fund in which the public is interested.

4. Public Accounts—Accountants—Statutes—Public Officers.

The provisions of C.S. 7008 to 7024, inclusive, creating and incorporating the State Board of Accountancy, confers upon its members continuous *quasi*-judicial powers as an arm of the State Government in which the people of the State are interested, both as to their administration and to a certain extent in the funds of the board, the compensation of members being paid by fees fixed by law, any surplus to be deposited in the State Treasury, and in these, and in other respects, its members are to be regarded as State officials to the extent of their duties specified in the statute.

5. Same—Jurisdiction—Territorial Limits—State Officials.

The exercise of the powers of the State Board of Accountancy, the members of which are to be regarded as State officials, is coextensive with the State boundaries, and may not be exercised beyond them, the word jurisdiction embracing not only the subject-matter coming within the powers of officials, but also the territory within which the powers are to be exercised.

6. Same—Quasi-Judicial Powers.

The examination and granting license to applicants for certificates as public accountants, beyond the borders of our State, being the exercise of a *quasi*-judicial power, under the police powers of the State, is void, and an injunction will lie to prevent it, in a suit of the State *ex rel.* Attorney-General and an accountant holding a certificate from the board, who is also a citizen and taxpayer of North Carolina.

7. Same—Statutes.

The legislative intent will not be construed by implication to extend the exercise of a *quasi*-judicial power by public officers to places beyond the State boundaries, as where the statute creates a State Board of Accountancy, gives it the power to examine and license applicants, and states that the board may do so "at such place as it may designate"; for the presumption being against the exercise of such extra territorial power, the discretion of the board in the exercise of this power will be confined to places within the boundaries of this State.

8. Same—Ultra Vires Acts—Courts.

Where a statute prescribes the means for the exercise of a power granted by the act, no other or different means can be implied as being more effective or convenient, and the Legislature having incorporated a State Board of Public Accountancy, giving it the power to determine upon examination whether applicants for license therein are qualified to receive them, it is for the courts of the State, upon proper action, to pass upon the question of whether the board acts *ultra vires* in holding an examination beyond the boundaries of the State upon the request of non-residents desiring to obtain a certificate, and a declaration in the fixing of such place that it would be the last time the board would hold an examination outside the State is not binding or controlling on the question.

9. Injunction—Pleadings—Demurrer—Evidence.

In a suit asking for an injunction, a demurrer admits the allegations of the complaint, and the Supreme Court, on appeal, will not settle the controversy on conflicting evidence; and where the defendant's admissions upon the demurrer justifies it, the injunction should be continued to the hearing.

10. Injunction—Ultra Vires Acts—Public Accountants—Acts Committed—Continuing Powers.

Where an injunction is sought to restrain an *ultra vires* act of the State Board of Public Accountancy in holding an examination for the applicants for license as public accountants, beyond the boundaries of the State, the courts, upon sufficient evidence or admissions, will continue the restraining order to the hearing, to prevent the commission of such acts in the future, and the objection cannot be successfully maintained, that the specific act complained of has been committed and leaves nothing for such order to operate upon, nor will the declaration by the board that they will not do so in the future affect the matter.

APPEAL by plaintiff from *Ray, J.*, at chambers, 9 June,
(867) 1921, from MECKLENBURG.

This action was brought by the plaintiff, who is a duly

certified public accountant, to enjoin the defendants from exercising certain of their duties beyond the limits of the State, and, to be more exact, from examining applicants for license and certificates to practice, as public accountants, beyond the State and in the city of Washington, D. C.

The case was tried below on demurrer to the complaint and the motion to vacate a restraining order theretofore granted. The court sustained the demurrer and vacated the restraining order, and refused a preliminary injunction to the final hearing. Plaintiff appealed.

Cochran & Beam and Carrie L. McLean for plaintiff.
E. R. Preston and James A. Lockhart for defendant.

WALKER, J., after stating the case: The State Board of Accountacy was created by a special act of the Legislature of 1913, the act being chapter 157 of the Public Laws of 1913, brought forward in the Consolidated Statute as chapter 116, sections 7008 to 7024, inclusive. The function of this board is to examine applicants and grant certificates, as certified public accountants of the State of North Carolina, to those giving evidence by such examination that they are qualified. The statute provides (C.S. 7010) that: "The board shall determine the qualifications of persons applying for certificates under this chapter, and make rules for the examination of applicants and the issue of certificates herein provided." The statute further provides (C.S. 7016): "The examination shall be held as often as may be necessary in the opinion of the board, and at such times and places as it may designate, but not less frequently than in each calendar year."

Before entering upon a discussion of the merits, we will first consider a preliminary question based upon the motion of the plaintiff in this Court to make the Attorney-General a party as coplaintiff, so that the title of the case shall be *"The State on the relation of the Attorney-General and D. H. McCullough,"* as plaintiffs, against the present defendants. The defendants resist the granting of this motion on the ground that the amendment here will deprive them of the benefit of their second ground of demurrer taken below, that plaintiff had no right to bring this action, and that this Court will not allow an amendment, when such a result will follow. This is true generally as the cases cited by the defendants show. *West v. R. R.*, 140 N.C. 620; *Bonner v. Stotesbury*, 139 N.C. 3; *Wilson v. Pearson*, 102 N.C. 290; *Grant v. Rogers*, 94 N.C. 755. And they further contend that it would substitute a new (868)

cause of action. If we could see that such would be the result, and that defendants would be prejudiced thereby, we might deny the motion, but it does not so appear to us. The plaintiff has some interest in the cause of action, as a member of the class for whose benefit this law was enacted, and is subject to the general supervision of its board and its official bodies, and also he has such interest as a citizen and taxpayer, in seeing that funds, in which the public have an interest, should not be diverted to an illegal purpose, or squandered for unauthorized purposes, and more especially he has an interest in requiring that funds raised for the support of this *quasi*-public body, they being trustees of the class of which he is a member, should not be unlawfully expended by the board, but should be held by it to subserve the special objects for which it was created. But, however this may be, and it is not necessary that we should definitely decide it, this Court has allowed the amendments requested, which are in the interest of a hearing of the case upon its real merits, and in accordance with, at least, one of our former decisions, when a similiar amendment was ordered here. *Forte v. Boone,* 114 N.C. 176 (opinion by the present Chief Justice). There it was held, as the syllabus of the case shows, that where an action was brought on the official bond of a clerk of the Superior Court in the name of the parties injured by a breach thereof, it was not error in the court below to permit an amendment of the summons by the insertion of the words "The State on relation of" after the pleadings were filed. The Court, in the opinion says with respect to this holding: "We may note, however, that the exception to the judge's allowing the summons to be amended by adding the words 'State on relation of' before the name of plaintiff, was not error. *Maggett v. Roberts,* 108 N.C. 174. It might have even been allowed after verdict (*Brown v. Mitchell,* 102 N.C. 347), or, indeed, *in this Court,*" citing *Hodge v. Railroad,* 108 N.C. 24, 26; *Grant v. Rogers,* 94 N.C. 755; *Justices v. Simmons,* 48 N.C. 187; The Code, 965.

(869) We then have a case, in the name of the State upon the relation of its Attorney-General and D. H. McCullough against the defendants, to enjoin the violation by the latter of the law creating them, wherein it is alleged that they have committed an *ultra vires* act, and to the extent that, if they may pay their expenses in the doing of the alleged unlawful act, they will misapply the trust fund established by the statute for the lawful costs and expenses of the board, and thereby are diminishing the amount which should go into the public treasury by the terms of the law, which provides in C.S. 7019, that after paying expenses, "Any surplus arising shall, at the end of each year, be deposited by the

treasurer of the board with the State Treasurer to the credit of the general fund." C.S. 1143, entitled "Actions by the Attorney-General to prevent *ultra vires* acts by corporations," provides:

In the following cases the Attorney-General may, in the name of the State, upon his own information, or upon the complaint of a private party, bring an action against the offending parties for the purpose of —

1. Restraining by injunction a corporation from assuming or exercising any franchise or transacting any business not allowed by its charter.

2. Restraining any person from exercising corporate franchises not granted.

3. Bringing directors, managers, and officers of a corporation, or the trustees of funds given for a public or charitable purpose, to an account for the management and disposition of the property confided to their care.

4. Removing such officers or trustees upon proof of gross misconduct.

5. Securing, for the benefit of all interested, the said property or funds.

6. Setting aside and restraining improper alienations of the said property or funds.

7. Generally compelling the faithful performance of duty and preventing all fraudulent practices, embezzlement, and waste.

To restrain corporations from *ultra vires* acts, and which was applicable where purpose was not to dissolve a corporation, as under section 1187, but to preserve it in its useful functions without abuse of its powers. *Attorney-General v. R. R.*, 28 N.C. 456. This section embodies provisions of Rev. Code, ch. 26, sec. 28; Rev. Statutes, ch. 26, sec. 10; acts of 1831, ch. 24, sec. 5, which authorized injunction proceedings in a court of equity.

The authority, given by statute, as approved by this Court, would seem to be ample justification for granting the relief prayed for by plaintiff in this action. The Attorney-General is doing only what the statute permits him to do in the interest of the public, of his own motion, or upon the complaint of a private party.

Having disposed of this preliminary question, we proceed to consider the case upon its merits. It must be steadily kept in mind that we are now dealing with an overruled demurrer, and we can consider only the facts alleged in the complaint (which are to be taken as admitted), and no extraneous matter. *Hartsfield v. Bryan*, 177 N.C. 166; *Brewer v. Wynne*, 154 N.C. 467; *Wood v. Kincaid*, 144 N.C. 393. (870)

We are firmly convinced that the statute, under which the defendants professed to hold this examination, does not authorize them to perform their duties, and exercise their functions, outside the State, and that, on the contrary, it requires them to confine their activities strictly within its limits. We do not suppose, for an instant, it will be controverted, that defendants are public officers. The board created by the act is, at least, a *quasi*-public corporation, required to discharge certain public duties, and responsiblities to the State and bound for their proper, and legal, performance, and also for the care, and administration of the funds they handle, the surplus of which, not used for defraying the board's expenses, being required to be deposited in the State Treasury. In *Groves v. Barden*, 169 N.C. 8, our Court defines the word "officers," and refers with approval to the case of *Attorney-General v. Tillinghast*, 17 A. & E. Anno. Cases 452. These cases, with the authorities therein collected, and the later authorities given in the notes to *Groves v. Barden* in Anno. Cas., 1917-D, p. 316, furnish us the indicia by which we determine whether a given position is or is not an "office." Applying to the State Board of Accountancy the tests laid down in the cases, we find that the board was directly created by the Legislature; the qualifications of its members are prescribed by law — all to be residents of the State, three to be actively engaged as certified public accountants of this State, one to be a lawyer of the State in good standing; the treasurer is required to give bond; the funds belong to the State after the expenses of the officer are paid; there is entrusted to this board some of the sovereign authority of the State, it being an arm of the State Government; the duties are not merely clerical, or those of agents or servants, but are performed in the execution and administration of the law, in the exercise of power and authority bestowed by the law; they are appointed by the Governor; the people of the State at large are concerned in the performance of their official acts; their compensation is derived from fees fixed by law; they are not under contract with the State, either as to their duties or their compensation; the law fixes the duration of their term of office, such discretionary power is granted and such judgment required in the exercise of the functions for which the board was created as to render the official acts of its members *quasi*-judicial; the duties are continuing in their nature — *i. e.*, they are to be regularly performed; and the duties pertaining to the office cannot be delegated to others. The certificates granted by the board constitute a license to practice as certified public account-

(871) ants within the State. The position held by each of the de-

fendants complies with all the tests prescribed in *State ex rel Attorney-General v. Noland Knight,* 169 N.C. 333.

In 22 R.C.L. 396, boards of education, boards of legal examiners, and boards of equalization of taxes, are mentioned as among various well known instances of boards of public officers. It is admitted that the jurisdiction of the board is statewide, and if the members are officers, they are, therefore, State officers. The plaintiff contends, and it is true, that the jurisdiction of State officers is only coextensive with the territory of the State from which they derive their powers. "It is apparent that in strictness a mere license or power conferred by statute is only coextensive with the sovereignty from which the license or power emanates." 17 R.C.L. 502. "State officers are those whose duties concern the State at large, or the general public, although exercised within defined limits, and to whom are delegated the exercise of a portion of the sovereign power of the State. They are in a general sense those whose powers and duties are coextensive with the State." 36 Cyc. 852. In *S. v. Hocker,* 63 Am. Rep. 174, after reciting very fully the attributes necessary to constitute an officer, it was held that without any semblance of doubt the members of the board of legal examiners were State officers, the field for the exercise of whose jurisdiction, duties and powers, was coextensive only with the limits of the State.

It cannot be said that "coextensive with State boundaries" means more than the words imply, that is so contradictory that the mere statement of it is seemingly absurd. The word "jurisdiction" embraces not only the subject matter coming within the powers of officials, but also the territory within which the powers are to be exercised. *S. v. Magney,* (Neb.), 72 N.W. 1006, 1008). The question as to jurisdiction must be considered with reference to the territory within which it is to be exercised. (*Konold v. Rio Grande W. Ry. Co.,* (Utah), 51 Pac. 256.) Jurisdiction is defined to be the "power to hear and determine causes." The hearing is as important a part of jurisdiction as the determining. The power of officials to act as fixed and limited by the place of performance, is discussed in the case of *S. v. Dolan,* 72 Miss. 960, 18 So. 387, and particularly in the notes to the same case in 33 L.R.A. 85. While it is true that in most of the cases referred to in these notes some place for performance was designated in the statute, still in the case of *Ex parte Branch,* 63 Ala. 383, cited in this connection, it is said: "If the law should not, however, appoint a place for the sitting of the Court, it would doubtless rest in the power of the judge to appoint the time and place of the sitting; and the only limitation of the power would be, that the place should be within the territory of his jurisdiction." In

(872) *Ferebee v. Hinton,* 102 N.C. 99, the clerk of the court of Camden County, North Carolina, went to Virginia, and took the examination and acknowledgment of the parties to a deed of trust on land in North Carolina, but did not write out his certificate and sign it until he returned to Camden County, North Carolina. The Court said: "That the deed was void as to the wife, if the clerk of the Superior Court of Camden County took her privy examination in the State of Virginia cannot be denied, and it is unnecessary to cite authority in support of such a plain proposition as to the admissibility of the evidence; as to the other point, it is equally clear that the clerk had no jurisdiction when he took the privy examination in the State of Virginia." This case is cited with approval in *Long v. Crews,* 113 N.C. 256, in which the present Chief Justice wrote the opinion, and in which he says: "In this State it is settled law that an acknowledgment of a deed by the husband and privy examination of the wife taken before a justice of the peace, commissioner, or notary, is a judicial, or, at least, a *quasi*-judicial act, and if such officer is not authorized to take it, the probate and registration are invalid against creditors and purchasers. . . . The principle has since been followed in *Todd v. Outlaw,* 79 N.C. 235; *Duke v. Markham,* 105 N.C. 131, and many other cases. . . . These were all cases where the registration and probate were insufficient because the acknowledgment was made before an officer, by reason of his locality, not authorized or acting outside of his local jurisdiction, and the ruling is sustained by ample authority elsewhere. 1 A. & E. 146, note 2, and 1 Devlen on Deeds, sections 487 and 488, with cases cited. . . . The acknowledgment is taken, so to speak, *coram non judice,* and cannot authorize probate by the clerk and registration," citing authorities. Acts of a school officer must generally be performed at the times and places designated by law, or they will be invalid; and, generally speaking, they must be performed within the territory over which the officer's jurisdiction extends. 24 R.C.L. 578.

In *Pardrige v. Morgenthau,* 157 Ill. 395, the judge out of Court and off the bench approved an appeal bond, and directed it to be filed *nunc pro tunc,* and it was decided to be invalid. In *Bear v. Cohen,* 65 N.C. 511, it was held that a judge appointed by the Governor to hold court in Wilson and Craven counties, did not have jurisdiction to act in cases pending in other counties of the district — specifically, to set aside an attachment in Wayne County. In *S. v. Jefferson,* 66 N.C. 309, the judge left the court in Warren County before the jury agreed on a verdict, and went to his home in the adjoining county of Franklin, where he was advised by telegraph that

the jury could not agree. He instructed the clerk by wire to discharge the jury and remand the prisoner. Discussing error in the exercise of power by the court, (the validity of his act as affected by the place of its performance), it was held to be the duty of the judge that he should be personally present in court, and therefore his act was illegal, and the prisoner was entitled (873) to his discharge. When in 1913 our Legislature enacted a curative statute validating probates and acknowledgments taken prior to 1913 by officers out of the county, or district, authorized by law, only such probates or acknowledgments were validated as had been taken within the State. Laws 1913, ch. 125, C.S. 3336. *In re Allison,* 13 Colo. 525, 10 L.R.A. 790, it was said that "no issue was made with the definition usually given that a court consists of persons officially assembled, under authority of law, at the appropriate time and place for the administration of justice, nor was it denied that the place of meeting was an important element in the definition."

It is elementary that when the law confers upon a person powers that he as a natural person does not possess, power cannot accompany his person beyond the bounds of the sovereignty which has conferred the power. For example, letters testamentary or of administration have no legal effect beyond the territorial limits of the State in which they are granted. An executor or administrator cannot sue in his official capacity in the courts of any other state than that from which he derives has authority to act in virtue of the letters there granted to him, because his appointment stops at the boundary of the state which appointed him. 11 R.C.L., pp. 432-447. He must resort to ancillary administration in the other state. A state may have extra territorial officers, such as commissioners to take acknowledgments of deeds in other states and territories, but such cases are clearly exceptional. 22 R.C.L. 405. The same familiar principle that forbids court officials, executors, administrators, and guardians from acting in their official capacity beyond the state boundaries, is applied in the case of corporations. In the case of *Miller v. Ewen,* 27 Maine 509, 46 Am. Dec. 619, it was held that a general clause in a charter authorizing certain persons to call the first meeting of a corporation at such time and place as they think proper, does not authorize them to call the meeting at a place without the state. Numerous cases may be cited to establish the general principle that meetings of corporations for the performance of corporate acts must be held within the state creating the corporation. 14 Cor. Jur. 886 and 7 R.C.L. 335. Our own State has enacted this principle into the statute, *i. e.,* that meetings of stockholders must

be held within the State. The reason given for this rule is that in the performance of corporate acts, the corporation shall be at all times under the supervision and control of the laws of a state creating the corporation. If this be true of private corporations, *a fortiori* is it true of an arm of the State Government, a body corporate to whom has been entrusted the performance of a governmental duty designated to protect the people of the State against unskilled and incompetent persons in a profession for which the State
(874) has seen fit to fix standards of proficiency before admission to practice.

As has been said, "jurisdiction" involves the hearing as well as the determining of matters to be decided — indeed, the hearing of the matter is the basis for the determination. The giving of examinations for determining the qualifications of applicants is not a mere incidental or ministerial duty such as might be delegated by the State Board of Accountancy to other persons, but is a judicial or *quasi*-judicial duty required to be performed by the members of the board themselves, and in order further to safeguard the public, certain standards of skill are required of the examiners. The plaintiff contends that the submission and the supervision of the holding of the examination, and the determination of the qualifications of applicants, constitute one official act, requiring such judgment and discretion as to render it judicial or *quasi*-judicial in character; that it is the performing of a function of government designed to benefit the people of the State; and therefore, in going beyond the boundaries of the State to perform this function, the board would exceed its jurisdiction. It seems superfluous to cite other authorities than those already cited from our own Court in *Ferebee v. Hinton,* 102 N.C. 99, and in *Long v. Crews,* 113 N.C. 256, either as to the judicial character of the official acts of the Board of Accountancy, or as to the place where these acts may be performed. The comparatively simple act of taking the acknowledgment and examination of the grantors in a deed, by a notary, commissioner, justice of the peace, or clerk, has been repeatedly held by this Court, to be judicial, not only in the cases cited above, but in *S. v. Knight,* 169 N.C. 333; *Paul v. Carpenter,* 70 N.C. 508; *White v. Connelly,* 105 N.C. 68; *Piland v. Taylor,* 113 N.C. 1, and others.

Bishop or Non-Contract Laws, secs. 785, 786, says that *quasi*-judicial functions are those which lie midway between the judicial and the ministerial ones. The lines, separating them from such as are on their two sides, are necessarily indistinct; but in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a

way which it specifically directs, but after a discretion in its nature judicial, the function is term *quasi*-judicial. In 18 R.C.L. 294, in discussing the extent to which a board of examiners may be controlled in granting professional licenses, the discretionary power to pass on qualifications is termed "judicial," and in every case where the acts complained of constitute an abuse of discretion or an excess of jurisdiction, it is held that the courts should intervene to enforce or enjoin, as the circumstances might be. In 22 R.C.L. 383, it is said that certain officers are considered *quasi*-judicial, as for example, members of a board of pilot commissioners, to whom the law has entrusted certain duties, the performance of which requires the exercise of judgment. In *Boner v. Adams, Auditor, and Jenkins, Treasurer,* 65 N.C. 639, it was held that the State (875) Auditor is not a mere ministerial officer, but exercises discretionary powers. It was held in *Ex parte Garland,* 4 Wall. (U. S.) 333, at 378, that the admission and exclusion of attorneys is the exercise of judicial power, and has been so held in numerous cases at that time. This has been approved in numerous later decisions referred to in Rose's Notes, Vol. 6, p. 55. In Troop on Public Officers, pp. 507 *et seq.,* it is said that although an officer may not in the strictness be a judge, still, if his powers are discretionary, to be exerted or withheld according to his own view of what is necessary and proper, they are in their nature judicial. Where a power rests in judgment or discretion, so that it is of a judicial nature or character, but does not involve the exercise of the functions of a judge, or is conferred upon an officer other than a judicial officer, the expression used is generally *"quasi*-judicial." It is a general and sound principle that whenever the law vests any person with a power to do an act, and constitutes him a judge of the evidence on which the act may be done; and, at the same time, contemplates that the act is to be carried into effect through the instrumentality of agents; the person thus clothed with power is invested with discretion, and is *quoad hoc* a judge. By judicial action is meant, in legal understanding, that which requires the exercise of judgment or discretion by one or more persons, or by a corporate body, when acting as public officers, in an official character, as shall seem to them to be equitable and just.

In *S. v. State Medical Examining Board,* 50 Am. Rep. (32 Minn.) 575; in *People v. Dental Examiners,* 110 Ill. 180; in *S. v. Gregory,* 83 Mo. 123, 53 Am. Rep. 565; in *Williams v. Dental Examiners* (Tenn.), 27 S.W. 1019; and many similar cases, it was held that examining boards for physicians, dentists, lawyers, and other professions, exercise judicial of *quasi*-judicial powers; and in all other

cases, the courts addressed themselves largely to determining whether the act complained of was within, or in excess, or abuse, of such powers; if the latter, it could be enjoined or enforced by the courts. In the much-cited case of *S. v. Chittendon* (Wis.), 107 N.W. 500, at 516, it is said that the law leaves the matter (decision as to status of the college) to the board, acting reasonably, the same as similar matters are commonly left to such agencies exercising *quasi*-judicial authority. It contemplates that the members of the board will proceed with the dignity and fairness commonly expected of tribunals exercising judicial or *quasi*-judicial authority; that they will act as a body; that they will act upon proof of some sort reasonably appropriate to the case and made a matter of record, not necessarily that they will, in all cases, act regardless of personal investigation, but that in case of reliance thereon the result of the investigation will be made a matter of record. . . . In short, that they
(876) will exercise their judicial function judicially, and that their decisions will be open to review by the courts for jurisdictional error.

The general rule for the construction of statutes, when applied to the law under consideration, clearly indicate that the intention of the Legislature, and the object to be secured by the performance of the duties presented for the board of accountancy, require that the words "at such places as it may designate," shall be construed to mean "as such places within the State as it may designate." In construing a statute, it is to be considered in its relation to other laws, as part of a general and uniform system of jurisprudence, in connection with other statutes on the same or cognate subjects, or even on different subjects. Where the language is of doubtful meaning, or adherence to the strict letter would lead to injustice, the Court gives a reasonable construction consistent with the general principles of law. The spirit, or reason of the law, prevails over its letter. The meaning of general terms may be restrained by the evident object, or purpose to be attained, and general language may be construed to admit implied exceptions, in order to accomplish what was manifestly intended. It is proper to consider the occasion and the necessity for its enactment, and that construction should be given which is best calculated to advance the object by suppressing the mischief and securing the benefits contemplated. If the purpose, and well ascertained object of a statute, are inconsistent with the exact words, the latter must yield to the controlling influence of the legislative will resulting from a consideration of the whole act. A statute should not be extended beyond the fair and reasonable meaning of its terms because the Legislature did not use proper words to

express its meaning. Where the ordinary interpretation of a statute leads to consequences so dangerous and absurd that they could never have been intended, the Court may adopt a construction from analogous provisions and thus supply an omission. *Abernethy v. Comrs.*, 169 N.C. 631.

The above is a summary of some of the general principles for the construction of statutes as laid down in 36 Cyc. 1102 *et seq.*, and many decisions and when applied to the statute under consideration in the case at bar, the conclusion is inevitable that the field for the discharge of the functions of the State Board of Accountancy is not the whole world, but only "such places within the State as the board may designate." In *S. v. Ind. Co.*, (Ark.), L.R.A. 348, in construing a statute in which the word "any" occurred thirteen times in the first section, the Court held that although the Legislature may use generally words, such as "any" or "all," in describing the persons or acts to which the statute applies, still it does not follow that the law has any extra territorial effect; for it is presumed that the Legislature did not presume it to have such an extensive, or world-wide effect, unless the language of the statute admits (877) of no other reasonable interpretation. *Bond v. Jay*, 7 Cranch 351. The reports furnish numerous instances of the application of this rule, by which general words used in statutes are taken as limited to cases within the jurisdiction of the Legislature passing the statute, and confining its operation to matters affecting persons and property in such jurisdiction. If it were necessary, hundreds of cases and statutes could be referred to containing general words, which are thus limited. Among the vast number of cases construing such statutes, it is doubtful if one can be found in which such general words have not been treated as limited to some extent, for it is unusual for a legislature to intend that its statutes shall apply everywhere.

We have already referred to the law of corporations as being a law on a cognate subject. Even more closely allied is our law as it relates to such professions as law, medicine, etc. Until 1917, our statute did not prescribe where the examinations for entrance to the bar were to be held, and even now the statute (C.S. 195) says that examinations for license to practice law may be held in the city of Raleigh. Before 1917 the examiners of applicants for admission to the bar did not construe their authority to permit the holding of examinations outside the State nor, since 1917, at any place other than the city of Raleigh, even though the word "may" sometimes implies discretion. C.S. 6609, prescribes that the board of medical examiners shall meet in the city of Raleigh. C.S. 6701, prescribes that the

board of osteopathic examiners shall meet in Raleigh in July of each year, "and at such other times and places as a majority of the board may designate." In our statutes, some discretion is permitted the various other boards of examiners for dentists, pharmacists, nurses, teachers, etc. In these cases, however, we are not left to apply only the general rules for the construction of statutes. The law is unmistakably clear that the Legislature has no power to enact statutes, even though in general words, that can extend in their operation and effect beyond the territory of the sovereignty from which the statute emanates. The legislative authority of every state must spend its force within the territorial limits of the State. Cooley's Const. Lim., p. 154. As a general rule, no law has any effect of its own force beyond the territorial limits of the sovereignty from which its authority is derived. 25 R.C.L. 781; *Hilton v. Guyot,* 159 N.S. 113; 40 L. Ed. 95. Black on Interpretation of Laws, p. 91, says: "*Prima facie,* every statute is confined in its operation to the persons, property, rights, or contracts, which are within the territorial jurisdiction of the legislature which enacted it. The presumption is always against any intention to attempt giving to the act any extra-territorial operation and effect." Endlich on Interpretation of Statutes, p. 233, announces the same principle. No presumption
(878) arises, from a failure of the state through its legislative authority to speak on the subject, that the state intends to grant any right, privilege, or authority under its laws to be exercised beyond its jurisdiction. *Walbridge v. Robinson,* 22 Idaho 236; 43 L.R.A., N.S. 240. Either the statute applies to "such places within the State as the board may designate," or its scope is unlimited, and, for the convenience of applicants, the board may hold examinations anywhere and everywhere it sees fit. And if this board may go outside the state to hold examinations, why not every other examining board of the State do likewise, if the place is left to its discretion? Obviously, this would be subversive of public policy, of the spirit and intent of the law, would defeat the very ends which these protective statutes were enacted to accomplish, and might, in effect, make the creature greater than the creator.

We must not be understood as holding that the Legislature may not require certain official acts to be done beyond the State's limits, for it can legally do so, as for example in requiring depositions of witnesses or the acknowledgment of a deed or other instrument, to be taken in some other state, or even in a foreign country, and perhaps there are other illustrations of this legislative power. But they are done by its express permission, and are not merely implied.

The demurrer of the defendants admits as true the allegations

of the complaint that the defendants intended: 1. To hold the examination outside the State. 2. To use in that examination the same questions that had been used in the preceding week in an examination in Raleigh; and, 3. That these duplicate questions were available to candidates for certificates in the Washington examination.

The defendants say that it was at the solicitation of applicants and for their convenience (not for the public welfare or interest) that they proposed to give the duplicate examination in Washington the week following the Raleigh examination. As a matter of fact, the defendants do not deny that some applicants were going to Washington from North Carolina to take the duplicate examination. This Court may judge for itself of the relative "convenience" of Washington and Raleigh for applicants already in this State, and of the interest of the citizens of this State to be served by holding a duplicate examination outside the State the week after such examination was held in Raleigh. The plaintiff seems to be in entire accord with the statement of the defendants in their demurrer that the act creating the State Board of Accountancy and prescribing its duties and powers, was passed in the interest of the general public, to protect them against incompetent, inefficient, or dishonest persons, and not for the purpose of granting special privileges or emoluments to any class of persons. The plaintiff contends, however, that in attempting to hold an examination in the city of Washington, "at the earnest solicitation of numbers of applicants living in that (879) section," and, as stated by defendants on the hearing "for the convenience of applicants," the board was attempting to "grant special privileges" to those applicants, and an even greater "special privilege" was the intended use of duplicate questions which were available to applicants. This Court with these admitted facts before it, can judge whether an official act thus performed is "for the public interest" or for the promotion of the personal interest of applicants. It is an unprecedented thing for the other examining boards of the State to go beyond the borders of the State to give examinations (much less duplicate examinations) to applicants who may not find it convenient to come to the State to take the same. Yet the defendants claim that they are justified in going hundreds of miles beyond the State boundaries, the week following an examination in Raleigh, to give a duplicate of that examination, because it is more convenient to certain applicants to take the examination in Washington; and some of the applicants going from this State to Washington for that purpose. As well suggested by the plaintiff's learned counsel, it is peculiar to certified accountants in Washington that the mountain should come to Mohamet. It is an established rule that

when the means for the exercise of a granted power are given, no other or different means can be implied, as being more effective or convenient. Cooley's Const. Lim. (4th ed.) p. 78. In stating in the call that this was "positively the last examination to be held outside the State," the Board of Accountancy impliedly admits that it considered such procedure irregular, to say the least.

The authorities cited above, defining judicial and *quasi*-judicial officers, also establish the principle that when such officers exceed their jurisdiction or abuse their discretion, it is subject to review by the courts; in fact, so fundamental is this principle that in most of the cases the courts do not discuss it, but address themselves to determining whether or not the act complained of was in excess of jurisdiction or in abuse of discretion, and if they decide these questions in the affirmative, then it is held as a matter of course that the act should be enforced or enjoined, as the case may be. In Throop on Public Officers, pp. 525, *et seq.*, it is said that where, in the exercise of a power, an officer is vested with a discretion, his act is regarded as *quasi*-judicial. . . . But, of course, if the officer or board attempts to exercise a power, either judicial or ministerial, in a case to which his or its jurisdiction does not extend, the act is either absolutely void or voidable by judicial proceedings, as the case may be. But the exercise of discretionary power is always subject, in some respects, to review by the courts. So it may be reviewed, where it has violated some rule of public policy, and of course it will be violated by any illegality or excess of jurisdiction. This principle has been enacted into our State laws for municipalities (C.S. 2962),
(880) giving to any taxable inhabitant the right to maintain an action to set aside or prevent any illegal official act on the part of the municipality or its officers, and it is also well settled by numerous decisions of this Court, and has received the sanction of the Supreme Court of the United States in *Crampton v. Zabriskie*, 101 U.S. 601, 609, quoted in Dillon Mun. Corp., sec. 1581, and cited with approval in *Stratford v. Greensboro*, 124 N.C. 127. In referring to statutes similar to our own as found in C.S. 2962, Dillon Mun. Corp., sec. 1585, says: "The first class of wrong provided for by the statute is simply defined as 'an illegal act,' and the statute contains no express provision that the illegal official act against which redress is sought be one which has resulted or will result in loss or injury to the municipality. So far as the literal language of the statute is concerned, any illegal official act may be prevented at the suit of a taxpayer having the requisite status as such. This liberal interpretation of the statute has been supported by the courts." In the notes to the above, it is said, citing authorities, that "an illegal official act

which may be the subject of the taxpayer's action may be any act of a municipal officer which is not authorized by law or which is in excess of the authority conferred by law." In actions brought by taxpayers the court has taken jurisdiction and has restrained or annulled official acts of great diversity of character.

The State in the lawful exercise of its police power has created the State Board of Accountancy and required examinations of applicants to safeguard the public against incompetent accountants. Every citizen of the State is in a certain sense injured when the duties of the board are performed in such a manner as to let down the bars and lower the standards of the profession. There is an especial injury to properly accredited members of the profession who have met the conditions imposed by law, in the manner prescribed by law. Poor Richard says, "He who hath a trade hath an estate." A man's profession is his capital. The State has set standards for entrance into this profession, and those who have entered in the manner prescribed by law are entitled to the protection of the State to the extent, at least, that they shall not be unjustly discriminated against by admission of others into the profession in any other way than that prescribed by law.

It is not necessary to go beyond the decisions of our own Court to establish the contention that this is a subject for the cognizance and intervention of our courts. In *Glenn v. Comrs.*, 139 N.C. 421, our Court said: "If an *ultra vires* act were being threatened, the courts would enjoin it." In all the following cases it is said that when a discretionary power is exercised wrongfully, or transcends the authority of the officers, or is *ultra vires*, or when there is a manifest abuse of discretion, the courts will enforce or enjoin the act as the case may be, at the suit of a citizen, or taxpayer, (881) and whenever the Court has declined to intervene, it has been on the ground that the act complained of was *infra vires*. *Brodnax v. Groom*, 64 N.C. 244; *Vaughan v. Comrs.*, 118 N.C. 636; *Stratford v. Greensboro*, 124 N.C. 127; *Edgerton v. Water Co.*, 126 N.C. 92; *Ewbanks v. Turner*, 134 N.C. 77; *Barnes v. Comrs.*, 135 N.C. 27; *Graves v. Comrs.*, 135 N.C. 49; *Merrimon v. Paving Co.*, 142 N.C. 539; *Newton v. School Committee*, 158 N.C. 186; *Comrs. v. Comrs.*, 165 N.C. 632; *Supervisors v. Comrs.*, 169 N.C. 548; *Cobb v. R. R.*, 172 N.C. 58.

The decisions of the courts of other states and the principle announced by the various text-books, are well summarized in *Perkins v. Indi. School Dist.*, 56 Ia. 476, 9 N.W. 356, where it was held that the courts of the State are arbitors of all questions involving the construction of the statutes conferring authority upon officers and

jurisdictions upon special tribunals. It was certainly never the intention of the Legislature to confer upon school boards, superintendents of schools, or other officers discharging *quasi*-judicial function, exclusive authority to decide questions pertaining to their jurisdiction and the extent of their power. All such questions may be determined by the courts of the state. Hence, when the rights of a citizen are involved, in the exercise of authority by a school officer, the courts may determine whether such authority was lawfully exercised.

As to the demurrer, we have covered the entire field of inquiry, as the facts stated in the complaint are to be taken as admitted. On the motion for a continuance of the injunction to the hearing, there is an affidavit of Mr. G. G. Scott denying that the same questions as propounded in the State were used in the Washington examination, thereby giving the applicants there a decided advantage over those examined here. But we need not settle the controversy of fact, because it has been the rule for time out of mind that where there is conflict in the evidence the injunction is generally continued to the hearing. We stated the prevailing rule in *Cobb v. Clegg*, 137 N.C. 153, at p. 159, where it was said that it is generally proper, when the parties are at issue concerning the legal or equitable right, to grant an interlocutory injunction to preserve the right *in statu quo* until the determination of the controversy, and especially is this the rule when the principal relief sought is in itself an injunction, because a dissolution of a pending interlocutory injunction, or the refusal of one, upon application therefor in the first instance, will virtually decide the case upon its merits and deprive the plaintiff of all remedy or relief, even though he should be afterwards able to show ever so good a case. The principles we have attempted to state, are, we think, well supported by the authorities upon this subject, citing 1 High on Injunctions (3 ed.), sec. 6; Bisphams Eq. (6 ed.),
(882) sec. 405; *Marshall v. Comrs.*, 89 N.C. 103; *Capehart v. Mahoon*, 45 N.C. 30; *Jarman v. Saunders*, 64 N.C. 367; *Lowe v. Comrs.*, 70 N.C. 532; and other authorities. In the *Marshall* case, *supra*, the Court said: "The injunctive relief sought in this action is not merely auxiliary to the principal relief demanded, but it is the relief, and a perpetual injunction is demanded. To dissolve the injunction, therefore, would be practically to deny the relief sought and terminate the action. This the Court will never do where it may be that possibly the plaintiff is entitled to the relief demanded. In such cases it will not determine the matter upon a preliminary hearing upon the pleading and *ex parte* affidavits; but it will preserve the matter intact until the action can be regularly heard upon

its merits. Any other course would defeat the end to be attained by the action." The case last cited is directly in point here. But without the aid of this principle and the authorities sustaining it, we hold that the injunction should have been continued to the final hearing. It is argued that this case is like that where the tree was cut down, after the restraining order against felling it had been vacated. *Harrison v. Bryan,* 148 N.C. 315, and these additional cases are cited, supposedly to the same effect. *Pickler v. Board of Education,* 149 N.C. 221; *Wallace v. North Wilkesboro,* 151 N.C. 614; *Moore v. Monument Co.,* 166 N.C. 211. But they do not apply to this case, as the facts are not the same. In *Harrison v. Bryan, supra,* the tree had fallen under the stroke of the axe, never to rise again. It could not grow again after it had been destroyed. It had died and was therefore beyond restoration. This was a fact established, and not even a mandatory injunction could change it. But here, the act of the defendants may be repeated, it, at least, is possible for them to do so, and plaintiffs are not bound by their declared intention not to repeat their mistake. The law will strip them of the power to do so by its restraining process.

The entire judgment below will be reversed, injunction to the final hearing issued, the demurrer overruled, and the defendants permitted to answer over, if they so desire.

Reversed.

Cited: Cherry v. R. R., 185 N.C. 93; *Tobacco Growers Asso. v. Pollock,* 187 N.C. 413; *Coburn v. Comrs.,* 191 N.C. 73; *S. v. Deposit Co.,* 191 N.C. 646; *S. v. Lockey,* 198 N.C. 555; *Smith v. Light Co.,* 198 N.C. 620; *Van Kempen v. Latham,* 201 N.C. 514; *Harris v. Watson,* 201 N.C. 666; *McGuinn v. High Point,* 219 N.C. 88; *Warren v. R. R.,* 223 N.C. 845; *Owens v. Chaplain,* 228 N.C. 713; *Teer v. Jordan,* 232 N.C. 51; *Arey v. Lemons,* 232 N.C. 535; *Roller v. Allen,* 245 N.C. 525; *S. v. Warren,* 252 N.C. 694.

(883)

STATE v. SMITH JOHNSON.

(Filed 7 December, 1921.)

1. Seduction—Breach of Promise of Marriage — Fault of the Woman — Statutes—Innocence and Virtue.

In order to convict of crime of seduction under a breach of promise of marriage, the woman should have previously been both innocent and virtuous, and should she have committed the act of adultery induced by her

own lascivious desire, with or without the promise, her conduct is not such as to bring her within the intent and meaning of the statute as an innocent and virtuous woman. C.S. 4339.

2. Same—Instructions—Appeal and Error.

Where there is evidence upon the trial for seduction under breach of promise of marriage that the woman had consented to the act, induced solely by her own lascivious desire, irrespective of the promise to which she has testified, the jury may disregard her testimony as to the promise, and render a verdict acquitting the defendant of the charge; and a requested instruction is erroneously refused which leaves out the element of seduction and bases the defendant's innocence or guilt on the finding as to whether the woman had been solely induced by her own desire. C.S. 4339.

3. Same—Subsequent Chastity.

Upon the trial for seduction under a breach of promise of marriage, there was evidence that the woman, a widow, had had sexual intercourse with her husband before her marriage, which had also been induced under promise thereof: *Held*, the woman does not come within the intent and meaning of the statute as having been "innocent and virtuous"; though however often she may have committed the act with her husband before the marriage, yet had she remained faithful to him thereafter, and had not had sexual intercourse with any other man until that with the defendant, it would render the defendant guilty under the provisions of the statute if he had violated them. C.S. 4339.

APPEAL by defendant from *Ferguson, J.*, at August Term, 1921, of WILKES.

This was in indictment for seduction under promise of marriage.

There was evidence tending to show that the prosecutrix, Darrie Ball, before the seduction, charged in this case, had been seduced under promise of marriage by Thomas Ball. This she admitted. Ball afterwards married her, and they lived together as man and wife, but he did not marry her until she gave birth to a child, of which he was the father, she being at that time about sixteen years of age. She had been married to Ball about fourteen years, when he died, in January, 1916. She had five children by him, including the one not born in wedlock. She was thirty years old when Ball died, and the defendant was twenty-one at that time. There was some evi-

(884) dence that he had never had anything to do with a woman in his life, and at the time of the death of prosecutrix's husband, the defendant was going to see a young girl just across the mountain beyond the home of the prosecutrix. The defendant prior to the death of prosecutrix's husband, and afterwards until about one year ago, lived within sight and within less than one-half mile of her home.

There was evidence tending to show that the prosecutrix was seduced by the defendant under a promise of marriage, and, slight

though it may have been, it was sufficient to be submitted to the jury. She confessed to the jury that she submitted to the defendant "partly because she loved him and partly because she knew that it would be good to her." There was considerable testimony, which was, more or less, to the same effect. There also was further testimony, in defendant's behalf, tending to show that soon after the death of the husband and prior to July, 1916, prosecutrix began meeting the defendant along the road near the home of defendant and would walk with him and tease him about the girls and invite him to come and see her. As defendant would pass the home of prosecutrix's brother going to see his girl across the mountain, she would be there and her brother would hitch his ox to the wagon and drive the defendant to see his girl and the prosecutrix would go along, and come back in the same wagon, and leave defendant at the home of his girl. Later they would carry him in the wagon to visit their homes. Sometime during the month of July, 1916, at the invitation of the prosecutrix, the defendant went to her home and they sat around the fireplace, until the children went to bed. After they sat there for a while, the prosecutrix moved her chair over close to defendant, put her arms around his neck and said, "I have been loving you for a good while and you did not find it out until a few days ago." She hugged and kissed him, and put her hands upon him in such a way as to excite his sexual passions. At this he asked her to have intercourse with him, she consented, and they had intercourse there in a chair. After the intercourse, they talked about the girl the defendant was going to see and she asked defendant when he and the girl were going to marry, after which defendant went home. Nothing was said about their marrying. Defendant went to see prosecutrix often afterwards and often had sexual intercourse with her up to sometime before the baby was born on 16 July, 1918. Defendant and prosecutrix had said nothing about marrying, until defendant was drafted into the United States Army for service over-seas, and after the child was born and prior to 21 July, 1918, when defendant left for the camps. At this time defendant went to see prosecutrix, she cried and complained to him that she was not able to raise the baby and begged defendant to marry her. Defendant promised her then if she would keep a decent house and conduct herself properly, until he returned from the army, that he would marry her, and this is the promise he referred to in the letters copied in the record. After defendant returned from the (885) army he found that prosecutrix had not kept a clean house as she had promised to do, and prosecutrix asked him to try her again and she would keep the boys away. Defendant consented to

do so, all of her promises she failed to keep, and all relations were broken off and the defendant married 5 December, 1920, and was arrested in this action in January, 1921.

The Court charged the jury, among other things, not related to this instruction, as follows: "If you find from the evidence beyond a reasonable doubt, that the prosecutrix never had sexual intercourse with any man except her husband and the defendant, and if you should further find from the evidence beyond a reasonable doubt, that she only had sexual intercourse with her husband before she was married after the engagement between her and her husband to be married, and it was at his solicitation after the said engagement and promise of marriage and before their marriage, and if you should further find from the evidence beyond a reasonable doubt, that the defendant and the prosecutrix were engaged to be married and that the defendant solicited her to have intercourse with him, promising to marry her, and she yielded to him because she trusted him and because he promised to marry her, she would be in the eyes of the law, an innocent and virtuous woman.

The court refused to give the following instruction requested by the defendant:

1. The court charges you that an innocent and virtuous woman under the law of this State, is a woman who had never had actual illicit sexual intercourse with any man. The court further charges you that if you should find from the testimony that the prosecutrix permitted her husband to have sexual intercourse with her prior to their marriage, then the court charges you that she would not be an innocent and virtuous woman and your verdict in this case, if you so find, will be "not guilty."

2. If you find from the testimony that the prosecutrix permitted her husband prior to their marriage to have sexual intercourse with her, that said sexual intercourse was illicit, notwithstanding you further find that the same was procured by seduction under promise of marriage, as the seduction under such a promise does not render sexual intercourse legal (except as between the prosecutrix and her husband) but to all the rest of the world it was illicit sexual intercourse, and the defendant would not be guilty.

Defendant duly excepted to the instruction given and to the refusal of those requested.

There was a verdict of guilty and from the judgment thereon, defendant appealed to this Court, after reserving his exceptions.

Attorney-General Manning and Assistant Attorney-General Nash for the State. (886)

J. A. Rousseau and Charles G. Gilreath for defendant.

WALKER, J., after stating the case: The evidence in this case is not only repulsive, but filthy, in some of its parts, but we are to determine upon the legal guilt of the defendant or, in other words and speaking more accurately, whether he has been legally tried below. We do not think that he has been, and will proceed now to state our reasons for so thinking. The instruction above set forth contains a proposition of law which cannot be sustained and it no doubt caused the defendant's conviction. We know of no case in this State which decides that a woman would be innocent and virtuous under the facts and circumstances detailed by the judge therein. If a woman commits adultery with a man simply because she is solicited to do so, even upon the promise of marriage, she is to be pitied, but is not "innocent and virtuous" within the meaning of the statute upon which this prosecution is based. If she yielded to temptation solely because of the promise and not to gratify her lustful passions, she is still an adultress, and cannot be said, in the language of this Court, to be a woman who never had had actual sexual intercourse with a man. She may be virtuous, but not innocent, within the meaning of the statute, as is shown so clearly by Justice Davis in *S. v. Ferguson*, 107 N.C. 841. It is said in that case, without quoting literally, that the woman must be virtuous, that is, pure and chaste, as well as innocent. The purpose of this statute is to protect innocent and virtuous women against wicked and designing men, who know that one of the most potent of all seductive arts is to win love and confidence by promising love and marriage. In section 1113 of The Code the word "innocent" is used, which Justice Ruffin defines, in *S. v. McDaniel*, 84 N.C. 805, as meaning "a pure woman — one whose character, to use the language of the preamble of the statute, is unsullied." In *S. v. Davis*, 92 N.C. 764, "an innocent woman," within the meaning of that section, is defined to be "one who had never had actual illicit intercourse with a man," and mere lasciviousness, and the permission of liberties by men, are not contemplated by the statute; and this definition of the words, "an innocent woman," has been followed in *S. v. Horton*, 100 N.C. 447, in construing the word "innocent" in the statute now under review. But the woman must not only be "innocent" but "virtuous." What force, if any, does the word "virtuous" impart to the act? In *S. v. Grigg*, 104 N.C. 882, it is said, citing *S. v. Aldridge*, 86 N.C. 680, that a woman, who at some time in her life has made a "slip in her virtue" is en-

titled to the protection of section 1113 of The Code, if she is chaste and virtuous" when the slanderous words are uttered. There is a manifest reason why the words "an innocent woman," in
(887) section 1113 of The Code, and "innocent and unprotected woman" in section 3763, should be construed to mean innocent of illicit sexual intercourse, as affecting her reputation when the slanderous words are spoken, for the purpose of these sections is to protect women, who, however imprudent they may have been in other respects, have not so far "stooped to folly" as to surrender their chastity and become incontinent, or who have regained their characters for innocence and chastity if a "slip has been made," from "the wanton and malicious slander" of persons who may attempt to destroy their reputations and blast and ruin their good names. But the act of 1885, recognizing the frailty of man as well as woman, superadds to the word "innocent" the word "virtuous," and before it will condemn and punish the man, who may be seducible as well as seductive, requires that it shall be made to appear that the woman was herself "innocent and virtuous," and that the seduction was compassed by winning her confidence and love under the false and alluring means of a promise of marriage; but, if she willingly surrenders her chastity, prompted by her own lustful passions, or any other motive than that produced by a promise of marriage, she is in *pari delicto*, and there is no crime under the statute. She must not only be innocent, but virtuous, that is, chaste and pure, and if such a woman yields under the promise of marriage to the "studied, sly, ensnaring art . . . dissembling smooth" of the seducer and is betrayed, she deserves sympathy and charity; and he not only deserves the "curse" of all who love honor and virtue, but the severest penalties of the law. The woman, however, must be "virtuous" as well as "innocent," and this implies something more in her conduct than mere innocence of illicit sexual intercourse. If she willingly submitted to his embraces, the mere promise of marriage would not make it seduction. 33 Mich. 117. And her evidence must be supported. No such proviso is to be found in sections 1113 and 3763. For illustration, there is no evidence that Potipher's wife ever had illicit sexual intercourse with anyone, and yet the idea of a "virtuous woman" would hardly be suggested by her name.

This definition of the words has been the settled and fully accepted one ever since the decision in *S. v. Ferguson, supra*, and has been adopted, and followed, in several more recent cases. *S. v. Horton*, 100 N.C. 443; *S. v. Crowell*, 116 N.C. 1052; *S. v. Whitley*, 141 N.C. 826; *S. v. Ring*, 142 N.C. 596; *S. v. Kincaid, ibid.* 657; *S. v. Raynor*, 145 N.C. 472; *S. v. Malonee*, 154 N.C. 200; *S. v. Cook*, 176

N.C. 730; *S. v. Pace,* 159 N.C. 462; *S. v. Cline,* 170 N.C. 751; *S. v. Moody,* 172 N.C. 967; *S. v. Fulcher,* 176 N.C. 724. If we are still to follow the opinion of Justice Davis, which has always guided us in cases such as this one, the charge of the Court cannot be sustained. *S. v. Crowell,* 116 N.C. 1052 (opinion by the present Chief Justice), for he told the jury that, notwithstanding that the prosecutrix (Darrie Ball) had committed adultery with Thomas (888) Ball (by whom she had a child) before they were married, the jury should find that she was both an innocent and a virtuous woman. And the judge committed the same error in a more pronounced way, if anything, when he refused the clear-cut requests of the defendant for instruction as to this feature of the case. The first prayer for instructions omitted the element of seduction and defendant was entitled to have the jury charged as requested, because the defendant was not concluded by the statement of the prosecutrix that the illicit intercourse was induced by his promise of marriage. It was for the jury to say whether it was merely to gratify her lust, or was induced by his promise, and there was evidence in this case, and, too, some strong evidence, that she was a very lustful woman, and enough to justify the jury in finding that she did not require a promise to overcome the longing of her lewd nature or her lascivious desires, or even yearnings. But we may pause here to state that, on the next trial, it will be proper for the court to instruct the jury that if the prosecutrix had committed adultery with the man, who afterwards became her husband, even though it was often repeated before marriage, yet if after she thus fell, she married her lover and was always faithful to him, and ever, after the first act of adultery with him, was innocent and virtuous, that is, had not had sexual intercourse with any man, until the defendant seduced her under promise of marriage, if he did such a thing, then that she would be an innocent woman, and if she was also chaste and pure in the sense above defined, she also would be a virtuous woman within the meaning of the statute. An adulteress may reform and become innocent and even virtuous, and if this woman has done so, the statute protects her just as much as if she had never fallen, but had always walked in the straight and narrow way of spotless innocence, virtue, and chastity, not even permitting undue familiarity from any man, and especially the debaucher. This was clearly decided in *S. v. Ferguson, supra,* and some of the other cases above cited have carefully followed it.

The statute was passed to guard, and protect, the innocent and virtuous woman, and not those who seek only to gratify their own lustful desires and have no proper regard for the sacredness and

purity of the marriage promise, and do not even wait for it, before yielding their persons to the embraces of evil minded men. In such a case, the woman is considered to be as bad as he is, and beyond the pale of the law's protection under this statute.

We have not overlooked the fact of the disparity in the ages of this woman and the defendant, she being fourteen years his senior, and that he contends, and offered evidence to prove, that he was the seduced, and not the seducer. She was, by her own evidence, of a most lascivious disposition, and seemed to have lured this (889) young man from the path of virtue by constantly tempting him, if the testimony be true, and even going to the length of saying, unblushingly and to her open shame, that in the perpetration of the act itself, "she preferred the woods to the porch."

There was error in the respects indicated, for which another trial is necessary.

New trial.

Cited: Hardin v. Davis, 183 N.C. 47; *S. v. Hopper,* 186 N.C. 411; *Metcalfe v. Chambers,* 188 N.C. 805; *S. v. Shatley,* 201 N.C. 84.

STATE v. HARVEY OVERCASH AND ARCH PETHEL.

(Filed 7 December, 1921.)

1. Criminal Law—Indictment—Time Not of the Essence.

Ordinarily it is not required that an indictment for larceny and receiving charge the exact time of the alleged offense, this not being of the essence thereof.

2. Same—Evidence—Variance—Indictment.

Where the trial upon two indictments have been consolidated; and the time of the offense charged as to the appellants is prior to the time alleged as to the other defendants in the second bill of indictment: and the evidence tends to show that the appellants were guilty, at the latter time, this variance between the time charged and the proof is immaterial, and a verdict of guilty will be sustained on appeal.

3. Criminal Law—Larceny—Accessories— Principals — Conspiracy — Instructions.

Where the appellants entered a prearranged plan, with others, for the others to enter a certain warehouse and steal goods therefrom, which the appellants were to receive and pay for, and this was accordingly done, the appellants, having aided, abetted, advised, or procured the crime, are guilty with the others as principals, and an exception that the judge ad-

verted to them in his charge as accessories, on the facts presented in this case could have worked no harm to appellants, and is untenable.

APPEAL by defendants from *Bryson, J.*, at April Term, 1921, of CABARRUS.

Criminal action. From a perusal of the record it appears that at said April Term, 1921, a bill of indictment, No. 78, was submitted to the grand jury, charging that the defendants, Harvey Overcash and Arch Pethel, on 29 January, 1921, did feloniously steal, take, and carry away two thousand yards of cloth of the value of two hundred dollars of the goods and chattels, etc., of the Locke Cotton Mills, and there was also a count in the bill for feloniously receiving said property knowing the same had been stolen.

At the same April Term, 1921, there was a further bill submitted, No. 79, charging that on said 29 January, 1921, (890) Fred Widenhouse, William Sides, and Walt Sides with force and arms, at or in the county aforesaid, did break into the warehouse of said Locke Cotton Mills with felonious intent and did there feloniously steal, etc., five bolts of cloth, the property of said company of the value of two hundred dollars, and with a count on bill for feloniously receiving the property. In No. 80 at same term a bill was submitted charging in proper terms, that on 15 January, 1921, William Sides, Dewey Furr, and Roy Hall feloniously did break and enter the warehouse, etc., of the Locke Cotton Mills and then and there did feloniously steal, etc., cloth of the value of two hundred dollars, the property of said company, with a count for receiving, etc.

These bills were all considered and found by the grand jury to be true bills, and the three causes by consent were tried together at said term and before the one and the same petit jury, and all of the defendants were convicted of the crime of larceny, except Roy Hall, he being acquitted of the offense. There was judgment on the verdict, and defendants Overcash and Pethel excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

H. S. Williams, R. Lee Wright for defendants.

HOKE, J. It is objected to the validity of this conviction that under a bill of indictment charging a larceny as of 29 January, the judge submitted the question of the guilt of these appellants and they have been convicted solely for a larceny as of 15 January, 1921. So far as the bill of indictment is concerned and as a matter of form, unless time is of the essence of the offense, it is fully established

that a variance between the allegation as to time and the proof is not material, and that the prosecution, unless it is otherwise required by order of the court, is not restricted to the time named in the bill but may offer evidence as to the commission of the offense charged at any time before indictment found and within the period where no statute of limitations operates to protect the accused. *S. v. Newsom & Brindle,* 47 N.C. 173; Clark, Criminal Procedure, p. 237.

In the present case, the evidence offered on the part of the State tended to show that there were two distinct offenses committed, each constituting a larceny of cloth, the property of the Locke Cotton Mills, one on 15 January, 1921, and the other 29 January; that defendant Overcash was only connected with that of the fifteenth and was not involved in the second offense. The court, therefore, ignoring the date of the charge named in the bill, very properly submitted the question of the guilt of these defendants as it was
(891) presented in the evidence and not otherwise. While there may have been at times some apparent confusion in stating the contention of the opposing parties growing out of the fact chiefly that there were three bills of indictment being tried at the same time, and by one and the same jury, on the issue as to this first bill, No. 78, in which these appellants alone were indicted, the instructions of his Honor were both comprehensive and careful, and on perusal of the record, we are well assured that the rights of defendant have not been prejudiced in the determination of the issue.

Again it is objected that the court in charging the jury referred to evidence tending to show a conspiracy an the part of appellants with others to commit the offense, and of their being accessories before the fact, when there was no charge against defendants covering these positions, but the bill of indictment contained only a direct charge of larceny, and for which the conviction was had. It has long been held "for settled law" in this State that the distinction between grand and petit larceny has been abolished, and unless in case of robbery or in connection with some felonious breaking, that "all felonious stealing has been reduced to the grade of petit larceny," and as to this offense, our decisions are to the effect that there can be no accessories, but all who "aid, abet, advise or procure the crime are principles." *S. v. Stroud,* 95 N.C. 626; *S. v. Fox,* 94 N.C. 928.

While there is no proof that either of these appellants were physically present at the time the goods were stolen, on 15 January, or at any other time, there was testimony on the part of the State from Fred Widenhouse, a defendant in bill No. 80, in effect that on said date of 15 January, he, Will Sides, a codefendant, were at the house of Arch Pethel, where Pethel and Overcash were at the time,

and it was then and there arranged between them that the witness and Sides would steal the cloth from the Locke Cotton Mills and bring and deliver it to appellants, who were to take same and pay for it, and pursuant to this arrangement the witness and Sides, associating the other defendants with them, did steal the cloth in question from the company's warehouse, delivered same to appellants that same night about 9:30 o'clock, and appellants paid them for it, part in money and part in whiskey.

The fact that this arrangement spoken of may have amounted to a conspiracy to steal does not render the evidence incompetent on the issue presented, as it clearly tends to show that appellants "advised and procured the crime" and would justify a conviction for the consummated offense.

There is no reversible error and the judgment on the verdict is affirmed.

No error.

Cited: *S. v. Whitehurst,* 202 N.C. 633; *S. v. Williams,* 219 N.C. 368; *S. v. Trippe,* 222 N.C. 601; *S. v. Epps,* 223 N.C. 744.

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(892)

STATE v. ALECK SATTERWHITE.

(Filed 14 December, 1921.)

1. **Appeal and Error—Failure to Docket—Dismissal.**

Where the defendant in a criminal action has failed to docket his case until after the expiration of the term at which it should have been heard, the Attorney-General may on motion have it dismissed as a matter of course.

2. **Criminal Law—Sentence—Judgment—Pending Sentences—Commencement of Sentence.**

A sentence, upon conviction in a criminal action, which recognizes an existing sentence of the same defendant then pending on appeal to the Supreme Court, and makes the term of imprisonment to begin at once, or immediately after the expiration of the former sentence, according to the outcome of the appeal, is not void for uncertainty, indefiniteness, or being alternative or contingent; and when a pardon has been obtained from the Governor, in the meanwhile, the present sentence will take effect at once.

3. **Appeal and Error—Criminal Law—Sentence—Case Remanded—Void Sentence.**

Where the sentence in a criminal case is void for indefiniteness, etc., the case will be remanded in order that a correct sentence may be imposed.

STATE *v.* SATTERWHITE.

APPEAL by defendant from *Long, J.*, at September Term, 1920, of BUNCOMBE.

The defendant was convicted and sentenced for selling spirituous liquors, and appealed. Said appeal not having been docketed here at the spring term, as required, the Attorney-General moves to dismiss.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Philip C. Cocke for defendant.

CLARK, C.J. This case was tried at September Term, 1920, of Buncombe. Not having been docketed here till this term, the motion of the Attorney-General to dismiss should be allowed as a matter of course. At his option, the case might have been docketed and dismissed under Rule 17, at last term.

The only point, however, raised by the defendant in his brief is "Appellant assigns error that the judgment imposed is uncertain, indefinite, conditional, alternative, and contingent in respect to the time the said judgment shall go into effect and be executed upon the person of the defendant."

If the case was properly before us, we should have to hold against the appellant. The record sets out that "when the solicitor prayed judgment in this case he informed the court that this defendant has, since 1914, been under indictment in Asheville in different
(893) courts, in about 40 cases on the criminal docket, acquitted in some and convicted in others. This information is put on the record in explanation of the court's sentence, and made a part of it. The sentence of the court is that he be imprisoned in the county jail for 18 months, and assigned to work on the public roads of Buncombe County. It also appearing to the court that he has been sentenced, by another judge at a previous term of court for housebreaking, for 18 months, and the case is still in the Supreme Court, this sentence is made so that it shall not conflict with the other sentence if the same is approved. In other words, this sentence is to begin at the expiration of the other sentence. If the sentence in the other case is reversed or there is a new trial, this sentence is to begin first and become effective immediately."

The statement of the case on appeal was settled by the judge 18 November, 1920. The defendant having been pardoned by the Governor (Bickett) in the other case pending in this Court from a sentence of 18 months for housebreaking, the defendant's counsel contends that the sentence in the present case is void, and that the defendant will be entitled to a new trial.

If the sentence imposed were defective, there being no other er-

ror assigned, the defendant, though he had prosecuted his appeal in time, would not have been entitled to a new trial, but the case would have been remanded that a correct sentence might be imposed. *S. v. Lawrence,* 81 N.C. 522; *S. v. Queen,* 91 N.C. 660; *S. v. Jones,* 101 N.C. 724; and this irrespective of whether the case came to this Court by appeal from the judgment or on a *habeas corpus,* or by *certiorari. S. v. Walters,* 97 N.C. 490; *S. v. Crowell,* 116 N.C. 1059; *S. v. Austin,* 121 N.C. 622.

But there is no defect in the judgment as entered. In *S. v. Hamby,* 126 N.C. 1067, it was held that a sentence "made to begin on the expiration of another sentence imposed on the defendant is valid. This practice, called 'cumulative sentences,' is not unusual on the circuit, and is not contrary to any principle of law. It is in conformity with the settled criminal practice in England and most of the states, where a person is convicted of several offenses at the same time," citing the textbooks and authorities, and the reasons therefor, saying, among other things: "If this were not so, a person could not be punished for an offense committed while undergoing punishment unless the trial were postponed till its expiration. Out statute does not expressly require sentences to begin *in presenti,* and it ought not to be so construed (especially) where no present effect can be given to such sentence by reason of another subsisting judgment of imprisonment."

S. v. Hamby, supra, was approved, *In re Hinson,* 156 N.C. 252, and *In re Black,* 162 N.C. 459, in which the Court said that it had been "settled by many decisions and with entire uniformity" that where a defendant had been sentenced to im- (894) prisonment on conviction of two or more indictments, "sentence may be given against him on each successive conviction, the sentence of imprisonment in each successive term to commence from the expiration of the term next preceding," and that such sentences are not void for uncertainty, but the sentence should state that the later term should begin at the expiration of the former term, else they would run concurrently, citing many authorities.

But we have a more recent case affirming a sentence in the exact terms of the present sentence, which was rendered by the same judge and was affirmed, *S. v. Cathey,* 170 N.C. 797, in which Allen, J., said that it was "lawful to impose a sentence to take effect at the expiration of the first sentence, and by legal operation such sentence would begin immediately upon the reversal of the first sentence on appeal, or upon its expiration by the lapse of time, *or otherwise,* and it cannot impair the validity of the judgment that his Honor set down in words in this case what the law would have written into it." The

sentence in that case was in the identical terms of that now before us.

We find no error, and have thought proper to call attention to these principles, though well settled, but as the case was not brought up at the proper term the motion of the Attorney-General must be granted.

Appeal dismissed.

Cited: *S. v. Barksdale,* 183 N.C. 786; *S. v. Jarrett,* 189 N.C. 521; *Pruitt v. Wood,* 199 N.C. 790; *S. v. Shipman,* 203 N.C. 327; *Winchester v. Brotherhood of R. R. Trainman,* 203 N.C. 743; *S. v. Doughtie,* 237 N.C. 372; *S. v. Smith,* 238 N.C. 88; *S. v. Corl,* 250 N.C. 258.

STATE v. SOL SLAGLE AND LATT SLAGLE.

(Filed 14 December, 1921.)

1. Homicide—Murder—Evidence—Nonsuit—Trials.

Where, upon the trial for murder, there is direct evidence of the actual shooting of the deceased by the defendant's and circumstantial evidence that they afterwards loaded the deceased's body in a wagon and took it to the place where he was afterwards found dead, a motion as of nonsuit was properly denied.

2. Evidence—Homicide—Murder—Res Gestæ.

Upon a trial for murder, circumstantial evidence, forming a part of the *res gestæ*, is properly admitted.

3. Homicide—Murder—Evidence—Nonsuit—Trials—Dismissal as to One Defendant—Instructions—Prejudice—Appeal and Error.

Where two defendants are tried for committing the same crime, the court, upon the evidence, eliminates one of them from the trial upon nonsuit, and a part of the evidence is only admissible as to the one thus discharged, it will not be held as prejudicial to the other when the judge instructed the jury, unmistakably, that this evidence must not be considered against the defendant remaining on trial.

4. Courts—Trials—Bench Warrants—Arrest of Witness—Expression of Opinions.

Where one of the defendants, on trial for murder, has been released on the granting of a motion as of nonsuit upon the evidence, and ordered arrested, in the presence of the jury by the judge for illicit distilling of spirituous liquor, on evidence given on the trial, and bond required for his appearance, it is not an expression of opinion by the trial judge in the case at bar upon the weight or credibility of the evidence, as it might if he had been held for perjury.

5. Instructions—Contentions—Disagreement Between Judge and Attorney —Jury.

When the counsel and judge disagree as to a part of the evidence introduced during the trial, in the charge to the jury while stating the contentions of the parties, it is proper for the court to instruct the jury to depend upon their own recollection of the evidence.

APPEAL by defendants from *McElroy, J.*, at March Term, 1921, of BUNCOMBE. (895)

The defendants were convicted of murder in the second degree at March Term, 1921, of Buncombe Superior Court, and from the judgment upon such conviction, appealed to this Court.

The State's evidence tended to show that Luther Merrill left his home, eleven miles from Asheville, in Buncombe County, about two o'clock in the afternoon of Monday, 31 January, 1921, in the company of defendant Sol Slagle. His wife saw him no more until she was taken to the place, where his dead body was, on Wednesday afternoon, 2 February, 1921. It was lying about 116 yards from the public road and behind a chestnut tree. It had evidently been removed from the place of killing to the chestnut tree, for his hat and extra pair of shoes were placed near the body and his overcoat was thrown across it. There is evidence of threats made by Sol Slagle that if Luther ever fooled around him he would kill him and do away with him, and that they were all at the still last fall at the time this statement was made. He further said that Luther had "turned him up" a time or two. It appeared that Sol Slagle, Charlie Slagle and Latt Slagle were operating a blockade still with Eli Kilpatrick, not far from Sol's house. It was in a dug-out on the back of a branch and covered over with leaves. A large pistol belonging to Latt Slagle was seen by the witness at Sol Slagle's house, where Latt lived a short time before the tragedy. About 400 yards from where the body was found, an officer, Dillingham, by name, discovered where a wagon had been turned around and backed against the bank of the road with the prints of the feet of horses appearing to have been standing there some time. A little ravine ran from the road there, and Dillingham followed this ravine up and found the blockade still in a dug-out as hereinbefore mentioned. He described where the still was, and what he did at that place. From the still to where he had discovered the wagon tracks and (896) horse tracks the distance was 238 steps. He pursued the tracks of the horse and wagon, and also examined the ground at the red bank, where the wagon had been backed, and he saw well-defined tracks of a man in the soft earth. He inserted a shoe, gotten at Sol Slagle's house, into this track and it fitted it. He measured the wagon tracks, and also the wagon at Sol Slagle's, and the width of

the tires were exactly the same. The left hind foot of the horse, in the tracks made at the bank, showed two high nails, that is, new nails that had been driven in after the shoe had been put on. The track at the soft place in the earth, and the foot of Sol Slagle's horse were identical in size, and Sol Slagle's horse had high nails in his shoes. The witness examined the wagon, also, and at the right-hand side found a blood spot, that had run down from the top of the board. It ran down the board and then seeped through where the board comes to the bottom and on the brakes. He discovered other blood spots on the wagon. Dillingham saw the body of deceased at the undertaking establishment. The first shot hit just above the hip bone and went through to the other side, and the other shot was about four inches higher. The upper shot looked as though it had ranged a little downward. The lower shot apparently went straight through. The bullets, after passing through the body, lodged in the clothes of the deceased. They were steel jacketed and in size 45 caliber. He also found a pair of coveralls, a jumper jacket and a pair of shoes at Sol Slagle's and on the jumper jacket were blood stains. The board with blood stains on it, the shoes, bullets and overalls were all introduced in evidence.

Onie Kilpatrick and his father, Eli Kilpatrick, both testified that they were eye witnesses of the killing of Luther Merrill by Latt Slagle and Sol Slagle. Eli testified: "I was on the other side of the branch from the still, within 25 or 30 yards of it. I saw Sol and Latt and Luther Merrill there at the still. Luther Merrill was sitting down when I first noticed him, and Sol and Luther were arguing someway or another, I couldn't understand exactly what they were saying, they were arguing, and Luther raised up, and Latt shot him. Luther just raised and began to turn like he was going to run, and when he did that, why he just lit in shooting at him, Latt did; I saw him until the shooting was over and he fell, and I just went on home, moved pretty fast. I didn't go back up there; I never said anything to either one of the Slagle boys about it. I stayed at home that night."

Attorney-General Manning and Assistant Attorney-General Nash, and A. Hall Johnston for the State.

J. Scroop Styles for defendants.

(897) WALKER, J., after stating the case: The theory of the State was, that Sol and Latt Slagle killed Luther Merrill at the still and then carried his body to the wagon at the road and thence to the place where it was found on the following

Wednesday. With plain and direct evidence of this sort, as to the actual killing of the deceased by the defendants, Sol and Latt, there can certainly be no foundation for defendant's Exceptions 5 and 7, to the judge's refusal to give judgment as of nonsuit against the State, at the conclusion of the State's testimony, and again, at the conclusion of all the testimony.

Exceptions 1 and 2 were taken to evidence which detailed circumstances connected with the disappearance of the deceased. Exception 4 was to similar evidence, and in each case, it seems that this evidence was material as part of the *res gestæ*. Exception 5 was taken to evidence plainly admissible as to Charles Slagle, and confined expressly by the judge to the purpose for which it was admissible, and after Charles Slagle was eliminated, as a defendant, by a judgment of nonsuit in his favor, the judge, again in his charge to the jury, expressly told them that they must disregard this evidence.

The defendants, in their brief, refer to an error which nowhere sufficiently appears in their assignments of error. It is thus set out in the record:

"It is agreed by the attorneys of record, whose names are hereto attached, that, at the time the motion was sustained as to Charles Slagle, as set out in the record, there was no charge of distilling against Charlie Slagle, but the court ordered him held, pending an indictment based upon the testimony given by Jim Lawrence, Oney Kilpatrick and Eli Kilpatrick, and ordered Charlie Slagle in custody, fixing his bond at one thousand five hundred dollars ($1,500), and all this was done in the presence of the jury. This may be treated under the defendant's Exception No. 6." But we will discuss it nevertheless.

The right of a *nisi prius* judge to order a witness, or anyone else, into immediate custody for a contempt committed in the presence of the court in session, is unquestioned. But the committing of a witness, in either a criminal or a civil action, into immediate custody for perjury in the presence of the jury is almost universally held to be an invasion of the rights of the party offering the witness, and as an intimation of opinion on the part of the judge, prohibited by the statute. *S. v. Swink,* 151 N.C. 176, and the cases there cited. In this case, the charge that Charles Slagle was guilty of "blockading" was dependent upon the testimony of Jim Lawrence and the two Kilpatricks. As it turned out, the State's case against the two defendants, Sol and Latt Slagle, for murder, was also largely dependent upon the credit the jury should give to these witnesses. It seems that this was not an expression of opinion by the judge upon their credibility. In no sense, was it a direct attack upon

(898) the credit of a principal witness such as there was in *Swink's* case and the cases similar to it. There was nothing to do in the case of Charles Slagle except to discharge him after the nonsuit, unless there was another charge pending against him, and so this was only an attempt by the judge to hold him to answer to another charge, which arose out of the evidence, and the effect of this was not to give these witnesses any additional credit, or to express an opinion favorable to the credibility of their testimony, but simply to say that, on the whole case, there was probable cause against Charles Slagle, and a necessity to investigate further, which investigation could only be made by a jury, in like manner as the pending investigation, as to the other two Slagles, was being made by a jury.

The course of the presiding judge in demanding bail of Charles Slagle, upon the charge of unlawfully dealing in liquor, commonly called "blockading," which is a violation not only of our statute, but of the "Volstead Act" of Congress, did not, in law, prejudice the defendants. The judge did not express any opinion as to whether Slagle was guilty, or as to whether the testimony of the two witnesses was true, or not, but he merely acted upon the suspicion that the simple oath of the two men, as to the fact, were sufficient to show probable cause, as to Slagle, and added nothing to the credibility of the other two men, and we are quite sure it was so intended by the judge and not so regarded by the jury. It was one of the ordinary incidents of a trial, and while it may always be better to send the jury out before taking such action, it sometimes becomes necessary, for a judge to act with great promptness in such cases to prevent any escape of the offender. *S. v. Swink, supra,* cited by the defendants' counsel in support of this alleged exception, is not at all in point. There the Court by its action directly impeached the credibility of the party's principal witness, by binding him over for perjury, which, of course, would prejudice the defendant for whom he had testified. We doubt if this exception is properly raised in the record, but we have, nevertheless, commented upon it.

The court admitted certain evidence which was competent against Charles Slagle so long as he remained a defendant, and when he was retired by the nonsuit, the judge properly instructed the jury not to consider it.

Several exceptions were taken to the judge's statement of contentions of the parties, but only one was called to the court's attention, and that raised an issue between the judge and counsel as to what the evidence was on the particular point. This relates to the supposed evidence as to defendants' being seen while tracking Merrill

and as to whiskey being found near the house. The response of the judge was sufficient to protect the rights of the defendants. He told the jury that if there were any contentions, supported by evidence, to consider them, which implied that those, not (899) so supported, should not be considered. The counsel could not himself remember with certainty whether the contention then being stated was supported by evidence. He merely said that he did not then recall any such evidence.

There is no merit, at all, in the other exceptions and they, therefore, require no separate discussion.

We have carefully reviewed and considered this very long record, and find no reversible error therein. The defendants' counsel safeguarded the rights of the defendants at every point by a very able argument, but there is no reason for disturbing the judgment.

No error.

Cited: *S. v. McNeill,* 231 N.C. 667; *S. v. Simpson,* 233 N.C. 441; *S. v. Wagstaff,* 235 N.C. 72; *S. v. Mangum,* 245 N.C. 329.

STATE v. FRANK BLACKWELDER.

(Filed 7 December, 1921.)

1. Homicide—Murder — Circumstantial Evidence — Questions of Law — Questions for Jury—Trials.

Whether the accumulated and connected strength of circumstantial evidence is sufficient as a whole to sustain a verdict of the jury of guilty in a criminal action, is for the court to decide as a matter of law, and when so held, it is for the jury to determine whether they are satisfied thereon of the defendant's guilt beyond a reasonable doubt.

2. Same—Arrest Statutes.

There being direct evidence upon this trial for murder that at night the deceased heard his garage on his premises, wherein was his automobile, being broken into, and upon going there saw several men, whom in the dark he did not recognize; and sufficient circumstantial evidence that the prisoner was one of these, whom he endeavored to arrest with his gun, and who fired upon him inflicting the mortal wound, it is *held* sufficient to submit to the jury on the question whether the deceased had reasonable ground to believe the prisoner had committed a felony in his presence, under the provisions of C.S. 4235, 4543, and a verdict of murder in the second degree is sustained in this case.

CRIMINAL action, tried before *Bryson, J.,* and a jury, at the April Term, 1921, of CABARRUS.

Frank Blackwelder and Sid McDaniel were indicted for the murder of M. W. Allman, but Blackwelder only was tried. When the case was called for trial, the solicitor announced that he would not request a verdict for murder in the first degree, but only for murder in the second degree, or for manslaughter, as the evidence might warrant. The jury returned a verdict against Blackwelder for murder in the second degree. The judgment of the court was
(900) pronounced, and the defendant, having entered exceptions of record, appealed to the Supreme Court.

There was evidence for the State tending to show the facts to be as follows: M. W. Allman resided in Cabarrus County, some distance from Concord, the county-seat, and about a quarter of a mile from the cross-roads. On the occasion hereinafter referred to, he, his wife, and his son were at his home. Between one and two o'clock on the morning of 4 January, 1921, the defendant arrived at Concord on a train which had come from Charlotte, and at the station met McDaniel and a man named Jones. The defendant, after a conversation with the other two, went to the Hartsell mill, and took a pistol and some cartridges from a traveling bag which he had left at the home of McDaniel's mother. About two o'clock these three men left Concord in a Ford car, and went in the direction of the place at which the deceased lived, and about four o'clock in the morning a car passed the residence of the deceased, and stopped in front of his garage, which was about fifty yards from the residence; the wife of the deceased about this time heard the door of the car close, and raised the curtain, looked through the window, and saw the car go on down the road. In about three minutes the car returned, and again passed the residence of the deceased, and stopped at a distance of about forty or fifty yards from the house in the road leading to Concord. The deceased, his son, and his wife had been disturbed by the noise, and the deceased going out to make an investigation, called out, "What are you doing there?" Just prior to this time, or about this time, the son of the deceased heard the door of the garage open, and taking the shotgun went to the piazza and fired the gun twice. The car which had stopped beyond the house thereupon moved on in the direction of Concord, and the deceased and his son a few minutes thereafter took the car of the deceased from the garage and went in pursuit of the other car a distance of about two miles, when failing to overtake it, they returned in the direction of their home. When about a mile from home, the deceased and his son met the defendant and McDaniel in the road coming from the direction of their residence, and apparently going toward Concord. Upon their meeting, the deceased had the car stopped, and

entered into a conversation with the defendant and McDaniel. The deceased inquired where Blackwelder and McDaniel were going, and they said they were going to Concord. The deceased asked where they were from, and they said from Georgeville. The deceased asked their names, and Blackwelder said his name was Smith. The deceased inquired whether the car had run off and left them, to which Blackwelder answered "No." The son of the deceased then got out of the car, walked in front of it, and the deceased thereupon told Blackwelder and McDaniel to come in front of the car so that he might see them in the light. They came in front of (901) the car, and Blackwelder inquired whether the deceased knew them. The deceased said he did not, got out of his car, took a position near his son, and said to Blackwelder and McDaniel, "Why do you hold your hands so closely in your pockets? You have a gun, haven't you?" Blackwelder and McDaniel had their hands in their overcoat pockets, and Blackwelder said "Yes." The deceased took the shotgun which his son had. He had previously asked Blackwelder and McDaniel if they had been in his garage, and each of them said "No." The deceased said, "I have reason to believe you are the two fellows I ran out of my garage a few minutes ago." He asked them to take their hands out of their pockets, and Blackwelder remarked, "There is no use of that." The deceased then said, "If you were not in my garage at the time mentioned, why do you refuse to take your hands out of your pockets?" Blackwelder and McDaniel then began shooting with pistols, and the defendant fell at the first shooting. The shotgun which he held was fired as he fell, and again after he had fallen to the ground. The son was shot in each shoulder. McDaniel shot him and Blackwelder shot the deceased. They fired four or five times before the shotgun was fired. Blackwelder was shot in the hand, and as he and McDaniel ran away, the son of the deceased fired two shots at them. The shotgun was the only weapon in the possession of the deceased and his son. The deceased was shot on the morning of 4 January, and died at three o'clock on the morning of the 7th. The defendant Blackwelder was a mechanic, and worked in one of the mills at Concord, and had mechanic's tools which he kept in his suitcase. On the morning following the homicide, defendant's glove and a pair of bolt nippers were found on the ground near the scene of the shooting. The defendant had previously pleaded guilty of carrying a concealed weapon and of larceny in Mecklenburg County, and had been sentenced to the roads for a term of two years. He had served about thirteen months when he was pardoned. He had been charged with breaking into a store at Mooresville, and had been arrested on another occa-

sion, and, it seems, had been released after trial. There was evidence tending to show that the general reputation of the defendant was bad. It had been raining for some time before the shooting took place, and the deceased, in his dying declaration, said that he noticed when he met Blackwelder and McDaniel that they had very little mud on their shoes, though the road from his house to the scene of the shooting was very muddy.

The State contended that Blackwelder, McDaniel, and Jones had gone in a car from Concord to the residence of the deceased for the purpose of committing larceny of the car which the deceased had locked in his garage; that Jones drove the car, and that Blackwelder and McDaniel got out of the car when it stopped in front
(902) of the garage, broke the door, and were in the act of taking the car away when they were frightened by the deceased and by the firing of the gun; that the night was dark, and after their car had left them, they secreted themselves and made their way cautiously in the direction of Concord, traveling as little as possible in the road. The State contended that Blackwelder and McDaniel at the time of the shooting had committed a felony, and that they were affected with notice of the statute which gave the deceased a right to arrest them without warrant.

The defendant contended that he, McDaniel, and Jones had gone from Concord in search of liquor, and that they left their car near the place of the shooting, while Jones went alone for the purpose of getting the liquor and bringing it to the defendants in the car; that it was their purpose, after getting it, to return to Concord; that Blackwelder and McDaniel were secreted within a short distance of the road when the two cars referred to passed in the direction of Concord; that neither Blackwelder nor McDaniel knew anything about the other car, had not been in it, had not gone to the residence of the deceased, knew nothing of the attempted larceny of the car owned by the deceased, and that the deceased did not have any reasonable ground for believing that they had broken the garage and attempted to take his car. The defendant further contended that when the four met in the road, the deceased required Blackwelder and McDaniel to walk in front of the car, and to hold up their hands; that the defendant thereupon said, "Please don't shoot me; give me a living chance"; that the deceased immediately thereupon fired his gun and shot Blackwelder's hand out of his pocket; that Blackwelder then began shooting his pistol with the other hand; that he shot once or twice, started to leave the road, stepped into a ditch and fell; that the gun was fired directly over him, and as soon as he recovered himself, he began shooting again.

The defendant contended that he and the deceased were at arms length; that the deceased had no right to arrest him; and that he shot the deceased, if at all, upon the principle of self-preservation, and insisted upon the law of self-defense in his exoneration.

The court admitted evidence tending to show all the occurrences at the residence of the deceased and at the garage, to which the defendants excepted, and the defendant thereafter moved to strike the evidence from the record, and upon the court's declining the motion, again excepted. The first five exceptions relate to the admission of evidence as to what took place at the residence and at the garage.

The defendant excepted to the court's charge to the jury as set out in the opinion of the court. This is the defendant's sixth exception.

Attorney-General Manning and Assistant Attorney-General Nash for the State. (903)

L. T. Hartsell and J. L. Crowell for defendant.

ADAMS, J. The State's theory of the case is diametrically opposed to that of the defendant. At the trial the State contended that Blackwelder and McDaniel, in the presence of the deceased, had broken and entered into his garage with intent to steal his car, and were, therefore, guilty of a felony, for the commission of which the deceased had a legal right to arrest them without a warrant. C.S. 4235, 4543.

The defendant contended that neither he nor McDaniel had gone to the garage of the deceased; and that the deceased, having no authority to make the arrest, fired the first shot, and the defendant acted in self-defense.

The two sections referred to are as follows:

"If any person, with intent to commit a felony or other infamous crime therein, shall break or enter either the dwelling-house of another otherwise than by a burglarious breaking, or any storehouse, shop, warehouse, banking-house, counting-house, or other building where any merchandise, chattel, money, valuable security, or other personal property shall be, or any uninhabited house, he shall be guilty of a felony, and shall be imprisoned in the State's Prison or county jail not less than four months nor more than ten years." C.S. 4235.

"Every person in whose presence a felony has been committed may arrest the person whom he knows, or has reasonable ground to believe, to be guilty of such offense, and it shall be the duty of every

sheriff, coroner, constable, or officer of police, upon information, to assist in such arrest." C.S. 4543.

When we consider the conflicting theories, we cannot escape the conviction that evidence of what occurred at the garage was material, if not absolutely necessary to a determination of the question whether the defendant had committed a felony under such circumstances as would justify his arrest by the deceased without a warrant. Neither the deceased, nor his wife, nor his son identified either the defendant or McDaniel at the garage. Wherefore, the immediate inquiry is whether the evidence as to what took place there, taken in connection with other evidence, was of such probative force as required its submission to the jury, or whether it was so indefinite and remote as to preclude its consideration.

The defendant's objection to this evidence rests upon the contention that there was not a particle of testimony tending to show that the defendant had gone to the garage, or that he had been seen near the home of the deceased; and that the deceased, therefore,
(904) could not have had any reasonable ground for believing that the defendant had attempted to steal the car.

True, the evidence as to the attempted larceny of the car was circumstantial, but not for that reason incompetent, for, says Starkie, "Circumstantial evidence is essential to the well-being, at least, if not to the very existence of civil society." Starkie on Evidence, p. 839. All evidence is direct or indirect. Direct evidence is that which is immediately applied to the fact to be proved, while circumstantial evidence is that which is indirectly applied by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred. In other words, as has been said, circumstantial evidence is merely direct evidence indirectly applied. "In a legal sense, presumptive evidence is not regarded as inferior to direct evidence. The two are parts of one system of means, intended to aid, and not to thwart, each other. Circumstantial evidence is often used as an aid to, and frequently as a test of, direct evidence. It is admissible in both civil and criminal cases in the absence of direct evidence, and is often the only means by which a fact can be proved. This is particularly the case in criminal trials where the act to be proved has been done in secrecy." I Jones Com. on Ev., sec. 6b(5).

Professor Greenleaf, in drawing the line of distinction between competent and satisfactory evidence, says: "By competent evidence is meant that which the very nature of the thing to be proved requires, as the fit and appropriate proof in the particular case, such as the production of a writing, where its contents are the subject of

inquiry. By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a common man; and so to convince him that he would venture to act upon that conviction, in matters of the highest concern and importance to his own interest. Questions respecting the competency and admissibility of evidence are entirely distinct from those which respect its sufficiency of effect; the former being exclusively within the province of the court; the latter belonging exclusively to the jury." Greenleaf's Ev., sec. 2.

In *S. v. White,* 89 N.C. 465, it is said: "It is well settled law, that the court must decide what is evidence, and whether there is any evidence to be submitted to the jury, pertinent to an issue submitted to them. It is as well settled that if there is evidence to be submitted, the jury must determine its weight and effect. This, however, does not imply that the court must submit a *scintilla* — very slight evidence; on the contrary, it must be such (905) as in the judgment of the court would reasonably warrant the jury in finding a verdict upon the issue submitted, affirmatively or negatively, accordingly as they might view it in one light or another, and give it more or less weight, or none at all. In a case like the present one, the evidence ought to be such as, if the whole were taken together and substantially as true, the jury might reasonably find the defendant guilty.

"A single isolated fact or circumstance might be no evidence, not even a *scintilla;* two, three, or more, taken together, might not make evidence in the eye of the law, but a multitude of slight facts and circumstances, taken together as true, might become (make) evidence that would warrant a jury in finding a verdict of guilty in cases of the most serious moment. The court must be the judge as to when such a combination of facts and circumstances reveals the dignity of evidence, and it must judge of the pertinency and relevancy of the facts and circumstances going to make up such evidence. The court cannot, however, decide that they are true or false; this is for the jury; but it must decide that, all together, they make *some evidence,* to be submitted to the jury; and they must be such, in a case like the present, as would, if the jury believed the same, reasonably warrant them in finding a verdict of guilty. *Cobb v. Fogalman,* 23 N.C. 440; *S. v. Vinson,* 63 N.C. 335; *Wittkowsky v. Wasson,* 71 N.C

451; *S. v. Massey,* 86 N.C. 658; *Imp. Co. v. Munson,* 14 Wall. 442; *Pleasants v. Fonts,* 22 Wall. 120."

There was evidence tending to support each of the theories above referred to. For the prosecution there was evidence tending to show that the defendant left Charlotte and arrived at Concord after one o'clock in the morning, and met McDaniel and Jones at the station; that the defendant went to the Hartsell mill, and after procuring a pistol and cartridges, started about two o'clock with McDaniel and Jones in a Ford car toward the residence of the deceased; that about two hours later a car passed by the residence and stopped in the road in front of the garage, when the car door was heard to close; that in about three minutes the car returned, passed the house, and stopped forty or fifty yards beyond; that the garage door was opened, and the deceased, who had gone out to make investigation, called out, "What are you doing there?" and about this time, or soon thereafter, his son fired a shotgun, which moved the chauffeur to "crank up" and to proceed in the direction of Concord. The evidence tends to show that in a few minutes the deceased and his son took the car from the garage and went in pursuit, but when two miles from home desisted, and on their return met the defendant and McDaniel within a mile of the garage; that deceased told the defendant and
(906) his companion that he had reason to believe they had broken into the garage; that they claimed to have come from Georgeville, and the defendant gave his name as Smith. There was evidence tending to show that the defendant, who is a mechanic, kept his tools in the house from which he had taken his pistol, and that sometime during the next day the defendant's glove and a pair of bolt nippers were found near the scene of the shooting. The defendant admitted that he had previously pleaded guilty of carrying a concealed weapon, and of larceny, and, having been sentenced for a term of two years, had been pardoned, after serving for a period of thirteen months.

Applying to the testimony the law which has been stated, we are of opinion that the evidence relating to the occurrences at the residence and at the garage is not so indefinite or remote as to make it incompetent, and that the trial judge properly left to the jury the weight of these and other circumstances pertinent to the questions under investigation.

The sixth exception is directed to the following excerpt from the charge of the court:

"The State says, and insists, that the deceased was acting in compliance with law in attempting, or declaring his intention to, arrest the defendant and his companion and to take them before the

proper officers in the town of Concord or elsewhere where such officers might be found. The State says, and insists, that you should be satisfied beyond a reasonable doubt that a felony had been committed; that an attempt had been made to break and enter the garage of the deceased; that not only had the attempt been made, but the breaking had actually been effected and the door opened; and it was the intent of those committing such act to commit the crime of larceny and feloniously take and carry away the car, the property of the deceased; and the State says and insists that this act was committed in the presence of the deceased; that the garage was situated but a short distance from his dwelling; that hearing the noise he repaired to the front porch and opened the door, and that there he was enabled to see the bulk of the car, and that the darkness of the night only prevented his distinguishing the forms of those at the door of the garage or retreating therefrom; and the State says that this was in the presence of the deceased and under such circumstances as the law declares it to be in his presence, and that he was only prevented from actually identifying those at the door and retreating therefrom on account of the darkness of the night, and the court instructs you as a question of law that if the deceased was only prevented from seeing and distinguishing them and observing their acts by reason of the darkness, if he was in such a place as he could have otherwise seen and distinguished them, and seen their deceased and his son, after the hinge had creaked in turning, went acts, then such acts as were committed in law were committed in the presence of the deceased."

To the foregoing instruction the defendant interposed these objections: (1) The deceased, at the time the shoot- (907) ing occurred, did not know that a felony had been committed at the garage; (2) if he knew a felony had been committed, he did not know the felon; (3) the felony, if any, was not committed in the presence of the deceased; (4) the court, in effect, instructed the jury that the deceased was acting in compliance with the law in attempting to arrest the defendant.

As to the first two grounds of exception, the answer is this: the deceased and his son, after the hinge had creaked in turning, went to the garage and found the door open, and afterwards met the defendant and McDaniel within a mile of the garage under circumstances found by the jury to be sufficient to create reasonable ground for believing that the defendant and McDaniel had attempted to take the car. The third objection is met by the decision of this Court in *S. v. McAfee*, 107 N.C. 812, in which Justice Avery said: "We concur with the judge below in the view expressed in his charge, that

if the defendant struck his wife with the stick described by the witness at a point so near to the officer that he could distinctly hear what was said and the sound made by the blow, it would be considered in law a breach of the peace in his presence, though he could not at the time actually see the former, because it was too dark." Considering the fourth objection, we cannot concur in the defendant's interpretation of the instruction. A perusal of the charge will show that his Honor, in referring to "the defendant and his companion," was stating the contentions of the State, and that in his explanation of the law he applied the word "them" to "those at the door," and not as a necessary legal inference to the defendant and his companion. Finding no error in the record, we hold that all the exceptions must be overruled.

No error.

Cited: *S. v. Jenkins,* 195 N.C. 749; *S. v. Lawrence,* 196 N.C. 564; *S. v. McKinnon,* 197 N.C. 582; *S. v. Allen,* 197 N.C. 686; *S. v. McLeod,* 198 N.C. 653; *S. v. Beal,* 199 N.C. 293; *S. v. Burns,* 200 N.C. 271; *S. v. Marion,* 200 N.C. 718; *S. v. Casey,* 201 N.C. 203; *S. v. Shipman,* 202 N.C. 524; *S. v. Ammons,* 204 N.C. 757; *S. v. Anderson,* 208 N.C. 784; *S. v. Eubanks,* 209 N.C. 763; *S. v. Coal Co.,* 210 N.C. 746; *S. v. Baker,* 212 N.C. 235; *S. v. Smoak,* 213 N.C. 90; *S. v. Adams,* 213 N.C. 247; *S. v. Hammonds,* 216 N.C. 75; *S. v. Davenport,* 227 N.C. 493; *Perry v. Hurdle,* 229 N.C. 220.

STATE v. BEN MUNDY.

(Filed 21 December, 1921.)

1. Intoxicating Liquors—Statutes—Criminal Law — Indictments — Separate Offenses—Motions—Verdict—Appeal and Error.

Objections to a bill of indictment on account of duplicity comes too late after verdict, and where it is to the charge of two separate offenses in the same bill, one under C.S. 3407, for unlawfully permitting a still to be set up for operation on the defendant's land; and the other for unlawfully manufacturing spirituous liquor, C.S. 3409, and there is sufficient evidence on the latter count, a judgment upon the verdict on that count will be sustained.

2. Appeal and Error—Evidence—Declarations—Corroborative Evidence—Spirituous Liquor—Intoxicating Liquor.

While the accused may testify as to his consistent declarations made to others, to corroborate his testimony of innocence of the offense charged

against him, its exclusion will not be held for reversible error if it could not have affected in any way the verdict of guilty; as to whether his declaration accusing another of manufacturing, etc., spirituous liquor, of which he himself was accused, comes within the rule, *Quære?*

APPEAL by defendant from *Harding, J.*, at the May Term, 1921, of MECKLENBURG. (908)

Criminal action. Defendant was convicted on the following bill of indictment:

"The jurors for the State, upon their oath present that Ben Mundy, late of Mecklenburg County, at and in said county, on 7 March, 1921, unlawfully and willfully did allow a distillery to be erected upon premises in his possession and under his control, and did manufacture, distill, and make spirituous and intoxicating liquors."

The evidence, in chief, on the part of the State is as follows:

V. P. Fesperman testified: "I am deputy sheriff of Mecklenburg County. From the information that I received, on 7 March, 1921, I went out in the country to the premises of the defendant and examined his premises. In the front room of the defendant's house, in a closet on the left-hand side, I found a still cap, two connecting pipes, and a lot of new sheet copper; piled upon this was four hundred pounds of sugar in one-hundred-pound sacks. In this room there were two empty sugar sacks, which had recently contained sugar. There was another empty sugar sack in another room. The empty sacks were like the sacks that had sugar in them, and when shaken the sugar sprinkled out. I found a large, new copper funnel in the safe in the dining-room. (This copper funnel was introduced in evidence, and a size shown to the jury. The still cap and pipes were also introduced in evidence and shown to the jury.) I also found a still worm concealed under the hay in the barn. The still worm was wet at the time I found it, and had upon it the odor of whiskey, and had been used in making whiskey either the night before or the day before. It had meal and other evidence of its use upon it.

"The defendant told me that he knew nothing about the worm in the barn, and also told me that he knew nothing about the sugar in the closet. I told him that I would take the sugar, as it did not belong to him; he then said that it was his sugar. I arrested the defendant, and we went over to Mr. Cross's in order to get Mr. Cross to go on the defendant's bond. The defendant then told Mr. Cross that he did not know the still or worm was there; that a fellow had left it there, and when Mr. Cross asked him who had left it there, he said that he did not know his name.

"All of the articles, viz., the worm, the funnel, the still
(909) cap, the connecting pipe, which were found on the premises were introduced in evidence in court.

"Cross-examination: I went to the defendant's house in the daytime. Mr. and Mrs. Mundy and the children were not there at home. There was a young man there about eighteen years old called Babe Stillwell. He told me that he stayed there, and that he occupied the left-hand front room. The defendant came home about five o'clock, while I was still there, and I arrested him."

Defendant, a witness in his own behalf, testified as follows: "I was in Charlotte, having brought my wife to town the day the sheriff was there. I found Sheriff Fesperman at my house when I returned home. He told me what they had found. I knew nothing about the cap, the worm, or any of the stuff being there. I knew nothing about the worm in the barn under the hay. I had nothing to do with making whiskey either directly or indirectly.

"Babe Stillwell was staying at my house, had been there about three weeks, and he roomed in that room where the cap and other stuff was found. I knew nothing about the worm in the barn under the hay. I bought the four sacks of sugar a few days before that. One of the sacks was for myself and the other three sacks were for three neighbors. I got the sack of sugar so that we could have it for canning purposes. I do not know about the empty sacks, except I know I bought Irish potatoes a few days before that, and they were put in sugar sacks, and I planted the potatoes and the sacks were there somewhere.

"Babe Stillwell had my automobile out the night before, all night, and brought it back the next morning about 11 o'clock, and then I brought my family to Charlotte in the automobile and left Stillwell at home. I did not know that he was engaged in making liquor, or that he had placed the still on my premises."

At this point defendant was asked, What did you say to Stillwell? Objection by State. Objection sustained, and defendant excepted.

Attorneys for defendant stated that the defendant proposed to prove by his own evidence that after he had been apprized of the fact that the still was out there, that he upbraided Stillwell and told him he had no business bringing the still to his house; that he had gotten witness into trouble.

There was judgment on the verdict, and defendant appealed, assigning for error, first, that the bill was defective in that it attempted to charge, in one and the same count, two distinct offenses. One under C.S. 3407, for unlawfully permitting a still to be set up for op-

eration on one's land, and the other for the unlawful manufacturing of spirituous liquors contrary to C.S. 3409; and second, that the declarations of defendant and Stillwell should have (910) been received in corroboration of defendant's testimony denying his guilt.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Stewart & McRae for defendant.

HOKE, J. It is held with us that an objection to the bill of indictment, on account of duplicity, comes too late after verdict. The bill undoubtedly contains a proper charge of the unlawful manufacture of spirituous liquors under C.S. 3409, and as a matter of form this will suffice to uphold the judgment. *S. v. Burnett*, 142 N.C. 577; *S. v. Cooper*, 101 N.C. 684. And the objection to the ruling of the court on the question of evidence must also be disallowed. There is doubt if the proposed declaration comes within the principle permitting corroboration by consistent declarations of a defendant who has testified. They seem to be rather an effort to fix the crime on a third party, Babe Stillwell, but if it be conceded that the evidence was competent there was no testimony from Stillwell or any other that they heard defendant make these alleged statements. And on the facts presented in the record, it is clear that the excluded evidence added nothing to the testimony of the defendant already received, and that if the same had been admitted it could have had no appreciable effect on the result. In *Goins v. Indian Training School*, 169 N.C. 739, speaking to an exception of this character, the Court said: "Besides, if the evidence had been properly excepted to, it is not a matter of sufficient importance that we could see it would have probably affected the result. Courts do not now grant new trials upon merely technical objections, unless the error is of sufficient importance to justify a belief that if the error had not been committed the result reasonably would have been different." A ruling that finds support in many of our recent decisions. *Powell v. R. R.*, 178 N.C. 243-248; *Brewer v. Ring*, 177 N.C. 476. In this last case Walker, J., delivering the opinion has well said: "Courts do not lightly grant reversals, or set aside verdicts, upon grounds which show the alleged error to be harmless, or where the appellant could have sustained no injury from it. There should at least be something like a practical treatment of the motion to reverse, and it should not be granted except to subserve the real ends of substantial justice," citing Hilliard on New Trials (2 ed.), secs. 1 to 7.

We find no reversible error, and the judgment against the defendant must be affirmed.

No error.

Cited: *S. v. Brown,* 183 N.C. 792; *Freeman v. Ponder,* 234 N.C. 308; *S. v. Avery,* 236 N.C. 280; *S. v. Merritt,* 244 N.C. 688; *S. v. Wells,* 259 N.C. 180.

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(911)

STATE v. J. A. CAMPBELL.

(Filed 21 December, 1921.)

1. **Constitutional Law—Spirituous Liquors—Intoxicating Liquors—Criminal Law.**

   The IVth and Vth Amendments to the Federal Constitution are limitations upon the Federal Government and do not affect the validity of C.S. 3385, making unlawful the possession of more than one quart of spirituous liquor, or of C.S. 3384, making the carrying and delivery thereof unlawful.

2. **Intoxicating Liquors — Spirituous Liquors — Statutes — Possession — Prima Facie Case—Instructions—Criminal Law.**

   Where the judge has withdrawn from the consideration of the jury the question of *prima facie* guilt of violating the statute from the possession of more than one gallon of spirituous liquor, C.S. 3379, a conviction under C.S. 3385, in having more than one quart thereof in possession, will be sustained when supported by competent evidence.

3. **Intoxicating Liquors—Spirituous Liquors — Criminal Law — Warrant for Arrest—Statutes.**

   Where the defendant has been arrested for violating our prohibition law, and at his own request he is not searched, but voluntarily produces five pints of spirituous liquor concealed in different places on his person, before the committing magistrate, the question of search and seizure without a warrant and the Federal constitutional question predicated thereon does not arise; and he may be convicted under C.S. 3385, 3384, by the provisions of C.S. 4548, relating to an arrest without a warrant for offenses committed in the presence of the officer, etc.

HOKE and STACY, JJ., concur in result; ADAMS, J., did not sit in the case.

APPEAL by defendant from *Adams, J.,* at the July Term, 1921, of BUNCOMBE.

The defendant was convicted of having in his possession spirituous liquors for the purpose of sale. He was arrested as he was walk-

ing on Church Street in Asheville by officers who had received information that he had liquor in his possession for sale. He was not searched by them, and he requested that they should not do so. They put him in an automobile, and took him to the sheriff's office, where the defendant voluntarily took out of his several pockets 5 pints of corn whiskey, which were later introduced in evidence on his trial. Officer McLean testified that he told the defendant that he had a search warrant for his person, thereupon the defendant said: "All right, but don't do it here." It appears that the search warrant was what officer Wells called an "alias John Doe warrant," which had been obtained that morning. The warrant was not used at all, except as above stated, and when carried to the sheriff's office the defendant voluntarily took the whiskey out of his pockets.

The defendant was found guilty by the jury, and the judge being satisfied from the testimony of the witnesses, (912) who were examined after the verdict, stated in the judgment: "The defendant has heretofore been convicted for illegal sale of spirituous liquor and fined, and it appearing from the testimony of these witnesses that the record of the defendant for dealing in liquor is bad, it is adjudged that the defendant be confined in jail and assigned to work on the public roads of Buncombe County for the term of two years, not to wear felon's stripes." Appeal by defendant.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Reynolds, Reynolds & Howell for defendant.

CLARK, C.J. C.S. 3379, provides: "It is unlawful for any person, firm, association, or corporation, by whatever name called, to have or keep in possession, for the purposes of sale, any spirituous, vinous, or malt liquors." There was ample evidence in this case submitted to the jury which justified the verdict that the defendant had liquor in his possession for the purpose of sale.

He had it in his possession concealed, and was going from the direction of his home when taken to the sheriff's office, he voluntarily produced 5 pints of whiskey from as many or more pockets, and he offered no evidence tending to rebut the inference that he had it for an illegal purpose, for he could not conceivably intend to drink it himself.

It is true that C.S. 3379, makes the possession of more than one gallon of spirituous liquors at any one time *prima facie* evidence of violation of that statute, but the court did not charge that there was

such *prima facie* evidence, but the contrary. C.S. 3385, makes it unlawful for any person, firm, or corporation at any one time . . . to receive at a point within this State for his use, or for the use of any person, firm, or corporation, or for any other purpose, any spirituous or vineous liquors, or intoxicating bitters in a quantity greater than one quart, or any malt liquors in a quantity greater than 5 gallons; and C.S. 3384, makes it unlawful for any person to carry or to deliver in any manner or by any means whatever, for hire or otherwise, any spirituous or vineous liquors in a quantity greater than one quart. These two sections have been held valid in numerous decisions, which are cited thereunder in the Consolidated Statutes.

The defendant moved for a return of the property under the authority of *Amos v. U. S.*, 41 Supreme Court Reporter 266, and that all evidence based on possession of the liquor be stricken out by virtue of the authority of that case, and the Fourth and Fifth Amendments to the U. S. Constitution. But it has been uniformly
(913) held that the first ten amendments to the U. S. Constitution impose limitations only upon the Federal Government and not upon the states. 4 Michie Encyc., U. S. Supreme Court, 139, and cases there cited from *Barron v. Baltimore*, 7 Pet. 250, down to *Barrington v. Missouri*, 205 U.S. 486, and there are other cases since.

The same ruling has been often made by this Court. *S. v. Patterson*, 134 N.C. 617, and cases there cited; *S. v. Blake*, 157 N.C. 611, and many other cases.

In *Burdeau v. McDowell*, 41 Supreme Court Reporter 574, the U. S. Supreme Court held that the Eighth Amendment applies only to governmental action, and however illegal the seizure of private papers by a private person or corporation may be, they are admissible in evidence against the defendant. The defendant contends, however, that in a still more recent case, *U. S. v. Yuginovichi*, Advance Opinions, U. S. Supreme Court (65 L. Ed.) 679, it has been held that the existing penal statutes as to intoxicating liquors have been repealed by the Eighteenth Amendment. But an examination of that opinion shows that the holding is that the Eighteenth Amendment and the National Prohibition Act since "repeal all prior laws only to the extent of the penalties against the manufacture and sale of liquor under the revenue laws, since they are inconsistent with the amendment, which now makes the manufacture and sale of liquor illegal."

Besides, there was no illegal search, and *S. v. Fowler*, 172 N.C. 905, is directly in point, which held that articles illegally obtained from the prisoner are not required to be returned to the prisoner if

evidential. The subject is fully discussed in that very able and clear opinion by Walker, J., to which we could add nothing.

It has always been held in this State, as stated in Best on Evidence 283, that though a person under duress confesses to have stolen goods and deposited them in a certain place, although the confession of the theft will be rejected, yet his statement where the goods were deposited will be received, if they are found there. *S. v. Thompson,* 161 N.C. 241. To the same purport is the reasoning and citations in *S. v. Neville,* 157 N.C. 591.

The defendant, however, seems to place his chief emphasis upon the allegation that the defendant was arrested without a legal warrant, and therefore that his subsequent voluntary act in making a disclosure voluntarily of the liquor he was carrying on his person was under duress, and that the liquor should have been returned to him, and that fact should have been struck out as evidence. He relies upon the above decisions from the U. S. Supreme Court, and contends that the provision in our Constitution, Art. I, sec. 15, prohibiting general search warrants being similar, that (914) our own precedents should be overruled.

Whatever has been the purport of the U. S. decisions, above quoted, in the enforcement of the Fourth and Fifth Amendments to the U. S. Constitution, the construction placed by our own courts uniformly upon our own police regulations must govern us, and we have seen no reasoning which will justify us in overruling them.

In this case there was no search and seizure, and the arrest of the defendant was valid, C.S. 4548, and the evidence of the whiskey being found on his person is competent. In *S. v. McNinch,* 90 N.C. 699, Smith, C.J., says: "In making an arrest upon personal observation and without a warrant the officer will be excused, though no offense has been perpetrated, if the circumstances are such as to reasonably warrant the belief that it had been." *S. v. McNinch, supra,* was for assault and battery.

In a much later case, *Brewer v. Wynne,* 163 N.C. 322, Hoke, J., in a well reasoned opinion, with citation of apposite authorities, held that when there is an immoral and indecent show taking place in the presence of officers, or where the performance of the act is imminent, or immediate interference is required to prevent it, officers "may arrest, without warrant, any and all persons who aid and assist in such plays and shows whenever, under all the facts as they reasonably appear to them, such course is necessary for the proper and effective performance of their official duty. This, we think, presents the correct interpretation of the statutory provisions controlling the matter, and the position is in accord with our cases dealing generally with

the subject, as in *Martin v. Houck,* 141 N.C. 317; *Sossaman v. Cruse,* 133 N.C. 470; *S. v. Campbell,* 107 N.C. 948-953; *S. v. Sigman,* 106 N.C. 728; *S. v. McNinch,* 90 N.C. 695; *Neal v. Joyner,* 89 N.C. 287."

In 3 Cyc. 886, it is said that where "An offense is committed in the presence or view of an officer, within the meaning of the rule, authorizing an arrest without a warrant, when the officer sees it, although at a distance, or hears the disturbance created thereby and proceeds at once to the scene thereof, or the offense is continuing, or has not been consummated at the time the arrest is made." In the case at bar the officers had information, which proved to be correct, that the defendant was carrying on his person, concealed, a quantity of liquor in violation of the provisions of the Consolidated Statutes above quoted. The offense was continuing, and the sale had not been consummated at the time the arrest was made. In many cases, unless an arrest is made under these circumstances, the criminal would escape or the crime be committed before the officer could make affidavit and obtain a warrant. For instance, if the officers had
(915) information, which was reliable, that one was carrying a concealed weapon, or was on his way to commit an assault with it, surely it would be their duty to arrest the offender though our statute and our decisions require that in such case they should at once take him before a judicial officer and procure a warrant and institute a judicial investigation.

In *S. v. Grant,* 76 Mo. 236, quoted in the note to Cyc., *supra,* where a person had stolen butter from an express office, and had carried it several hundred yards when apprehended, the Court held that the larceny might be considered as still continuing so as to authorize his arrest by a police officer. Such arrest is valid, if there was reasonable ground for the action of the officer. To this effect are many cases cited in the notes to 3 Cyc. 887. Among them, *Ex parte Morrill,* 35 Fed. 267, where it is said: "At common law, a peace officer might arrest, without warrant, on reasonable grounds of suspicion; if the facts and circumstances which furnish such grounds of suspicion amount to probable cause under the Constitution, which is such cause as will constitute a defense to an action for false imprisonment or malicious prosecutions." This seems to us a clear definition of the duties and liability of an officer to arrest under circumstances such as in this case, though of course under our statute it is the duty of the officer at once to take the prisoner to a judicial officer to procure a warrant, and investigation. C.S. 4548.

In *O'Connor v. Bucklin,* 59 N.H. 589, the general rule is thus stated: "An officer, having in his legal custody a prisoner arrested for violation of the criminal law, may make such sufficient search

of his person to ascertain if he has money or other articles of value, by means of which, if left in his possession, he might obtain tools, implements, or weapons with which to effect his escape. If such are found, the officer may take and hold them until they can be safely returned, or otherwise properly disposed of, if in good faith he believes such course necessary for his own, or the public safety, or the safe keeping of the prisoner." It is further held in that case that an officer, without warrant, may in good faith and for proper purpose make an arrest upon such acts as show a reasonable ground therefor.

The Eighteenth Amendment to the U. S. Constitution and the Federal statutes for the better execution thereof have not repealed the State prohibition legislation except where the latter conflicts with the former. The State legislation, if it is merely more general or more effective than the Federal provisions, is in nowise restricted thereby. The Eighteenth Amendment itself provides that "Congress and the several states shall have concurrent power to enforce this article by appropriate legislation." This gives to the states power to enact legislation to aid even in the enforcement of the Eighteenth Amendment. But it does not restrict the power of the states to make their own police regulations against intoxicating (916) liquors more extensive and of broader scope than the Eighteenth Amendment.

This Court has held to the above purport in *S. v. Fore*, 180 N.C. 744, and we can add nothing thereto. In *S. v. Muse*, 181 N.C. 506, at last term, the Court held that "A State statute, in furtherance of and not in conflict with the Federal Prohibition Law, may be declared a valid exercise of the police power of the State, expressly sanctioned by the Eighteenth Amendment to the U. S. Constitution."

There was no search or seizure in this case, and we have discussed the rules applicable, only in view of the motions made by the defendant. If the "John Doe warrant" was illegal, which we are not called upon to consider, as it is not set out or described, the defendant was arrested without warrant, but the officers complied with the requirement of the statute, which is as follows: "C.S. 4548. *Procedure on arrest without warrant.* Every person arrested without warrant shall be either immediately taken before some magistrate, having jurisdiction to issue a warrant in the case, or else committed to the county prison, and as soon as may be, taken before such magistrate, who, on proper proof, shall issue a warrant and thereon proceed to act as may be required by law."

The motion for nonsuit requires no discussion. The indictment was in five counts. The defendant was convicted on the fourth count for keeping in his possession intoxicating liquors for sale. The court

charged the jury that the provision in the statute making the possession of more than a gallon of liquor *prima facie* evidence had no application in this case because the evidence tended to show that the defendant had in his possession not exceeding 5 pints of liquor, but if the jury found beyond a reasonable doubt that the defendant had any quantity of intoxicating liquor in his possession for the purpose of sale to return a verdict of guilty, but if they did not so find the verdict should be not guilty.

There are five other cases at this term, all from Buncombe, upon similar facts, as to which a *per curiam* opinion affirming the judgment has been entered in accordance with this opinion.

No error.

HOKE and STACY, JJ., concur in result; ADAMS, J., did not sit.

Cited: *S. v. Simmons,* 183 N.C. 685; *S. v. Baker,* 184 N.C. 753; *S. v. Godette,* 188 N.C. 502; *S. v. Jenkins,* 195 N.C. 749; *S. v. Hickey,* 198 N.C. 48; *S. v. Riddle,* 205 N.C. 594; *Perry v. Hurdle,* 229 N.C. 220; *Alexander v. Lindsey,* 230 N.C. 669; *S. v. Harper,* 236 N.C. 373; *S. v. Mobley,* 240 N.C. 487.

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(917)

STATE v. MINNIE ALDERMAN ET AL.

(Filed 21 December, 1921.)

1. Assault—Intent to Kill—Deadly Weapon—Poison—Statutes.

An assault by means of poison comes within the intent of our statutes making an assault with a deadly weapon with intent to kill punishable as a felony. C.S. 4213, 4214.

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

Evidence tending to show that after threats of poisoning made by the wife against her husband, the daughter prepared her father's breakfast at their home in the presence of her mother, sent it out to him by their son, and the daughter thereafter attempted to destroy in the fire a spoon having a greenish color on it, apparently paris green, a poison; and soon after the father had commenced his breakfast he became ill from the effects of paris green, is sufficient for conviction of the offense of an assault with intent to kill, as to each defendant.

3. Same—Husband and Wife—Threats.

In case of assault and battery with intent to kill by poison, with evidence tending to show the previous threats of the wife, and that the poison was put into the food prepared by the daughter in her mother's

presence at their home, and that the husband was poisoned from eating thereof, the testimony of the husband as to his wife's previous threats is not inadmissible under the provisions of C.S. 1802, but is admissible for the purpose of showing knowledge and identifying the perpetrators of the crime, and is distinguishable from the rule that threats are ordinarily inadmissible on trials for assault and battery.

4. Assault—Instructions—Intent to Kill—Poison.

The charge upon the trial of an assault with intent to kill by administering poison by several defendants, with evidence sufficient of the guilt of each, that if one of them did it without the knowledge of the other, the one who did it would be guilty, and the other would not be, is the stating of a legal truism, and not error, when construed with the other parts of a correct charge.

5. Assault—Evidence—Motive.

While motive is not a necessary ingredient of the crime of an assault with intent to kill by poison (a deadly instrumentality), it may become important, with other relevant evidence, to identify the accused as the one who has administered, or helped to administer, the poison.

APPEAL by defendants from *Kerr, J.*, at May Term, 1921, of PENDER.

The defendants were convicted upon a bill of indictment which in the first count charged an attempt to kill Luther Alderman by administering paris green, a poison, to him; in the second count a secret assault with intent to kill by administering paris green; the third, an assault with intent to kill by administering paris green; and fourth, an assault with a deadly weapon by administering paris green, and thereby inflicting a serious injury upon him.

Defendants were convicted, and appealed from the judgment. The essential facts are stated in the opinion.

Attorney-General Manning and Assistant Attorney-General Nash for the State. (918)

C. E. McCullen for defendants.

WALKER, J. Exceptions 3, 4, 5, and 6 were taken to the refusal of the judge to nonsuit the State at the close of the State's evidence, and again at the close of all the evidence.

The defendants were the wife and the daughter of the prosecuting witness, Luther Alderman. It appeared that on 14 April, 1921, the defendant, the daughter, Christiana, prepared the breakfast of her father, Luther Alderman, who was working on the farm of John Murphy, not very far from his own home. The son, Solomon Alderman, took the breakfast to his father about eleven o'clock. It consisted of coffee in a quart bottle, and some biscuits and meat. He

drank some of the coffee and soon thereafter declared he had been poisoned. The witness further stated that he did not put anything in the coffee. Luther himself described the effect of the coffee as follows: "I chewed up a mouthful of biscuit and swallowed it, and then I took another bite. I then took a drink of coffee to wrench it down, but when I took the drink of coffee it was so bad, it naturally burned my mouth up, and I went to heaving and throwing it up. I said to Solomon, 'Who fixed my breakfast?' He said, 'Christiana cooked it.' I said, 'She or your mamma has certainly poisoned it.' "

J. A. Murphy, Sr., described the effect of the poisoning upon Luther as being very serious. He became unconscious and remained so until the next day. He could be heard screaming a quarter of a mile away, and he had all kinds of spasms. The doctor testified that the poison from which he was suffering was paris green, and the chemist, after an examination of the bottle and its contents, also reported that it contained paris green.

Solomon Alderman, the son, testified that he did not put paris green in the bottle, either before or while he was carrying it to his father. The mother, Minnie Alderman, is connected with the poisoning in two ways. First, she was at home, and Christiana was under her control and influence; second, she and her husband had been on bad terms for fifteen years, and Luther himself testified that his wife, Minnie, had told him that she was going to poison him if it was the last thing she would do, and made violent threats against him.

The daughter Christiana's connection with it was shown by the fact that she prepared the breakfast for her father and gave it to Solomon to be taken to him. There was a spoon having something green on it which she put in the stove that the green substance might be burned off. The theory of the defense was that Luther himself put the paris green in the coffee after he got it from his son
(919) that morning with a view to bringing this charge against his wife and daughter. Upon the evidence, the judge was right in overruling the motion for judgment as of nonsuit.

Defendants' counsel, however, by his exceptions 1 and 2, raised the question as to the admissibility of threats testified to by the husband himself. He presents the question in two aspects, first, that this being an indictment for an assault and battery, evidence of previous threats is not admissible, citing *S. v. Kimbrell,* 151 N.C. 702. In this case, however, one of the questions involved was as to the identity of the party who put the poison in the coffee, and another, as to the knowledge of the defendants that poison had been put in the bottle. This distinguishes it from the ordinary cases of assault and battery, and takes it out of the principle of the *Kimbrell* case. He then, secondly, contends that all the evidence of Luther

Alderman against his wife, Minnie, was incompetent under C.S. 1802. It is stated in Wharton's Criminal Evidence, vol. 1, p. 808, that "In all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other. Thus, the husband may be a witness against the wife when she is prosecuted for assaulting him. The wife may be a witness against the husband on a prosecution against him for attempting to poison her." The converse, it seems, also would be true. This Court, in *S. v. Davidson*, 77 N.C. 522, held that the husband is a competent witness against the wife on a prosecution for striking him with an axe. Among the instances given of the force necessary to constitute an assault and battery, is putting a poisonous or noxious substance in another's drink whereby he is injured. 5 C.J., p. 721; see, also, 20 L.R.A., p. 863.

The defendants' third assignment of error, as stated in the brief of their counsel, is based upon an erroneous statement of the judge's charge in the particulars assigned, which was made inadvertently. The actual charge given was as follows: "If one of them did it, and the other did not know anything about it at all, then the one who did it would be guilty, if you find it beyond a reasonable doubt; and the one that had nothing to do with it would not be guilty, and you ought to so find." This charge cannot be successfully assailed. He was stating what, in law, is a truism, and this part must be read with the remainder of the charge, and so construed.

It appears that this man and his wife had lived together many years, but their married life had been anything except a peaceful one. It had been interrupted by frequent outbreaks of the wife, and if tranquility ever prevailed in their home, it was at long intervals. What the cause of their disagreement was does not clearly appear, nor can we determine who was in fault, otherwise than by the verdict which finds that the wife attempted to commit (920) a grave and serious offense against her husband. It was not justified, even if she acted solely in retaliation for what he may have done. She resorted to a secret and underhand method of getting rid of him, and involved her daughter with herself in the commission of the crime. She was at her home with Christiana, her daughter, when the food was prepared for her husband by the latter, and there are circumstances, though they may be slight, to show that they were acting in concert. The wife had declared her intention to kill her husband with poison, and she said it most emphatically and unrelentingly. Whatever inspired her vindictiveness towards him, she had fully made up her mind to do precisely what was afterwards attempted to be done, and almost accomplished her purpose. She

therefore had the motive, which was coolly and deliberately formed, and venomously entertained, if the evidence is believed, and motive sometimes becomes very important, even though it may not be an essential element of the crime. We held, in *S. v. Adams*, 138 N.C. 688-697, that 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 element of murder in the first degree, nor is it indispensable to a conviction, even though the evidence is circumstantial, citing *S. v. Wilcox*, 132 N.C. 1143; *S. v. Adams*, 136 N.C. 620, to which we add, *S. v. Wilkins*, 158 N.C. 603; *S. v. Millican*, 158 N.C. 617; *S. v. Matthews*, 162 N.C. 534; *S. v. Stratford*, 149 N.C. 483; *S. v. Turner*, 143 N.C. 641; *S. v. Rose*, 126 N.C. 1036; *S. v. Green*, 92 N.C. 779; *S. v. Teachey*, 138 N.C. 587.

The evidence was sufficient to support the conviction of the wife, and still stronger against the daughter. She had the spoon, at their home, discolored or stained, by some green substance having the appearance of the poison used to take her father's life, and she attempted to burn it away, but failed in her effort to do so in time to conceal the crime. The fact that the spoon was discolored by a greenish substance, and that the daughter attempted to destroy it, so that she and her mother would not be detected in carrying out the latter's threat against her husband, and the father of the girl, is almost, if not quite, conclusive evidence to rebut, or overcome, the suspicion that he had endeavored to take his own life, when he went around the house and then returned to eat his breakfast, and the other circumstances tend strongly to show that no such thing had occurred.

The defendants were very charitably treated by the very learned and humane judge who presided at the trial, in the administration of punishment for the crime, which was a very cruel and heartless one, and they have no reason to complain of the result.

No error.

Cited: *S. v. Allen*, 197 N.C. 687; *S. v. French*, 203 N.C. 640.

CASES FILED WITHOUT WRITTEN OPINIONS.

S. v. Petty. (92)

Boyett v. R. R. (106)

Starr v. O'Quinn. (97)

Hobbs v. R. R. (175)

Gaskins v. Smith. (181)

S. v. White. (274)

Campen v. Lumber Co. (173)

Maxwell-Pugh Co. v. Southgate & Co. (176)

Brown v. R. R. (178)

Box Co. v. Davis. (179)

Dudley v. Harrington. (172)

Almond v. Lumber Co. (589)

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AMENDMENT TO RULES OF PRACTICE IN THE SUPREME COURT.

Rule 34, as printed in 164 N.C. 551, shall be amended so as to read as follows:

34. *Appellant's Brief.*

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except that as to an exception that there was no evidence, it shall be sufficient to refer to pages of printed transcripts containing the evidence. Such briefs shall contain, properly numbered, the several grounds of exceptions and assignments of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment, and, if statutes are material, the same shall be cited by the book, chapter, and section. Exceptions in the record not set out in appellant's brief or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs, when filed, shall be noted by the clerk on the docket and a copy thereof furnished by him to opposite counsel on application. *Appellants shall leave with the clerk, at the time of filing briefs, typewritten or printed copy of same, to be used in immediately supplying the application of appellee's counsel therefor.* If not filed by 12 o'clock noon on Tuesday of the week preceding the call of the district to which the cause belongs, the appeal will be dismissed, on motion of appellee, when the call of that district is begun, unless for good cause shown the Court shall give further time to print brief.

Adopted this 6 October, 1921; and it is ordered that the added and amendatory part of above rule shall take effect and be in force from and after 1 January, 1922. The rule, as amended, will be printed in the 182 Report.

MEETING OF BAR OF SUPREME COURT

IN MEMORY OF

THE LATE ASSOCIATE JUSTICE WILLIAM R. ALLEN

16 SEPTEMBER, 1921.

The Bar of the Supreme Court met at 9:15 a.m., Friday, 16 September, 1921, in the Supreme Court room. Governor Cameron Morrison was elected chairman, and E. M. Land, of the Goldsboro Bar, secretary.

On motion, the chairman appointed a committee of five to prepare a memorial sketch of the late Associate Justice William R. Allen, with appropriate resolutions. The committee consisted of Judge J. Crawford Biggs, ex-Governor T. W. Bickett, of the Raleigh Bar; W. H. Ruffin, of the Louisburg Bar, and D. H. Bland and M. T. Dickinson, of the Goldsboro Bar.

The committee, through D. H. Bland, reported the following memorial sketch and resolutions:

REMARKS OF ASSISTANT ATTORNEY-GENERAL FRANK NASH ON PRESENTING THE RESOLUTIONS

In the unavoidable absence of the Attorney-General, it is my privilege to present to this Court the resolutions of the Bar upon the death of Associate Justice Allen. These resolutions will receive the hearty assent of all who know this distinguished lawyer and judge.

Death, always with us, never becomes familiar. We may place our fingers on a waning pulse, as it indicates the approach of death, yet when it comes, it brings with it a shock. It is a mystery of mysteries when it invades our own circle and suddenly strikes down one in the hey-day of his powers, in the full tide of his usefulness. The materialist can supply no key to this mystery, for to him man comes from nothing, and, like the dumb beast, goes to nothing. One of the wisest of men, however, has said: As we are, by our bodies, akin to beasts which perish; no less are we, by our souls, akin to the God Eternal. And One infinitely wiser and greater and better than he has said to his followers, "I go to prepare a place for you." Death, then, is but the portal to the full, abounding life of eternity: "the grave but a covered bridge leading from light to light through a brief darkness."

We may be sure that this excellent lawyer and judge, the greater part of whose active life has been spent as a minister at the altar of

justice, this kind-hearted Christian gentleman, who has
(924) bound his friends to himself by unbreakable ties, has, ere this, entered into the place prepared for him by the Master whom he followed and served so faithfully.

MEMORIAL SKETCH AND RESOLUTIONS

Associate Justice William Reynolds Allen, son of the late Col. William A. Allen and Mariah Hicks Allen, was born at Kenansville, Duplin County, North Carolina, in the year 1860. He was prepared for college by Mr. Richard Millard at the seminary in Kenansville, and entered and graduated from Trinity College, where he came under the influence of that great teacher, Dr. Braxton Craven, president of the college.

He read law with his father and stood his examination for license in January, 1881, but being under twenty-one years of age his license was withheld until he attained his majority. From that time he was a practitioner of the law, and entered into a partnership with his father in Kenansville, but within a few months both the father and son moved to Goldsboro, where they practiced together until the death of Col. William A. Allen, when Judge Allen formed a partnership with the late Chief Justice Faircloth, which partnership continued for several years. In 1889 he and the late William T. Dortch entered into a partnership under the firm name of Allen & Dortch, and they practiced together until 1894, when Judge Carr appointed Judge Allen a judge of the Superior Court to fill out the unexpired term of Judge Spier Whitaker, who had resigned. In the election of that year the Democratic ticket was defeated, and Judge Allen returned to his law practice in the firm of Allen & Dortch in Goldsboro, where he continued until the year 1902, when he was elected to the Superior Court bench, and, after occupying that office for eight years, he was, in 1910, elected Associate Justice of the State Supreme Court, and was elected for a second term in the year 1918.

Besides his long and eminent service on the Superior Court and Supreme Court benches, Judge Allen rendered great public service as a member of the State Legislature, his first term being in the Legislature of 1893, when he was appointed by Speaker Lee S. Overman as chairman of the Judiciary Committee of that body, although he was then only thirty-three years of age. He was again elected a member of the Legislature in 1899 and together with his associates, Connor, Justice, Rountree, Winston, Daniels, Craig, Travis, and others, prepared that great document, the Constitutional Amendment, which was so well framed and just in its provisions that no attempt

has ever been made to attack it as in contravention of the Constitution of the United States.

Judge Allen was again elected to the Legislature and served his third term in the General Assembly of 1901, where (925) he took a leading part in framing the important legislation of that session as he had done in the previous sessions.

Before his elevation to the bench, Judge Allen enjoyed an extensive practice, and appeared in the important cases in Wayne and the neighboring counties, and established a reputation for great ability, learning, and clear-cut reasoning. His knowledge of the decisions of the State Supreme Court was remarkable, and, in the opinion of many lawyers, he was in this respect without an equal. The occasion was rare when he could not, off-hand, cite a North Carolina case in point on any question of law that might arise.

In the Legislature Judge Allen's labors were highly constructive and practical; on the bench his judgments were just, and the reasons for his decisions were so clearly stated and so convincing that their justness was apparent to all.

Judge Allen always took a deep interest in the young men of the legal profession, and devoted a large part of his last two summer vacations to teaching the summer law classes of the State University, and this work demonstrated his great ability as a teacher. He was greatly loved by all those who were so fortunate as to enjoy his instruction.

Judge Allen was deeply religious, and was a member of the Methodist Church. His interest in all public affairs was keen, and he enjoyed the unbounded confidence of his neighbors. Nothing was more pleasing to him than to return to his home in Goldsboro at the end of each week's work, and there to enjoy the association of his family and life-long friends, and to mingle with them and give the kindly advice that his neighbors so often sought from him. Although he occupied a lofty station, he never developed a feeling or manner of aloofness, and was always easily approachable and in close sympathy with his fellow-man. It was on one of these weekly visits to his home that he died suddenly on 8 September, 1921.

In the year 1886 Judge Allen was married to Miss Mattie Middleton Moore, daughter of the late Dr. Matt Moore and Martha Middleton Moore, of Duplin County, and to them were born six children, Lila McCrae, who died in infancy, Mary Moore, William Reynolds, Elizabeth Hicks, Oliver Harrison, and Dorothy Sloan, and these children, together with his wife and one brother, Judge Oliver H. Allen, of Kinston, and a sister, Elizabeth A. Allen, a member of the faculty of the Elizabeth City High School, survive him, and to them his going is the greatest loss, but every part of the State is

(926) touched and saddened by his death: Therefore, be it

Resolved, That in the death of Justice Allen the bench and the bar have lost one of their greatest leaders, and the State one of its most honorable and useful citizens;

Resolved, That the Attorney-General present this memorial and these resolutions to the Supreme Court, with a request that the same be spread upon the minutes and published in the Reports;

Resolved, That the Secretary of this meeting transmit a copy of these proceedings to the family of the deceased.

. . . . . .

Ex-Governor T. W. Bickett, in seconding the motion for the adoption of the report of the committee, Associate Justice W. A. Hoke, and Governor Cameron Morrison, in speaking to the resolution, paid fitting and beautiful tributes to Justice Allen.

REMARKS OF JUSTICE HOKE

Mr. Chairman: I am grateful that we may take some part in this memorial service. None know better than his former associates that a strong man amongst us has fallen — that North Carolina and its people have lost a great citizen, and the courts an upright, able, and learned judge. Going further, we realize that we have been bereft of a wise and warm-hearted friend, who was ever ready to spend himself in high-minded, helpful, and sympathetic service. Truly, my brethren, a great personal sorrow has come to us, and we earnestly and sincerely join in the tribute of appreciation and affectionate respect.

. . . . . .

The resolutions were unanimously adopted by a rising vote.

REMARKS OF CHIEF JUSTICE WALTER CLARK, UPON PRESENTATION OF THE PROCEEDINGS OF THE BAR, 16 SEPTEMBER, 1921

The Court has heard the remarks of Mr. Nash and the resolutions of the bar in memory of Judge William Reynolds Allen with a deep sense of the loss which the Court and the State has sustained in his death.

We shall not repeat what has been already so well said in regard to his life and services. His distinguished record on the Superior Court caused the people to place him on this bench. Here he was a patient hearer of argument, and we found him in conference invaluable in the consideration and decision of causes. His active and trained mind was quick to sense every view of a question and he carefully considered it in all its bearings. He was tireless in his

examination of precedents, and careful in the preparation of his opinions. Always courteous, he was a most agreeable (927) as well as a most valuable member of the Court.

Elected to this Bench in the fall of 1910, he took his seat at Spring Term, 1911. His first opinions appear in the 154 N.C., and his last opinions were filed this week after his death, to appear in the 182 N.C. He thus worked till the last. His opinions in these 29 volumes will be a lasting memorial of his ability, industry, great learning, and the clearness of his intellect.

He died at the post of duty as surely as a soldier falls on the field of battle. The open book that he was reading was at his side, the unfinished opinion lay on his table, the notes for its preparation were at his hand.

The chisel of the sculptor fell at the foot of the unfinished statue. The shuttle dropped from the hand of the weaver. The bow of the archer was broken while it was still bent. His life's work finished ere he was aware, he heard the call of the roll, and, like a pupil, he answered to his name and stood in the presence of the Master.

The proceedings of the bar and the remarks of the distinguished speaker who has so eloquently presented them to the Court will be printed in the forthcoming volume of the Reports.

. . . . . .

Chief Justice Walter Clark and Associate Justices W. A. Hoke, Platt D. Walker, and W. P. Stacy were present at the meeting of the bar.

The meeting adjourned at 10:15.

CAMERON MORRISON,
Chairman.

Attest:

E. M. LAND, *Secretary.*

INDEX.

ABANDONMENT.

See Principal and Agent, 10; Appeal and Error, 85; Criminal Law, 2, 8, 9.

ABATEMENT.

See Statutes, 13.

ABORTION.

See Criminal Law, 25.

ABUSE OF PROCESS.

See Appeal and Error, 40.

ABUTTING OWNERS.

See Constitutional Law, 4.

ACCEPTANCE.

See Accord and Satisfaction, 1; Contracts, 21, 25, 26, 28.

ACCESSORY.

See Criminal Law, 24, 29.

ACCORD AND SATISFACTION.

1. *Accord and Satisfaction—Compromise—Offer—Acceptance — Evidence — Questions for Jury.*—The principle upon which the debtor is discharged of his obligation when the amount is in dispute, by the creditor's accepting a less sum with knowledge that it was intended to be received in full payment, may not be determined as a matter of law when, from the evidence, a reasonable inference may be drawn that it was not accepted with knowledge of the debtor's intent, that it was to be in full of account, and when the evidence is conflicting and in parol it raises a question for the jury. *Blanchard v. Peanut Co.*, 20.

2. *Same—Evidence.*—Where the evidence tends to show that the amount of a debt was in dispute between the debtor and the creditor, and the former sent the latter a check for a less amount than claimed by him, together with his statement, without anything written as to its being received in full or definitely understood that it was to be so received, the mere fact that the creditor knew that the check was for the full amount claimed by the debtor to be due, does not alone amount to a discharge; and where the evidence is conflicting as to whether it was so received, or as to the intent of its acceptance, it raises a question for the determination of the jury. *Ibid.*

3. *Accord and Satisfaction—Statutes.*—Accord and satisfaction is a method of discharging a contract or settling a cause of action arising either from a contract or tort, by the parties compromising the matter in dispute between them, and accepting its benefits. C.S. 895. *Walker v. Burt*, 325.

4. *Same—Issues.*—Where the cropper sues for damages arising from the breach by the landlord of his contract to furnish certain lands for cultivation, selling plaintiff's crops without accounting for the proceeds, and retaining more of the crops than he was entitled to for the rent, and there is evidence on the trial of full accord and satisfaction between them, the submission of the one issue as to the compromise and settlement will not be considered for error when the case has thereunder been presented to the jury, without prejudice to any of the appellant's rights. *Ibid.*

ACKNOWLEDGMENT.

See Contracts, 18.

ACTIONS.

See Courts, 1; Railroads, 1, 17; Contracts, 1, 5, 19, 30; Judgments, 2, 8; Malicious Prosecutions, 1, 3; Married Women, 1, 2; Statute of Frauds, 1; Pleadings, 13, 14; Drainage Districts, 10; Injunction, 5; Negligence, 8, 16; Wills, 12; Public Officials, 1; Statutes, 13; Corporations, 13, 14.

1. *Actions—Marriage—Married Women—Husband and Wife—Dependents—Statutes—Constitutional Law.*—The cause of action for damages separately and independently and proximately caused the wife arising from the injury inflicted on her husband by the negligent act of a third person, arises from the relationship created by the contract of marriage as now recognized by our Constitution and statutes, and does not extend to the children of the marriage or other dependent relatives. *Hipp v. Dupont*, 9.

2. *Actions—Parties—Subject-matter—Misjoinder—Severance.*—A contractor sued the owner for the contract price of the building and the latter had the architects made parties and then answered setting up an offset or counterclaim upon allegation that certain damages were caused either by faulty construction or fault of the architects in their plans and specifications, without allegation that the architects in any manner had charge of or participated in the construction of the building, to which the architect demurred upon the ground of misjoinder of parties and causes of action: *Held*, a demurrer was good, and a severance of the causes could not be ordered. C.S. 607. *Rose v. Warehouse Co.*, 107.

3. *Actions—Partnership—Independent Business.*—Where one of the partners is engaged in an independent business unrelated to that of the partnership, and has for such individual enterprise purchased goods, wares, and merchandise from the partnership, the principle upon which one partner cannot sue the other except for a settlement of partnership affairs has no application. *Martin v. McBryde*, 175.

4. *Actions—Parties—Dismissal as to One Party—Statutes—Prosecution as to Party.*—In an action against a railroad company and the Director General of Railroads, following the opinion of the Supreme Court of the United States, there is no liability upon the railroad company, but the action may be continued against the Director General under the provisions of C.S. 602, that a several judgment may be entered. *Kimbrough v. R. R.*, *ante*, 234, cited and applied. *Smith v. R. R.*, 291.

5. *Controversy Without Action—Case Agreed—Facts—Evidence—Questions for Jury.*—In an action against a bank to recover the value of certain bonds that were stolen while placed with it by a customer for safe keeping, a case agreed must contain all the essential facts, and present only the naked questions of law for the decision of the court, and not alone the evidence from which the facts may be inferred: and the fact of defendant's negligence, or its absence, being the controlling question, which neither party could agree upon without the risk of an adverse decision, it should be determined either by a jury or upon a reference. *Trustees v. Banking Co.*, 299.

6. *Same—Appeal and Error—Case Remanded.*—Where the character of the evidence stated in the case agreed, submitted without action under the statute, is such that the parties could not agree upon the facts upon which the principles of law must necessarily be determined, and the case presented requires the findings of facts upon the evidence set out, the case will be remanded to be proceeded with according to law. *Ibid.*

7. *Actions—Principal and Agent—Contracts—Breach—Torts—Contributory Negligence.*—The action of the principal against his agent to recover upon the

latter's negligently causing loss to the former, within the scope of his duties, may be for breach of contract for faithfulness or in tort for the breach of duty imposed; and if brought in tort, the plaintiff's negligence contributing to the injury will defeat his recovery, but if on contract, for its breach, it will not do so *in toto*, but the plaintiff's contributory negligence will be considered only on the issue as to damages recoverable in the action. *Elam v. Realty Co.*, 600.

8. *Same—Laches of Principal—Principal Misled—Rule of Prudent Man—Evidence—Questions for Jury—Trials—Principal and Agent.*—A party to a contract who has been injured by the breach of the other thereto is ordinarily required to do what a prudent man would do to minimize the loss thereafter accruing and incident to his own breach of duty. *Ibid.*

9. *Same—Nominal Damages.*—The plaintiff sued the defendant, as an agent or broker of insurance, for the latter's breach of contract in his negligent failure to provide him a policy indemnifying him against loss through accident to his automobile, and in procuring a policy which afforded him no protection for the designated loss, which had occurred: *Held*, upon the establishment of the negligence of the plaintiff as the cause of the actual damages sought, only nominal damages will be awarded him for the defendant's failure to perform the duty required of him. *Ibid.*

10. *Actions—Parties—Administration—Proceedings to Sell Lands—Creditors—Equity—Appeal and Error—Statutes.*—Where issue has been joined before the clerk in proceedings by the administrator to sell lands of deceased to pay debts due by the estate, and upon transferring the cause to the trial court, the judge has ordered claimants to file original evidence of their indebtedness and then referred the matter, the proceedings assume the character of a creditor's bill in which a creditor, whose claim has been disallowed, may appeal to the Supreme Court, under the express provisions of C.S. 632, as a party aggrieved. *Irvin v. Harris*, 647.

11. *Actions—Survival—Attachments—Statutes.*—The history of legislation as to attachments culminating in C.S. 798 (4), shows a legislative intent to broaden the right of this writ to make the same well-nigh coextensive with any well grounded demand for judgment *in personam*, and is sufficiently comprehensive to include the action for "causing the death of another by wrongful act, neglect, or default of another." C.S. 160. *Mitchell v. Talley*, 683.

12. *Same—Wrongful Death—Continuing Cause.*—C.S. 160, has been held to create a new cause of action only in the sense that at common law an action for the wrongful death did not survive to the personal representatives of the deceased; and the purpose of the statute was to withdraw claims of this kind from the effect and operation of the maxim *actio personalis moritur cum persona*, and to continue, as the basis of the claim of his estate the wrongful injury to the person resulting in death. *Ibid.*

13. *Same—Defenses.*—A recovery for a wrongful death allowed by C.S. 160, depending upon the question of self-defense in case of willful injury, and on contributory negligence in case of "negligent act," or upon settlement of the damages in his lifetime by the one injured, shows that it was in the contemplation of the statute that the "injury to the person" should continue after his death to be a constituent part of the statutory action allowed to the personal representatives, and comes within the provisions of C.S. 798 (4), affording the remedy by attachment for the "injury to the person by negligent or wrongful act." *Ibid.*

ACTIONS—*Continued.*

14. *Actions—Interveners—Attachment.*—An intervener in an action wherein attachment on defendant's property has been issued, and who claims a prior lien by reason of a former order of court in another and independent proceeding, becomes party to the present action and may not successfully attack the validity of the proceedings in attachment, and the question of priority is left to be determined in the present action. *Ibid.*

15. *Same—Husband and Wife—Maintenance—Liens—Conflicting Claims.*—Where the wife has obtained an order for support from her husband, declared a lien on his property, C.S. 1667, in order for her to intervene in an action in another jurisdiction and claim priority over an attachment therein issued, it is necessary that she should show some valid service of process, or waiver by her husband in an appropriate civil action against him. Whether the lien of the wife will in any event prevail as against the lien of a valid attachment first levied in another court of equal or concurrent jurisdiction, *Quære. Ibid.*

ADMINISTRATION.

See Actions, 10; Limitation of Actions, 5.

ADMINISTRATIVE BOARD.

See Constitutional Law, 21.

ADMISSIONS.

See Appeal and Error, 7, 19, 31, 54, 55; Instructions, 2; Contracts, 16; Pleadings, 9, 15; Public Officials, 1; Criminal Law, 8.

ADVERSE POSSESSION.

See Tenants in Common, 1; Evidence, 27, 28; Instructions, 16; Deeds and Conveyances, 25, 26.

AFFIRMANCE.

See Judgments, 8.

AGENCY.

See Banks and Banking, 1; Deeds and Conveyances, 2; Attachment, 8; Principal and Agent.

AGREEMENTS.

See Contracts, 3, 29, 31; Appeal and Error, 47, 63.

AIDER AND ABETTOR.

See Criminal Law, 24.

ALIENATION.

See Estates, 1; Wills, 17, 20.

AMENDMENTS.

See Pleadings, 3, 18; Appeal and Error, 36; Statutes, 13; Constitutional Law, 18.

AMUSEMENTS.

See Nuisance, 3; Pleadings, 21.

ANTE LITEM MOTAM.

See Evidence, 27, 28.

APPEAL.

See Courts, 1; *Habeas Corpus*, 2; Malicious Prosecution, 4; Pleadings, 3.

APPEAL AND ERROR.

See Railroads, 2, 4; *Habeas Corpus*, 4; Jurors, 1; Constitutional Law, 12; Negligence, 3, 10, 16; Verdict, 2; Pleadings, 1, 18, 21; Principal and Agent, 1;

APPEAL AND ERROR—*Continued.*

Attachment, 4; Actions, 6, 10; Issues, 2; Damages, 2; Reference, 1; Deeds and Conveyances, 5; Instructions, 4, 5, 8, 9, 12, 13, 15; Employer and Employee, 6; Evidence, 24, 27; Ejectment, 3; Judgments, 8, 15; Municipal Corporations, 3; Trusts, 8; New Trials, 1; Parties, 2, 3; Wills, 11, 13, 14, 25; Statutes, 13; Seduction, 5; Trials, 1, 2, 3; Criminal Law, 12, 21; Intoxicating Liquors, 5, 7, 10; Homicide, 3.

1. *Appeal and Error—Objections and Exceptions—Assignments of Error—Record.*—An exception taken for the first time in the appellant's assignment of error will not be considered on appeal, except as to the charge of the court, etc., C.S. 590 (2), it being required that it appear in the record that it had been duly and properly taken. *Brown v. Brown*, 42.

2. *Same—Motions—Nonsuit—Evidence—Divorce.*—Where the husband appeals from a judgment in favor of his wife, in her action for an absolute divorce, because of his separation from her for five years, under C.S. 1659 (4), amended by Public Laws of 1921, ch. 63, and assigns error only in the court's refusing his motion to nonsuit upon the evidence on the ground that he was insane for a part of the time, it is necessary, so that we may pass upon its sufficiency, that the evidence should appear in the record and not in the assignment merely. *Ibid.*

3. *Appeal and Error—Contempt of Court—Findings.*—Where the appellant has been adjudged guilty of contempt in the proceedings before the judge in the Superior Court, upon proper findings supported by evidence, the findings are not reviewable in the Supreme Court on appeal. *In re Fountain*, 49.

4. *Same—Jurors—Abusive Language—Evidence—Statutes.*—Upon appeal to the Supreme Court from an adjudication of guilty in proceedings "as for contempt," C.S. 984, evidence that the appellant had approached a juror on the streets, not in the immediate presence of the court, after the jury in the case had been discharged but during the term, and had abused the juror and the others who had rendered a verdict against him, cursing them, and using threatening jestures to the juror, and putting him in fear, is sufficient to sustain the findings of the trial judge that such conduct tended to impede and hinder the proceedings of the court, and impair the respect due thereto and the authority thereof, and the conviction based thereon. *Ibid.*

5. *Appeal and Error—Contempt of Court—Habeas Corpus—Certiorari.*—*Held*, in this case, the respondent, found guilty of contempt of court, was entitled to appeal; but if it were otherwise, and if his sentence were excessive or the jurisdiction doubtful, his remedy was by *habeas corpus* proceedings and a *certiorari*, if necessary. *Ibid.*

6. *Appeal and Error—Irrelevant Evidence—Harmless Error.*—In this case the handwriting sought to be introduced as evidence before the jury and to be considered by them was irrelevant, and the action of the court in refusing to let the writing be submitted to the jury, to determine its genuineness, under the statute, was harmless error. C.S. 1784. *Newton v. Newton*, 54.

7. *Appeal and Error—Verdict—Pleadings—Evidence—Admissions.*—On appeal, the verdict of a jury may be given significance and correctly interpreted by reference to the pleadings, the evidence, the admissions of the parties, and the charge of the court. *Kannan v. Assad*, 77.

8. *Same—Motion to Set Aside Verdict.*—Where, upon the admissions of the parties, the cause has been proceeded with in the Superior Court upon conflicting evidence as to the establishment of a certain fact upon an issue agreed upon, a

party, in disregard to or in conflict with his admissions, may not, after verdict, successfully move for judgment thereon. *Ibid.*

9. *Appeal and Error—Presumptions.*—On appeal to the Supreme Court the presumption is against error, and in this case it is *Held*, the appellee's objection is not sufficiently supported to justify the court in disturbing the results of the trial. *Claypoole v. McIntosh*, 110.

10. *Appeal and Error—Review—New Trial—Second Appeal.*—A petition to rehear is the method by which the law in a case decided in the Supreme Court may be there reviewed, and this may not be done when a new trial has been granted and the case comes on appeal to the court again upon the same facts, and the Superior Court has ruled the law in accordance with the former opinion. *Lewis v. Nunn*, 119.

11. *Appeal and Error—Statutes—Mortgages—Courts—Resales—Dismissal of Appeal.*—Where it appears on appeal to the Supreme Court that the clerk of the court, under judgment of Superior Court on appeal, has ordered a resale of lands theretofore sold under the power of sale contained in a mortgage or deed in trust, not according to the provisions of the statute as to increase bids within the ten days, etc., the appeal will be dismissed. *In re Sermon's Land*, 123.

12. *Appeal and Error—Mortgages—Powers of Sale—Sales—Preferred Bidder—Harmless Error.*—Where the preferred bidder at a resale of land theretofore sold under a power contained in the mortgage has become the successful bidder at the second sale, without the suggestion of unfairness or fraud, the mere fact that the resale was unwarranted will not affect the validity of the resale, or cause it to be set aside on appeal to the Supreme Court, it appearing that this was the proper course to have pursued. *Ibid.*

13. *Appeal and Error—Dismissal—Expression of Opinion—Supreme Court.* The Supreme Court may dismiss an appeal and express an opinion as to the law on the facts contained in the record, in exceptional instances, where the importance of and the general interest in the question presented make it desirable. *Ibid.*

14. *Appeal and Error—Dismissal as to One Party—Joint Judgment—Distinction Between Courts of Equity and Law Abolished.*—Under the provisions of our statutes abolishing the distinction between courts of law and courts of equity, a joint judgment may be affirmed on appeal as to one defendant and dismissed as to another, when this may be done without prejudice. *Kimbrough v. R. R.*, 235.

15. *Appeal and Error—Second Appeal—Same Facts.*—On this appeal the facts are substantially the same as in the former appeal in this case, and as the trial court has followed the directions of this Court as to the law, no error is found. *Ibid.*

16. *Appeal and Error—Verdict—Exclusion of Questions of Law Presented.* Where the question of law presented on appeal is as to whether one partner may be an independent contractor of the firm so as to exclude liability of the other, and the verdict of the jury has excluded the question of independent liability as a matter of fact, without error committed by the court, the answer to this issue, so found, excludes the question of law presented for decision on appeal. *Wilbon v. Howard*, 249.

17. *Appeal and Error—Presumptions—Railroads—Director General—Dismissal as to One Party—Prejudice—Judgments.*—The presumption on appeal to the Supreme Court is against error committed in the Superior Court, and it is ac-

cordingly *held* in this case that a judgment against the Director General of Railroads and a railroad under Government control at the time of the negligence alleged in the action must be dismissed as to the railroad company and affirmed as to the Director General of Railroads. *Wyne v. R. R.*, 254.

18. *Appeal and Error—Grounds of Appeal—Theory of Trial.*—On appeal, the appellant is confined to the theory of the case on which it has been tried in the Superior Court. *Walker v. Burt*, 326.

19. *Appeal and Error — Instructions — Admissions.* — An exception to the charge as stating a fact alleged to be at issue is untenable when it is covered by an admission of the parties. *Wells v. Crumpler*, 352.

20. *Appeal and Error--Evidence—Questions and Answers.*—Exceptions to the exclusion of questions from the evidence must show what the contemplated answers would have been, or what the appellant expected to prove, so that the Supreme Court may pass upon their materiality or relevancy, or they will not be considered on appeal. *In re Edens*, 398.

21. *Appeal and Error—Harmless Error—Prejudice.*—Error committed in the Superior Court must appear on appeal to have been material and prejudicial to the appellant, amounting to a denial of a substantial right, and a new trial will not be granted for mere error otherwise. *Ibid.*

22. *Appeal and Error—Opinions—Case Presented.*—Opinions of the Supreme Court must be understood in connection with the case presented there on appeal. *Ibid.*

23. *Appeal and Error—Objections and Exceptions—Harmless Error.*—The appellant may not successfully complain for error of the admission of the testimony of the appellee's witness, when it lends color to his own contentions. *Ibid.*

24. *Appeal and Error—Misconduct of Juror—Supreme Court—Motions—New Trials.*—The alleged misconduct of a juror, discovered after the trial, and upon which a motion for a new trial is made in the Supreme Court, is *held*, upon the examinations of the affidavits filed on this appeal, to be insufficient. *Ibid.*

25. *Appeal and Error — Theory of Trials — Objections and Exceptions.* — Where, in an action to recover a division of the profits upon a resale of land, there are issues submitted as to the validity of a parol contract, or whether the plaintiff was entitled to recover for his services under a *quantum meruit*, and the defendant, by his plea and all the testimony available to him, directed his defense exclusively to the definiteness of the evidence to establish an express agreement, he is precluded from insisting on an appeal upon an exception entirely inconsistent with the position maintained by him on the trial as to the insufficiency of the evidence upon the second issue, as to the *quantum meruit*. *Pinnix v. Smithdeal*, 411.

26. *Appeal and Error—New Trials—Issues.*—Where an action for breach of contract for the resale of land and division of profits has been submitted to the jury upon one issue as to the damages and the other as to the statute of limitations set up and properly pleaded as a defense, and there is involved the question of plaintiff's recovery upon a *quantum meruit* against which the statute has evidently run, but not as to the breach of contract alleged; and the court has erroneously placed the burden upon the defendant to show that the statute had run against the plaintiff's action, and the verdict of the jury is in exact accordance with the plaintiff's demand, without allowing deduction for defendant's ex-

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penses, a new trial will be granted on appeal, upon both issues, it not distinctly appearing that the error committed has not prejudiced the entire verdict. *Poindexter v. Call*, at this term, cited and distinguished. *Ibid.*

27. *Appeal and Error—Instructions.*—The appellant has no just ground for an exception to an instruction of the court that is favorable to him, as appears of record in this action for false arrest. *Allen v. Gardner*, 425.

28. *Same—False Arrest—Personal Malice.*—The evidence must be taken in the light most favorable to the plaintiff on defendant's motion as of nonsuit thereon, and a requested instruction in this action for false arrest, that the plaintiff could not recover unless the jury should find that the defendant was moved by personal ill will or malice towards the plaintiff, was properly refused, under the evidence. *Ibid.*

29. *Appeal and Error—Fragmentary Appeals—Pleadings—Judgments—Dismissal.*—Upon the pleadings of three causes of action with counterclaims set up as to each, the defendant should preserve his exception to the action of the trial court in entering judgment on the pleadings in plaintiff's favor in two of them and reserving the other for trial, until a final judgment in the court below, and a present appeal by defendant is fragmentary, and will be dismissed. *Cement Co. v. Phillips*, 437.

30. *Same—Execution.*—Where the defendant has improvidently appealed from judgment entered on the pleadings in two of the causes of action alleged in the complaint, reserving the third alleged cause for trial, execution under the judgments so entered cannot be issued until the disposition of the case by final judgment adverse to the defendant. *Ibid.*

31. *Appeal and Error—Pleadings—Judgments — Admission.* — Upon judgment entered upon the pleadings against the defendant, the matters set up in defense are admitted to be true for the purpose of appeal. *Ibid.*

32. *Appeal and Error—Judgments—Unadjudicated Matters.*—Matters not passed upon and adjudicated by the Superior Court will not be considered on appeal. *Ibid.*

33. *Appeal and Error — Dismissal — New Trials — Discussion of Merits — Court's Discretion.*—Where the dismissal of an appeal will have the effect of a new trial, the Supreme Court may express its opinion upon the merits as a guide in the next trial. *Ibid.*

34. *Appeal and Error—Harmless Error—New Trials.*—A new trial will not be granted on appeal for mere technical error committed on the trial, which will not subserve the real ends of substantial justice in correcting some ruling that so tends to the prejudice of the appellant that a new trial may rectify it. *Cauble v. Express Co.*, 448.

35. *Same—Government—Express Companies—Railroads—Negligence—Measure of Damages.*—Where, in an action against a common carrier to recover damages for its negligence in rendering practically valueless the goods delivered to it for transportation, the measure of plaintiff's damages is the difference between the market value of the goods just preceding the injury and their value immediately thereafter; and though, in this case, the court erroneously charged the jury that the damage to the goods would be the difference between their market value immediately preceding the injury and such value at the time of the trial, a year

APPEAL AND ERROR—*Continued.*

or more thereafter, it was harmless, it appearing that such value was the same in both instances. *Ibid.*

36. *Appeal and Error—Motions—Pleadings—Process—Amendments — Parties—Express Companies—Railroads—Director General—Government.*—In an action to recover damages for the destruction of goods by express, when express companies, as a war measure, were under the management and control of the Director General of Railroads, the plaintiff's motion in the Supreme Court, on appeal, to amend process and complaint, to show the injury was not caused by the express company, but by the Director General, was allowed, which had the effect of eliminating defendant's contention that only the express company had been sued. *Ibid.*

37. *Appeal and Error—Presumptions—Burden on Appellant.*—The appellant must affirmatively show the errors he complains of in the lower court against a presumption on appeal that the trial was free from prejudicial or reversible error. *In re Ross*, 477.

38. *Appeal and Error—New Trials—Substantive Error—Technical Error.*—To entitle the appellant to a new trial for errors committed in the lower court, he must show that such errors were so substantially prejudicial to him that a new trial may result to his benefit in the reversal of the verdict on the issue, and not merely technical or unsubstantial error. *Ibid.*

39. *Appeal and Error—Opinions—Stare Decisis — Justices' Courts — Judgments—Superior Courts—Docketing—Rules of Property.*—The doctrine of *stare decisis* is established by the Court under an ancient and unbroken line of decisions, and when involving the title to lands, should be regarded and upheld by the courts, though this rule is not inflexibly binding upon their judgment in avoiding palpable error; *Held*, in this case, the Court will not disturb the precedent established that an execution may not validly issue against lands when docketed in the Superior Court more than a year after its rendition in the courts of the justice of the peace. The doctrine of *stare decisis* and its requisites, and of *fiat justitia ruat coelum*, discussed by WALKER, J. *Lowdermilk v. Butler*, 503.

40. *Appeal and Error—Motion to Dismiss—Rules of Court—Frivolous Appeals—Relief—Judgments—Abuse of Process—Procedure.*—Where the appellant's case on appeal is due to be heard at the next ensuing term of the Supreme Court at the call of the district to which it belongs, and the appellee has moved to dismiss under Rule 17, upon the certificate of the clerk of the trial court and affidavits filed, showing that appellant's defense was frivolous and only for advantages to be gained by delay to the appellee's loss, and that the appellant had lost the right to have the matter determined in the Supreme Court, and his answer to the motion is also frivolous, this Court will affirm the judgment in appellee's favor rendered in the court below, and order the judgment to be certified down *instanter* to afford the appellee relief from the appellant's abuse of the court's process and procedure. *Hotel Co. v. Griffin*, 539.

41. *Appeal and Error—Verdicts—Issues — Instructions — Nonsuit — Telegraphs—Mental Anguish.*—Where a complaint states two causes of action to recover damages for mental anguish against a telegraph company for negligent delay in the transmission and delivery of two messages, one relating to the illness and the other to the death of the plaintiff's mother, and the cause has been dismissed, without exception taken as to the first, and as to the second issue of negligence refers to both messages or "either of them," which was emphasized in the instruction of the court and found in the affirmative by the jury, the verdict does

APPEAL AND ERROR—*Continued.*

not necessarily show a finding of negligence as to the death message, the one under investigation, and a new trial will be ordered on appeal. *Hulin v. Tel. Co.*, 541.

42. *Appeal and Error—Objections and Exceptions—Instructions—Special Requests.*—Where the trial judge has assumed to charge upon a principle of law arising under the evidence in the case, he must do so in such way as not to cause prejudice to the appellant's right by an omission of material matter necessary for a comprehensive understanding by the jury of the principle laid down for their guidance, without the necessity of a proffered prayer for special instructions. *Butler v. Mfg. Co.*, 548.

43. *Same—Special Police—Principal and Agent—Night Watchman.*—Where, in an action for damages for false arrest and imprisonment, the defendant, a cotton corporation, resists liability upon the contention, with supporting evidence, that the arrest was made by its night watchman beyond a certain enclosure wherein his duty to it was solely to have been performed, and upon a remote part of the mill settlement; and it appears that this watchman had been officially deputized by the town to act as a special policeman for the defendant, a general instruction resting defendant's liability upon whether the watchman acted within the scope of his employment, as such, without particularizing the law applicable to the defendant's evidence, is reversible error. *Ibid.*

44. *Appeal and Error—Harmless Error—Instructions—Statutes—Substitution of Words—Negligence.*—A substitution of the words "deemed a violation of the statute" for the words "shall be a violation of this section" of the statute regulating automobiles upon the highways, with reference to the defendant's negligence in a personal injury case, is *held* not to be prejudicial to the defendant, or reversible error. *Jordan v. Motor Lines*, 559.

45. *Appeal and Error—Objections and Exceptions—Contentions—Instructions.*—Error alleged in the statement by the trial judge of the contentions of the parties must be made in time to allow him to make the necessary correction, or the exception will not be considered on appeal. *Ibid.*

46. *Appeal and Error—Remanding Case—Constitutional Law—Statutes—Schools—Taxation.*—Where, in proceedings for a *mandamus* by the county board of education, a county has been ordered to levy a tax for a six months term of its public schools, in excess of that limited for the purpose by statute, it does not appear whether the plaintiff has apportioned to the county the amount it was entitled to receive under the statute; and if so, whether it was sufficient for a six months term required by Art. IX, sec. 3, of the State Constitution, the case will be remanded for further findings in order to properly present the question for the determination of the Supreme Court whether *mandamus* would lie. *Board of Education v. Comrs.*, 571.

47. *Appeal and Error—Case—Agreement of Counsel—Writing—Rules of Court—Written Instruments.*—Where a case on appeal to the Supreme Court has not been settled in conformity with the procedure in such matters, any further extension of time claimed by the appellant must be in writing and signed, as required by Rule 39, 174 N.C. 838. *Rogers v. Asheville*, 596.

48. *Same—Laches—Stenographer's Notes—Certiorari—Motions.*—Where the appellant has failed to file his case on appeal within the time allowed, and files his motion for *certiorari* on the ground that the stenographer at the trial could not transcribe her notes in time owing to her other duties as court stenographer, the reason given is no excuse in law, for the stenographic notes are not indispensable to the settlement of the case. *Ibid.*

APPEAL AND ERROR—*Continued.*

49. *Appeal and Error—Docketing Case—Motion to Dismiss—Record Proper.* Where the case has been docketed in the Supreme Court within the time required, and appellant has moved for a *certiorari*, to which he is not entitled, the case will not be dismissed, but the judgment below will be affirmed if there is no error appearing upon the face of the record as docketed. *Ibid.*

50. *Appeal and Error—Instructions—Contentions—Objections and Exceptions.*—Objections to the statement of the contentions of the parties by the judge in his charge to the jury must be taken at some appropriate time during the charge or at its conclusion, to afford the trial judge opportunity for correcting errors he may have made therein, in order that an exception thereto may be considered on appeal. *Green v. Lumber Co.*, 681.

51. *Appeal and Error—Unanswered Questions—Record.*—The record on appeal must show what the answer to a question, ruled out at the trial, would have been in order for appellant to rely thereon as error on appeal. *Snyder v. Asheboro*, 708.

52. *Appeal and Error—Instructions—Contentions—Objections and Exceptions.*—An exception to the statement of the contentions of a party must be made at the time they were given in the charge to be available to appellant. *Ibid.*

53. *Appeal and Error—Fragmentary Appeal—Dismissal.*—An appeal from an order dismissing the action as to one cause set forth in the complaint, and retaining it as to other causes therein alleged, is fragmentary, and will be dismissed. *Farr v. Lumber Co.*, 725.

54. *Appeal and Error—Harmless Error—Evidence—Subsequent Admissions of Evidence.*—Excluded evidence afterwards admitted on the trial is not reversible error, and evidence relating to the rights of an interpleader and the defendant between themselves becomes immaterial when the verdict is rendered in the plaintiff's favor. *Roane v. McCoy*, 728.

55. *Appeal and Error—Record—Admissions—Remanding Case—Judgment.* The Supreme Court will remand the case and order a judgment to be entered in the Superior Court for the appellee, when such appears to be proper upon the facts admitted of record. *Ferguson v. Fibre Co.*, 731.

56. *Appeal and Error—Fragmentary Appeals—Partnership—Reference.*—Where the jury has found in the affirmative upon the issue of partnership, an appeal from an order of reference by the court for the taking of an account of the partnership's receipts and expenses necessary for the information of the court is fragmentary, and will be dismissed by the court *ex mero motu*. *Leroy v. Saliba*, 757.

57. *Appeal and Error—Motion to Dismiss.*—An appeal does not lie from the refusal of a motion to dismiss an action. *Capps v. R. R.*, 758.

58. *Appeal and Error—Evidence—Nonsuit—Motions.*—From this appeal of the defendant from the refusal of the court to grant his motion as of nonsuit upon the evidence, the evidence is *held* sufficient to have taken the case to the jury. *Midgett v. R. R.*, 758.

59. *Appeal and Error—Instructions—Evidence.*—A requested instruction, though stating a correct principle of law, is properly refused when not supported by, or in conformity with, the evidence in the case. *Whitley v. Kafir*, 760.

APPEAL AND ERROR—*Continued.*

60. *Appeal and Error—Verdict—Evidence.*—The verdict of the jury on conflicting and sufficient evidence will not be disturbed on appeal. *Coburn v. Express Co.*, 762.

61. *Appeal and Error—Docketing of Record—Dismissal.*—Appellee's motion to dismiss in the Supreme Court will be allowed if the appellant has failed to have the record docketed until after the expiration of the term in the Supreme Court at which it should have been docketed. *Buggy Co. v. McLamb*, 762.

62. *Appeal and Error — Service of Case — Motion to Dismiss — Notice — Waiver.*—It is not necessary for the appellee to give appellants notice of a motion to dismiss the appeal under the rules of court, and his saying that he had not examined the appellant's statement of the case, served after the expiration of the time allowed, is not a waiver of his client's rights. *Kerr v. Drake*, 764.

63. *Same—Agreement—Extension of Time.*—The statutory period of fifteen days given to appellant to make out and serve his case on appeal to the Supreme Court must be strictly complied with, within the time agreed upon with the appellee's counsel, unless an agreement has been made for an extension of time. *Ibid.*

64. *Appeal and Error—Statutory Right.*—The right of appeal to the Supreme Court rests upon the statute, and is not an absolute one, and the appeal will be dismissed, under the rules, unless appellant shows sufficient cause, and that he has not been negligent therein. *Ibid.*

65. *Same—Transcript—Docketing—Certiorari.*—Where the appellant is not in default in bringing up his case to the Supreme Court, the appeal will nevertheless be dismissed under the rule unless at the first term after the trial below and at or before the time when the appeal should be docketed, the appellant shall file a transcript of all the record available, and ask for a *certiorari* to complete the transcript or to have the case settled. *Ibid.*

66. *Appeal and Error—Docketing — Laches — Attorney and Client.* — The negligence of counsel in sending up, docketing, and printing the transcript is that of his client, and is imputed to him. *Ibid.*

67. *Appeal and Error—Negligence.*—This case involved controverted issues of facts as to negligence and contributory negligence, and no material error is found in the rulings of law by the trial judge. *Rollinson v. Alexander*, 767.

68. *Appeal and Error—Parol Agreement of Counsel—Dismissal of Case—Rules of Court.*—Where a case on appeal to the Supreme Court has been dismissed under Rule 17, the Court, upon motion to reinstate, will not consider any agreement as to extension of time beyond that allowed by the statute, for the appellant to serve his case, unless in writing and properly signed, or admitted by the opposing counsel. *Tripp v. Somersett*, 767.

69. *Same—Duty of Appellant—Illness of Counsel.*—It is the duty of appellant to employ counsel to perfect his appeal to the Supreme Court, and the illness of one of his attorneys is not a sufficient excuse, on motion to reinstate an appeal dismissed under Rule 17. *Ibid.*

70. *Appeal and Error—Docketing of Record—Motion—Certiorari—Dismissal of Appeal.*—When for sufficient cause a case on appeal has not been settled in time to have it docketed at the term to which it should have been brought, it is the appellant's duty, in apt time, to docket a transcript of the record proper and

APPEAL AND ERROR—*Continued.*

move for a *certiorari;* and when this has not been done by him, and the case has been dismissed under Rule 17, his motion to reinstate will be denied. *Ibid.*

71. *Appeal and Error—Criminal Law—Prostitution—Evidence—Motions—Nonsuit—Statutes.*—On this appeal from conviction for the defendant's having engaged in immoral prostitution and unlawfully using a building for like purpose in violation of C.S. 4357 *et seq.*, the judgment is reversed for the lack of evidence to justify the verdict, and the defendant's motion for judgment as of nonsuit under the Mason Act, ch. 73, Laws 1913, should have been granted. *S. v. Bradshaw*, 769.

72. *Appeal and Error—Objections and Exceptions—Harmless Error—Result of Trial—Evidence—Questions and Answers.*—Exceptions to evidence that could not affect the result of the trial, or to questions without showing what the answers would be, are untenable on appeal. *Fellows v. Dowd*, 776.

73. *Appeal and Error—Decision of Supreme Court—Retrial—Law of the Case.*—The opinion of the Supreme Court rendered in a former appeal in the same action is the law of that case, and where, upon the overruling of a demurrer and a trial, the Superior Court has ruled the law in accordance with the opinion, no error on the second appeal will be found. *Duffy v. Phipps*, 778.

74. *Appeal and Error—Courts—Justices' Courts—Superior Courts—Recordari.*—Where the defendant has appealed from a judgment in a justice's court, and has failed to docket his case at the next term of the Superior Court commencing ten days or more after the rendition of the judgment, in order for him to obtain a *recordari* from the Superior Court he must move therefor at the earliest moment, and also show a meritorious defense. *Pickens v. Whitton*, 779.

75. *Same—Laches—Meritorious Defense.*—Upon motion for a *recordari* to issue from the Superior Court to bring up an appeal from a justice's court, the mere allegation in an affidavit that the movant has a meritorious defense is insufficient, it being required that the facts be shown for the court to determine the matter. *Ibid.*

76. *Appeal and Error—Recordari—Statutes.*—The provisions of C.S. 660, as to the writ of *certiorari*, have no application where an appeal from the justice's court has been lost through the default of the appellant, and the failure of the appellee to docket and dismiss is no waiver of the appellee's rights upon appellant's motion for a *certiorari. Ibid.*

77. *Appeal and Error—Assignments of Error—Record—Objections and Exceptions.*—An assignment of error must be upon exceptions appearing of record duly taken, though exceptions to the general charge, or refusal to instruct, or giving instructions prayed for, may be taken after the trial, they also must be properly assigned and appear in the record, and an assignment of error otherwise taken will not be considered on appeal. *S. v. Jones*, 781.

78. *Appeal and Error—Presumptions—Record—Burden of Proof.*—On appeal to this Court, the presumption is in favor of the correctness of the trial in the Superior Court, and the appellant must show error by the record and an assignment of error, which, if it does not so appear, will not be considered. *Ibid.*

79. *Same—Instructions—Homicide.*—Where it appears in the record on appeal that a trial for a homicide was conducted on both sides upon the question of the defendant being guilty of murder in the second degree or his acquittal, and it is stated in the case that the trial judge, at the conclusion of the argu-

ment, charged the jury at length with respect to the case, and stated fully the contentions of the State and the defendant, to which there was no exception, the defendant's assignment of error that the judge failed to charge the jury upon the question of manslaughter, or there being no evidence of it, will be disallowed as contradicting the case. *Ibid.*

80. *Appeal and Error—Reversible Error—Trials—Instructions—Homicide.* The judge's charge, upon a trial for a homicide, that the jury must be convinced "to a moral certainty" of the defendant's guilt, and that they should return a verdict of guilty if they so found beyond a reasonable doubt is not reversible error. *Ibid.*

81. *Appeal and Error—Homicide—Instructions—Record — Harmless Error.* Where the charge of the court to the jury is not set out on appeal in full, in a trial for a homicide, and it is stated in the record that the judge charged the jury that their verdict would be "guilty" if they found beyond a reasonable doubt that the defendant committed the homicide, though the part of the charge so appearing may be somewhat brief and general, it will be considered in connection with the statement appearing of record that the court correctly charged the jury, and will not, therefore, be held for reversible error, as this Court cannot see that, when the charge is construed as a whole, it was not correct. *Ibid.*

82. *Appeal and Error—Instructions—Record—Presumptions — Objections and Exceptions.*—Where the charge of the court is not set out in the record on appeal, the presumption is in favor of its correctness, and that the appellant would otherwise have excepted, and especially so when it is stated that the judge charged the jury at length concerning the case. *Ibid.*

83. *Appeal and Error—Instructions, How Construed.*—On appeal to the Supreme Court the charge of the trial judge to the jury must be construed as one connected whole, and not by detached portions. *Ibid.*

84. *Appeal and Error—Instructions—Conflicting Instructions—Reversible Error.*—Where the judge's charge to the jury is conflicting as to the law material to the answer of the issue, it is reversible error. *S. v. Falkner*, 794.

85. *Same—Husband and Wife—Abandonment — Statutes — Criminal Law.* Where there is evidence that the husband indicted for the willful abandonment of his wife, etc., under C.S. 4447, was occasioned by her unchastity, it raises the question of his criminal intent therein, and it is reversible error for the court to charge the jury that the burden was on the defendant to satisfy them by the greater weight of the evidence of the fact of her unchastity, though he has charged them that the burden was on the State to show guilt beyond a reasonable doubt. *Ibid.*

86. *Appeal and Error—Evidence—Verdict.—Held*, in this action for violating the prohibition law, an exception of defendant relating to the credibility of defendant's witness is untenable, and could not have any possible relation to the verdict of the jury; or were it otherwise, it appears that he received the full benefit thereof in the course of the trial, and this is sufficient. *S. v. Haywood*, 815.

87. *Appeal and Error—Objections and Exceptions—Change of Ground of Exception—Different Theories.*—The appellant may not, on appeal, change the ground of his exception taken in the Superior Court, or change his theory of the case in the Supreme Court. *Ibid.*

APPEAL AND ERROR—*Continued.*

88. *Appeal and Error—Weight of Evidence—Objections and Exceptions—Court's Discretion.*—Where the indictment, verdict, and judgment appealed from are formally correct, objection that the trial court should have set aside the verdict as contrary to the weight of the evidence, is to the exercise of his sound discretion, and not reviewable. *S. v. Bynum*, 821.

89. *Appeal and Error—Objections and Exceptions—Instructions—Recital of Evidence.*—The recital of the testimony in the case in the summing up by the judge to the jury is an appeal to their recollection of the evidence, and where a party to the action thinks that this has inaccurately been done, he is deemed to have waived his right to except after the case has been submitted to the jury, and he has failed to call the matter to the attention of the judge at the time, and when thereafter the exception has been taken, it will not be considered on appeal. *S. v. Pannil*, 838.

90. *Appeal and Error—Objections and Exceptions—"Broadside Exceptions."* A general or "broadside" exception to the charge of the judge to the jury will not be considered on appeal. *Ibid.*

91. *Appeal and Error—Objections and Exceptions—Evidence—Self-serving Declarations—Corroborative Evidence.*—Upon the trial for larceny of an automobile, a question as to whether the defendant told the deputy sheriff at the time of the arrest that he had bought the car from a certain person is objectionable as tending to draw out a self-serving declaration, and should it thereafter have been competent in corroboration of other evidence, it should have been asked again at the later time; and further, an exception to its exclusion is not available on appeal when it does not appear of record what the answer would have been. *S. v. McCanless*, 843.

92. *Appeal and Error—Harmless Error—Homicide—Flight—Evidence in Explanation—Instructions.*—While evidence of flight, after the commission of a homicide, may be taken as a circumstance in connection with the other evidence tending to show his guilt, which he may explain by showing that it was for a different reason, the exclusion of the testimony in explanation is *held* as harmless error on this appeal, it appearing that he had received the full benefit thereof in the subsequent admission of the same testimony and under proper instructions of the court thereon. *S. v. Hairston*, 851.

93. *Appeal and Error—Failure to Docket—Dismissal.*—Where the defendant in a criminal action has failed to docket his case until after the expiration of the term at which it should have been heard, the Attorney-General may on motion have it dismissed as a matter of course. *S. v. Satterwhite*, 892.

94. *Appeal and Error—Criminal Law—Sentence—Case Remanded—Void Sentence.*—Where the sentence in a criminal case is void for indefiniteness, etc., the case will be remanded in order that a correct sentence may be imposed. *Ibid.*

95. *Appeal and Error—Evidence—Declarations—Corroborative Evidence—Spirituous Liquor—Intoxicating Liquor.*—While the accused may testify as to his consistent declarations made to others, to corroborate his testimony of innocence of the offense charged against him, its exclusion will not be held for reversible error if it could not have affected in any way the verdict of guilty; as to whether his declaration accusing another of manufacturing, etc., spirituous liquor, of which he himself was accused, comes within the rule, *Quære? S. v. Munday*, 908.

APPEARANCE.

See Attachment, 2, 5; Drainage Districts, 11.

APPORTIONMENT.

See Constitutional Law, 12.

ARBITRATION AND AWARD.

See Principal and Agent, 11.

ARGUMENTS.

See Instructions, 12.

ARREST.

See Malicious Prosecution, 4; Courts, 12; Homicide, 5; Intoxicating Liquors, 12.

ASSAULT.

See Contempt, 2.

1. *Assault—Intent to Kill—Deadly Weapon—Poison—Statutes.*—An assault by means of poison comes within the intent of our statutes making an assault with a deadly weapon with intent to kill punishable as a felony. C.S. 4213, 4214. *S. v. Alderman*, 917.

2. *Same—Evidence—Nonsuit—Trials—Questions for Jury.*—Evidence tending to show that after threats of poisoning made by the wife against her husband, the daughter prepared her father's breakfast at their home in the presence of her mother, sent it out to him by their son, and the daughter thereafter attempted to destroy in the fire a spoon having a greenish color on it, apparently paris green, a poison; and soon after the father had commenced his breakfast he became ill from the effects of paris green, is sufficient for conviction of the offense of an assault with intent to kill, as to each defendant. *Ibid.*

3. *Same—Husband and Wife—Threats.*—In case of assault and battery with intent to kill by poison, with evidence tending to show the previous threats of the wife, and that the poison was put into the food prepared by the daughter in her mother's presence at their home, and that the husband was poisoned from eating thereof, the testimony of the husband as to his wife's previous threats is not inadmissible under the provisions of C.S. 1802, but is admissible for the purpose of showing knowledge and identifying the perpetrators of the crime, and is distinguishable from the rule that threats are ordinarily inadmissible on trials for assault and battery. *Ibid.*

4. *Assault—Instructions—Intent to Kill—Poison.*—The charge upon the trial of an assault with intent to kill by administering poison by several defendants, with evidence sufficient of the guilt of each, that if one of them did it without the knowledge of the other, the one who did it would be guilty, and the other would not be, is the stating of a legal truism, and not error, when construed with the other parts of a correct charge. *Ibid.*

5. *Assault—Evidence—Motive.*—While motive is not a necessary ingredient of the crime of an assault with intent to kill by a poison (a deadly instrumentality), it may become important, with other relevant evidence to identify the accused as the one who has administered, or helped to administer, the poison. *Ibid.*

ASSESSMENTS.

See Drainage Districts, 1, 5, 9, 13; Judgments, 14; Municipal Corporations, 1, 2, 5; Cities and Towns, 1, 3.

ASSIGNMENT.

See Mortgages, 7; Public Sales, 4; Railroads, 11; Attorney and Client, 5, 10; Deeds and Conveyances, 17; Appeal and Error, 1, 77.

ATTACHMENT.

See Banks and Banking, 2; Actions, 11, 14.

1. *Attachment — Nonresident—Notice—Service—Publication—Summons — Statutes.*—In proper instances, where civil actions are commenced and service is obtained by attachment of defendant's property and publication of a notice based upon the jurisdiction thus acquired, the issuance of a summons at the commencement of the action is unnecessary. C.S. 802. *Jenette v. Hovey*, 30.

2. *Same—Special Appearance—Motions — Court's Discretion.* — Where an affidavit, filed in an action wherein attachment is sought against the property of a nonresident within the jurisdiction of the court, is sufficient for the clerk to order service of the summons by publication, but service has not been ordered or made, and the cause has come up on defendant's special appearance and motion to dismiss on that ground, and pending the motion the plaintiff, upon an additional affidavit, without the knowledge of the judge, has obtained an order of publication from the clerk, it is within the sound discretion of the judge to permit the publication of the summons to be proceeded with, and deny the defendant's motion. C.S. 802, 806. *Ibid.*

3. *Attachment—Undertakings in Lieu of Property—Statutes.*—Where attachment has been levied on the defendant's property necessary for the prosecution of his business, and upon his giving bond, he or his receiver is permitted by the court to continue operations, the giving of the bond is in lieu of the lien acquired in attachment, and analogous to the proceedings in discharge authorized by statute (Pell's Revisal, secs. 774 and 775); and he may not take advantage of the bond by continuing to ship his property thereunder beyond the jurisdiction of the court, and thereby repudiate it. *Martin v. McBryde*, 175.

4. *Same—Appeal and Error.*—Where the court has adjudged that the defendant in attachment, who in the course of his business, has rapidly been shipping lumber beyond the State, continue therein upon giving a bond in substitution of the lumber attached, conditioned upon the payment of the debt, he or his receiver may not thereafter except to the order made for his benefit, and at his request. *Ibid.*

5. *Attachment—Appearance—Undertakings in Lieu — Benefits — Waiver—Pleadings.*—An attachment debtor waives any defect therein by appearing and pleading to the merits of the action; and also by accepting the benefits of an order of court substituting at his request an undertaking in lieu of the property subject to the attachment. *Ibid.*

6. *Attachment—Intervener—Issues—Pleadings.*—In proceedings in attachment of the funds of a nonresident debtor in the hands of a local bank, a foreign bank intervening and claiming the funds has no interest in the action beyond the question of its ownership; and where the defendants neither appear nor plead, objection of the interpleader is untenable that it does not affirmatively appear that the defendants owned the funds, or that service has not been made on them, and that the court cannot, therefore, further proceed. *Feed Co. v. Feed Co.*, 690.

7. *Same—Service—Process—Waiver.*—The defendants in attachment may waive lack of service, and an intervener, a stranger to the action, except upon the issue of his ownership, will not be heard to object on that account. *Ibid.*

ATTACHMENT—*Continued.*

8. *Same—Banks and Banking—Agency for Collection.*—The intervening bank in attachment, if it establish the fact of its ownership as purchasers in due course, etc., will vacate the attachment; but if it be found that the intervener was only an agency for collection, the attachment will hold as between the intervener and the plaintiff. *Ibid.*

ATTESTATION.

See Wills, 24.

ATTORNEY AND CLIENT.

See Judgments, 4, 7; Jurors, 1; Appeal and Error, 66.

1. *Attorney and Client—Principal and Agent—Scope of Authority.*—By virtue of his employment, an attorney at law has the control and management of a suit of his client in all matters of procedure, and has the implied authority to make such stipulations and agreements as may commend themselves to his judgment in so far as they may affect the remedy he is endeavoring to pursue. *Bizzell v. Equipment Co.*, 98.

2. *Same—Consent Judgments.*—Under ordinary conditions there is an implied authority presumed from the relation of attorney and client that the attorney may consent to the rendition of a judgment against his client, in the absence of fraud or collusion, and in proper instances it will be binding upon his client. *Ibid.*

3. *Same—Impairment of Client's Rights.*—The principle upon which an attorney has implied authority from his client to bind him by consent in the course of the procedure, does not extend to compromising his client's cause of action or to entering into stipulations or agreements which sensibly impair such client's rights and interests involved in the litigation. *Ibid.*

4. *Attorney and Client—Contracts—Fees—Contingencies—Evidence—Recovery—Questions for Jury—Trials.*—The relationship of attorney and client is one wherein the parties do not stand upon an equal footing in making a new contract for the compensation of the attorney, *in medias res*, or after he has therein been employed and before the conclusion of the matter; and when, under such circumstances, the attorney has agreed with his client to be paid upon a contingent fee bases, this contract will be declared void, not upon the ground that actual fraud is necessary to be shown, but as a matter of sound public policy to exclude its possibility; and if no definite original contract of employment has been established, the measure of the attorney's recovery, is a reasonable compensation for the service rendered. *Stern v. Hyman*, 422.

5. *Attorney and Client—Fees—Contingencies—Contracts—Assignments—Judgments.*—Where the plaintiff's attorneys have intervened and filed a petition claiming an assignment of a part of the recovery for services rendered the plaintiff in the pending action upon a contingent fee basis, the defendant is not required to see to the application of the funds to be paid under the judgment rendered against him, and he has no interest in the interpleader that he can litigate. The judgment in favor of the interveners will conclude all the parties when they have had due notice of the interpleader and have failed to answer the petition in time allowed by law. *Casket Co. v. Wheeler*, 459.

6. *Same—Reasonable Fee.*—An agreement between the attorney and client that the former should receive a certain part of the recovery in an action as a fee upon the contingency of success, is an assignment that may be enforced upon a judgment rendered in the plaintiff's favor, when reasonable in amount, and

ATTORNEY AND CLIENT—*Continued.*

held in this case that a fee of one-third of the recovery in the case was not unreasonable under the facts and circumstances appearing therein. Contract between attorney and client for the former's compensation upon a contingent fee basis, and its reasonableness, discussed by WALKER, J. *Ibid.*

7. *Same—Intervener—Procedure.*—Where the plaintiff endeavors to avoid paying a contingent fee agreed upon for compensating his attorneys for successfully prosecuting the action, it is proper procedure for the attorney to intervene and show his interest in the judgment rendered in plaintiff's favor, and have their rights therein secured. *Ibid.*

8. *Attorney and Client—Amount of Fee—Fees—Contingencies — Evidence.* Where an attorney takes a matter to be litigated upon a contingent fee, it is not to be considered unreasonably large because larger than it would have been had it not upon such basis, and in the case, *held*, a fee of one-third of the recovery was not unreasonable, considering the services rendered and all the other facts and circumstances. *Ibid.*

9. *Same—Confidential Relationship—Fraud—Undue Influence.*—While the contract entered into by an attorney with his client for a fee for services upon contingency of recovery must be free from fraud or undue influence or oppression to be valid and enforceable, the mere fact that it was in a larger amount than would be reasonable upon a straight fee basis, does not make it void as being within the confidential relationship of attorney and client, and it is enforceable when it appears that the contract was fairly entered into without oppression or wrong, and that the fee was reasonable under the circumstances. *Ibid.*

10. *Attorney and Client—Fees—Contingencies—Contracts — Assignments — Law—Equity—Statutes.*—The common-law rule that the rights and benefits of a contract, with certain exceptions, could not be transferred by assignment, was afterwards modified in common-law courts, and more extensively in courts of equity, and extended by legislation, so that now, as a general rule, unless expressly prohibited by statute or in contravention of public policy, all ordinary business contracts are assignable, and actions for their breach may be maintained by the assignee in his own name; and *held*, where an attorney has contracted to receive as compensation from his client a fee contingent upon recovery in the action, it follows that upon the happening of the contingency he may enforce his right against his client in his own name, whether the assignment is regarded as a legal or equitable one. *Ibid.*

11. *Attorney and Client—Fees—Contingencies—Judgments—Liens.*—Where the interveners have established their right to compensation for their professional services as attorneys upon a fee contingent on recovery, the lien of the judgment attaches, *pro tanto*, under our statute, to the defendant's land, in favor of the interveners, from the time of docketing the judgment, that is, to the extent that there is a definite appropriation of a special part of the judgment or recovery to their use and benefit. *Ibid.*

ATTORNEY-GENERAL.

See Corporations, 13; Parties, 3.

AUTOMOBILES.

See Equity, 3, 4; Evidence, 23; Instructions, 13; Negligence, 9, 10, 11; Railroads, 14.

Automobiles—Negligence—Principal and Agent—Father and Son—Evidence —Nonsuit—Trials.—Where there is evidence that a father has given his auto-

AUTOMOBILES—*Continued.*

mobile to his son for the purpose of the latter's driving therein through the country to town to enter school, with instructions to leave the automobile at a garage, the father is responsible in damages for the negligence of the son in causing an injury to a third person on the streets of the town, while so driving, from which he is not released by a divergence of the son in taking some fellow-students from the depot, where he had met them, to the school, and a nonsuit or a direction of the verdict on the trial in the defendant's behalf was properly refused. *Duncan v. Overton*, 80.

BAILMENT.

See Banks and Banking, 4.

Bailment—Return of Property—Liability—Evidence—Prima Facie Case—Negligence.—Where property has been shown to have been delivered to a bailee for hire, and is not or cannot be returned by him, according to the terms of the bailment, it makes out a *prima facie* case for the bailor in his action for damages, which would justify a verdict in his favor. *Trustees v. Banking Co.*, 299.

BANKRUPTCY.

See Courts, 3.

BANKS AND BANKING.

See Constitutional Law, 1; Attachment, 8.

1. *Banks and Banking—Bills and Notes—Drafts—Holder in Due Course—Agency for Collection.*—Where a foreign draft has been attached by a local creditor of the drawer while in a bank subject to the jurisdiction of our courts, and the forwarding bank has intervened and claims as a purchaser of the paper for value and in due course, and has introduced evidence to that effect, a question of fact is raised for the determination of the jury, when the intervener's evidence also raised an inference that it was simply an agency for collection. *Brooks v. Mill Co.*, 258.

2. *Same—Attachment.*—A draft made by a nonresident debtor is the subject of attachment in the resident creditor's action, in the courts of this State, when it has not been transferred to another in due course, etc. *Ibid.*

3. *Same—Evidence—Questions for Jury.*—A resident creditor attached in his local bank a draft by his debtor on another, payable to himself, and the forwarding bank intervened and claimed as a purchaser for value in due course, and its evidence tended to establish its claim; but it further testified that it would look to the drawer, its depositor, for the payment of the discount and the rate of interest it charged: *Held*, it was for the jury to determine whether the interpleader was a holder in due course for value or merely an agency for collection. *Ibid.*

4. *Banks and Banking—Valuables Deposited for Safe Keeping—Consideration—Bailment for Hire—Negligence—Rule of the Prudent Man.*—A banking institution which keeps stocks, bonds, and other such valuables for its patrons, receives compensation therefor in the advantage it obtains in attracting and retaining the business of its patrons, and its liability for such deposits for safe keeping is not that of a gratuitous bailee, responsible only for its gross negligence, but its liability is governed by the rule of the prudent man in the care of papers of such character deposited with him for hire, or commensurate with the value of the property under the particular circumstances. *Trustees v. Banking Co.*, 298.

BANKS AND BANKING—*Continued.*

5. *Banks and Banking—Valuables Deposited for Safe Keeping—Scope of Business.*—An important part of the business of a bank, whether private or incorporated, consists of acting as the agent or bailee of its customers for the safe keeping of their valuable papers, and services of this character are not outside of the scope of the authority of such institutions. *Ibid.*

6. *Same—Care Required—Negligence.*—The care required of the bank receiving its customers' bonds or valuable papers for safe keeping, under the rule of the prudent man, is not measured alone by that it may have taken with its own property of like value, when not in keeping with the care required under the rule of the prudent man in receiving for safe keeping the valuable papers of another for a consideration. *Ibid.*

7. *Banks and Banking—Checks—Mortgages—Forgeries—Deeds and Conveyances.*—A depositor of defendant's bank obtained a loan from the plaintiff, secured by mortgage on his sister's land, containing the certificate made by a justice of the peace, and deposited the check, and obtained the money on the check for his own use, from the bank, by endorsing his sister's name by himself, without her authority or knewledge. The mortgage and the note it secured were forgeries: *Held*, the defendant bank was liable to the plaintiff for the amount of the check so endorsed and paid, and the principle upon which a bank may not be held responsible for cashing a forged check of the depositor where the drawer is at fault, or has received the benefit, etc., has no application. *McKaughan v. Trust Co.*, 543.

8. *Same—Drawers of Checks—Canceled Mortgages — Actions — Reinstatement of Liens—Negligence.*—A lender of money upon a forged note and mortgage made the check payable to the supposed mortgagor, and gave it to her brother, who placed it to his own credit in the bank, and he gave the lender his check on the proceeds for a former debt due by himself to the lender and secured by a mortgage on his own land: *Held*, the bank was entitled to credit for the amount of the borrower's check credited back to the lender; and if the lender has canceled the mortgage made by the brother to him, his remedy would be by suit to reinstate his lien. *Ibid.*

BARTER.

See Intoxicating Liquor, 5.

BENEFITS.

See Attachment, 5; Cities and Towns, 2; Drainage Districts, 13, 14; Constitutional Law, 13.

BETTERMENTS.

See Statute of Frauds, 8.

BIDS.

See Public Sales, 1, 3, 4; Mortgages, 2; Appeal and Error, 12.

BILL.

See Criminal Law, 1.

BILLS AND NOTES.

See Banks and Banking, 1.

1. *Bills and Notes—Mortgages—Trusts—Maturity—Purchasers—Notice.* — A purchaser of a note secured by mortgage or deed in trust, after maturity takes subject to outstanding equities. *Guthrie v. Moore*, 24.

2. *Same—Public Sale—Injunction—Equity — Courts.* — The owner of land gave two mortgages or deeds of trust thereon, and afterwards sold the land to

the plaintiff by deed to be held in escrow with notes secured by mortgage for the balance of the purchase price, and to be turned over to him when the prior mortgages should have been paid. The notes secured by the third mortgage were bought after maturity by one of the prior mortgagees, and sales under the powers thereof in all three of the mortgages are sought to be enjoined: *Held*, the purchaser of the third mortgage notes after maturity took with notice of plaintiff's equity; and as the question as to the distribution of the proceeds of the sale of the land affected them all, and a serious question has arisen, the injunction as to all was properly continued to the hearing to await the result of the suit. *Mosby v. Hodge*, 76 N.C. 387, cited and applied. *Ibid.*

3. *Bills and Notes—Notes—Negotiable Instruments—Delivery.*—The legal delivery of a note does not alone depend upon giving it to the payee in person, but it may be evinced by its delivery to another for the payee showing the maker's intent to part with control over it, and that it was for the payee's benefit in accordance with the terms of the instrument. *Irvin v. Harris*, 647.

4. *Same—Partnership—Husband and Wife.*—Where a partnership consists of the husband of the payee of the note, and others, and there is evidence that the wife became insane before the note was delivered to her and in consequence it was delivered to the husband by the partnership, and he had assumed to endorse the check given in payment, in his wife's name, and received the money thereon: *Held*, sufficient of a valid delivery; but not of payment of the note, it being only lawful that the money should be paid to the guardian of the wife, or the check in payment endorsed by him, in order to cancel it. *Ibid.*

5. *Bills and Notes—Judgments—Indorser—Principal and Surety—Evidence—Pleadings—Liability of Principal—Payment by Indorser.*—Where one of two defendants has paid a joint judgment upon a note against them both, and has the judgment assigned to another for his use, who brings action to recover against the other judgment debtor, he may, as between themselves, show that the defendant in the second action was the principal payee, and that he, the plaintiff, was an indorser, though not pleaded in the original action, and recover the full amount of the judgment he has paid, the action being, in substance, one by the surety on the note to recover against the principal thereon. C.S. 3963, 1795, as to excluding evidence of transactions with deceased persons not applying, the parties to the action being alive. *Haywood v. Russell*, 711.

6. *Bills and Notes—Due Course.*—This controversy involved the question of whether the plaintiff was a holder in due course of the note sued on, and no error is found under the doctrine announced in *Bank v. Exum*, 163 N.C. 199, and *Worth Co. v. Feed Co.*, 172 N.C. 342. *Bank v. Carson*, 763.

BOARDS.

See Statutes, 9.

BOARD OF EDUCATION.

See Constitutional Law, 12.

BOARD OF HEALTH.

See Injunction, 3.

BONDS.

See School Districts, 1, 3; Roads and Highways, 2; Schools, 1; Drainage Districts, 8; Statutes, 9, 12; Constitutional Law, 13, 18, 20; Elections, 1, 2.

BOUNDARIES.

See Deeds and Conveyances, 22; Instructions, 16.

BREACH OF PROMISE OF MARRIAGE.

See Seduction, 4.

BROKERS.

See Evidence, 30; Contracts, 30; Principal and Agent, 10, 13.

BOOKS.

See Evidence, 4.

BOUNDARIES.

See Deeds and Conveyances, 1; Evidence, 28.

BURDEN OF PROOF.

See Contracts, 2; Criminal Law, 3, 7; Negligence, 3, 12; Wills, 13; Ejectment, 3; Limitation of Actions, 2; Appeal and Error, 37, 78; Evidence, 24.

CANALS.

See Waters, 1, 2.

CAPTIONS.

See Statutes, 10.

CASE.

See Appeal and Error, 22, 46, 47, 49, 55, 62, 68, 94; Actions, 5, 6.

CAUSE OF ACTION.

See Pleadings, 7, 19; Actions, 12.

CARRIERS.

See Express Companies.

CAVEAT.

See Wills, 26.

CERTIFICATES.

See Contracts, 17; Corporations, 3, 12, 14; Guardian and Ward, 2; Married Women, 3.

CERTIORARI.

See Appeal and Error, 5, 48, 65, 70.

CESTUI QUE TRUSTS.

See Contracts, 9, 12; Trusts, 6.

CHARITIES.

See Trusts, 10.

CHECKS.

See Banks and Banking, 7, 8.

CITIES AND TOWNS.

See Equity, 1; Municipal Corporations, 1, 2, 4, 5, 7; Statutes, 12; Constitutional Law, 20, 24.

1. *Cities and Towns—Municipal Corporations—Street Improvements—Assessments—Prima Facie Case—Instructions.*—The assessment roll is *prima facie* evidence of the correctness of an assessment made in accordance with the provisions of statute by the governing board of a municipality as to the amount the owners of land upon an improved street shall pay for the special benefits they have received, and when there is no evidence to the contrary, it is not error for the court to direct a verdict upon this evidence. *Anderson v. Albemarle*, 434.

CITIES AND TOWNS—*Continued.*

2. *Cities and Towns — Municipal Corporations — Street Improvements — Benefits—Government.*—The question as to whether the owner of land abutting upon a street to be improved will be benefited thereby may be determined by the governing board of the municipality, under the provisions of our statute adopting the front foot rule as the method of assessment. The various methods of such assessments commented upon by CLARK, C.J. *Ibid.*

3. *Same—Pavements—Physical Contact of Improvements—Assessments.*—The paving of the full width of a city street may be postponed until such time as the governing body of a municipality may adjudge that the traffic conditions thereon require it; and on objection by the owner of land abutting on the street to an assessment by the front foot rule for special benefit, upon the ground that his property does not come in actual contact with the part of the street for which the city has paid as a general benefit, is untenable under our statutes, ch. 56, secs. 5, 13, Laws 1915. *Ibid.*

CITIZENSHIP.

See Military, 2.

CIVIL AUTHORITY.

See Military, 1.

CLAIMS.

See Actions, 15.

CLERKS OF COURTS.

See Mortgages, 6, 9; Statutes, 6; Guardian and Ward, 1, 2; Judgments, 17.

CODIFICATION.

See Statutes, 7.

COLLECTION.

See Attachment, 8.

COLLISIONS.

See Instructions, 133; Negligence, 9.

COLOR OF TITLE

See Deeds and Conveyances, 4, 25, 26; Instructions, 16.

COMMERCE.

Commerce—Discrimination—Federal Statutes—Pleadings — Void Contracts —Quantum Meruit.—Where a purchaser sued for the purchase price of goods in interstate commerce, sets up a counterclaim alleging an unlawful discrimination against himself in favor of other like purchasers (U. S. Consolidated Statutes, sec. 8835 b), and has accepted the goods from the carrier, he may recover the unlawful overcharge upon a *quantum meruit*, but not upon the contract, which is void. *Cement Co. v. Phillips*, 438.

COMMISSIONERS.

See Drainage Districts, 1; Roads and Highways, 5; Mortgages, 10, 11; Statutes, 4; Principal and Agent, 10, 13; Vendor and Purchaser, 1; Contracts, 30; Evidence, 30.

COMMISSIONERS

See Roads and Highways, 1; Taxation, 1; Drainage Districts, 6, 8.

COMMITTEES.

See Roads and Highways, 1; Taxation, 1; Drainage Districts, 6, 8; Schools, 1.

COMPROMISE.

See Accord and Satisfaction, 1.

CONDEMNATION.

See Roads and Highways, 4.

CONDITIONS.

See Judgments, 5; Contracts, 15, 16; Principal and Agent, 13; Vendor and Purchaser, 3; Deeds and Conveyances, 16.

CONFIDENTIAL RELATIONS.

See Attorney and Client, 9.

CONFLICT.

See Statutes, 6.

CONSENT.

See Judgments, 4, 7, 19; Contracts, 12; Trusts, 6.

CONSIDERATION.

See Banks and Banking, 4; Trusts, 7; Deeds and Conveyances, 15, 19: Principal and Agent, 7.

CONSISTENCY.

See Verdict, 4.

CONSOLIDATED STATUTES.

SEC.

6. Public administrator has no status until appointment in particular case. *In re Neal*, 405.

20. The expiration of period for qualification as administrator of deceased by his relatives, or letters of renunciation by them, before public administrator may qualify. *In re Neal*, 405.

160. Dying declarations of one whose death was caused in an admitted collision with a train are competent in an action against the railroad company. *Williams v. R. R.*, 267.

160. This section only creates a new cause of action in the sense it did not exist at common law, and continues as a basis of recovery by administrator for wrongful injury causing death. *Mitchell v. Talley*, 683.

250. As to doctrine of title by estoppel applying to married women, *Quære? Door Co. v. Joyner*, 519.

279. As to the subsequent marriage by the parents for claimant's legitimacy for the purpose of inheriting from the father, declarations of the parents or family traditions are competent as evidence. *Bowman v. Howard*, 662.

279. Only those having vested rights may question constitutionality of this section. *Ibid.*

361. Occupancy confers jurisdiction to clerk in establishing dividing line, and his judgment does not estop parties in separate action to show character or extent of possession or to establish easement by adverse possession. *Nash v. Shute*, 529.

407-412. Statute begins to run against insane claimant of estate of deceased, administered upon, from time of qualification of guardian. *Irvin v. Harris*, 647.

412-417. Payment made by surviving partner does not repel the bar of the statute as to the separate property of the deceased one, the authority being

CONSOLIDATED STATUTES—*Continued.*

SEC.

in the personal representative of deceased persons. The statute is suspended for year after qualification of administrator, within ten years from decedent's death. *Ibid.*

416. A new note embracing old debt is sufficient writing within statute. *Ibid.*

441(9). Probate of and caveat to wills should be within seven years, except in cases of married women, infants, insane persons, and right to caveat thereafter is barred without regard to time of discovery of fraud by ordinary care. *In re Johnson*, 523.

449. The trustee of an express trust may sue alone. *Trust Co. v. Wilson*, 166.

451. Proceedings involving ward's interest in land will not be declared void merely because ward has not been served with personal service, when guardian accepts service and defends for him. *Groves v. Ware*, 553.

463. It is for the statute to fix place of venue of action, and it will be disregarded when the parties otherwise fix it by contract. *Gaither v. Motor Co.*, 498.

507. Demurrer for multifariousness of pleading is bad when the allegations relate to the same causes and the matters alleged arose from a series of transactions complete as a whole. *Taylor v. Ins. Co.*, 120.

516. Demurrer for misjoinder of parties and causes of action will be sustained. *Ibid.*

537. Motion to make pleadings more definite or certain is the remedy, and not merely an objection lodged. *Wilson v. Batchelor*, 92.

567. Upon motion to nonsuit, only exception taken after all the evidence has been introduced will be considered on appeal to Supreme Court. *Butler v. Mfg. Co.*, 547.

564. Cross-examining an attorney, a nonresident witness for a party, by the court as to the professional ethics involved in his conduct in relation to the case, in the jury's presence, is ineradicable error. *Morris v. Kramer*, 87.

590(2). Exceptions taken after trial, except as to instructions, are too late. *Brown v. Brown*, 42.

591. Motion to set aside verdict before judge who tried the cause does not interfere with the application of equitable principles in proper instances. *Bizzell v. Equipment Co.*, 98.

607. In contractor's action against owner, he may not have architect made party and counterclaim damages for fault of latter, and demurrer misjoinder of parties and causes of action is good. *Rose v. Warehouse Co.*, 107.

614. The mortgagor's deed is of his equity in the lands conveyed, and to be superior to lien of judgment, it must have been registered first, and otherwise equity will remove it as a cloud on the title of the purchaser at execution sale. *Mills v. Tabor*, 722.

658. Action may be retained as to Director General and dismissed as to railroad, when without prejudice to the rights of the former. *Kimbrough v. R. R.*, 235; *Smith v. R. R.*, 290.

CONSOLIDATED STATUTES—*Continued.*

SEC.

632. Administrator's proceedings to sell land to make assets, transferred on issue joined to the trial calendar, becomes in the nature of a creditor's bill, in which disallowance of creditor's claim entitles him to appeal to Supreme Court. *Irvin v. Harris*, 647.

660. Appellant's laches will prevent recovery of damages from a justice of the peace for failure to docket appeal. *Simonds v. Carson*, 82.

660. Section has no application when appeal from justice's court has been lost through appellant's laches. *Pickens v. Whitton*, 779.

673. Defendant is not liable in damages by estoppel in plaintiff's subsequent action for malicious prosecution. *Overton v. Combs*, 4.

728(4). Actions for personal injuries resulting in death survive to administrator, including attachment. *Mitchell v. Talley*, 683.

774-775. Bond allowed to be given by attachment creditor to allow him to keep the property attached is analogous to the provisions of these sections, and he may not ship the property out of the State. *Martin v. McBryde*, 175.

802, 806. In proper instances the issuance of the summons at commencement of action unnecessary. Judge may permit publication to be proceeded with. *Jenette v. Hovey*, 30.

861. Courts will appoint receiver for defendant's property when insolvent, or reasonably apprehends property will be destroyed, removed, or otherwise disposed of to plaintiff's loss pending the action, etc. *Kelly v. McLamb*, 158.

867-868. Proceedings to compel deposed county treasurer to turn county funds over to successor upon abolition of the office is a matter for chambers and not for jury. *Tyrrell v. Holloway*, 64.

895. Parties may compromise differences arising either by contract or in tort by accord and satisfaction. *Walker v. Burt*, 325.

900. From judgment affirming order of court to allow examination of adverse party for evidence, appeal does not directly lie without prejudice shown. *Monroe v. Holder*, 79.

976. Agreement to bid in land for purpose of resale and profit not required to be in writing. *Newby v. Realty Co.*, 34.

984. Defendant may be convicted "as for contempt" for cursing and abusing the juror not in the immediate presence of the court. *In re Fountain*, 49.

988. Agreement to bid in land for purpose of resale and division of profits is not within the statute. *Newby v. Realty Co.*, 34.

988. The mother's petition setting forth facts by which she agrees to divide lands of her deceased husband with them is a sufficient writing under the statute of frauds. *McCall v. Lee*, 114.

1160. Shareholder of corporation liable for unpaid subscriptions to stock. *Claypoole v. McIntosh*, 109.

1179. Director of corporation liable for payment of unlawful dividend who does not come within the provisions of this section. *Ibid.*

CONSOLIDATED STATUTES--*Continued.*

SEC.

1187. Attorney-General may bring proceedings to annual certificate of a rural community in which the petition has misrepresented the area to be incorporated. *S. v. Rural Community*, 861.

1193-1194. The certificate of corporation continues for purpose of winding up by directors after dissolution, and they may convey corporate property in pursuance thereof. *Lowdermilk v. Butler*, 502.

1389. Statute abolishing office of county treasurer and authorizing a bank, etc., to act in his stead is valid. Remedy by *mandamus*. *Tyrrell v. Holloway*, 64.

1500. Rule 12 does not apply to judgments irregularly taken on defective or void service. *Graves v. Reidsville*, 330.

1536. The constitutionality of this section will not be passed upon on appeal where the act creating the recorder's court has been repealed pending the appeal. *Coffey v. Rader*, 689.

1659(4). Amended by ch. 63, Laws 1921, does not permit party at fault to obtain divorce, or apply in cases of infirmity. *Lee v. Lee*, 61.

1659(4). On husband's appeal from motion to nonsuit, under plea of his insanity a part of the time, the evidence must sufficiently appear of record. *Brown v. Brown*, 42.

1667. This section presents questions of whether the wife may claim priority of lien for support over attachment in another jurisdiction. *Mitchell v. Talley*, 683.

1667. Requiring State to show husband's willful abandonment of wife does not deprive her of her civil remedies. *S. v. Faulkner*, 794.

1681. This section referring to damages recoverable from injury done by dogs does not deprive defendant of jury trial, and is constitutional. *Combs v. George*, 414.

1784. Handwriting competent as evidence may now, by statute, be submitted to the jury. *Newton v. Newton*, 54.

1795. Declarations of common source of plaintiff's and defendant's title are incompetent. *Sherrill v. Wilhelm*, 673.

1795. When the parties are alive this section does not apply. *Haywood v. Russell*, 711.

1798. Trial judge has discretion to compel physician to testify as to confidential matters obtained by examination on trial for producing miscarriage or abortion. *S. v. Martin*, 846.

1802. Threats and conduct tending to establish the identity of the parties guilty of an assault with intent to kill by poison are admissible for that purpose. *S. v. Alderman*, 917.

1823-1824. It is necessary for applicant to show facts as to investigation of papers to obtain the order; and a mere allegation that they were material is insufficient. When made, order should designate a certain time for their production, before or at the trial. *Mica Co. v. Express Co.*, 669.

CONSOLIDATED STATUTES—*Continued.*

SEC.

1865 to 2078, includes the taking of escallops from the several waters of the State, under the jurisdiction of the Fish Commission. *S. v. Dudley*, 822.

1878. The jurisdiction of the Fish Commission is not confined to those of "the several waters of the State" specifically mentioned in this section. *Ibid.*

2195-2196. Guardians of contingent interests taken under a will must be residents, and the law here applied in interpreting the instrument. *Cilley v. Geitner*, 714.

2286. Clerk of court may only appoint guardian of insane person upon certificate of superintendent of institutions under State control. *Groves v. Ware*, 553.

2287. This section is constitutional though only requiring a jury of six to pass upon the question of insanity. When ward becomes sane, he may ratify the acts of his guardian through an invalid appointment. *Ibid.*

2309. The presumption is that the jury has not included interest in their verdict giving damages to plaintiff for permanent improvements on defendant's land, when this had not been spoken of or presented to them. *Perry v. Morton*, 585.

2417. See reference to sec. 279, *supra.*

2507, 2513. Separate earnings of married woman are her property, for which she may sue alone. *Croom v. Lumber Co.*, 217.

2515. Deed of wife to her husband of her realty is void without certificate of probate officer that the conveyance was not unreasonable or injurious to her. *Foster v. Williams*, 632.

2591. The provisions of this section enter into and control sales under mortgage; unless held open ten days no title is acquired; within the ten days loss by fire falls on owner; specific performance not enforced; provision controls as to resales with no power in clerk of court to make order. *In re Sermon's Land*, 122.

2591. Sale of land under mortgage kept open for ten days; reported to clerk only when advanced bids are made; on resale original sale a nullity. *Quære*, as to amount of commissions allowed. *Pringle v. Loan Asso.*, 316.

2617. Judgment may be entered allowing abutting owner on street to pay assessments for improvements by installments. *Durham v. Public Service Co.*, 333.

2708. City franchise exempting street railway from paving applies to then existing conditions. Width of right of way as to length of cross-ties. *Ibid.*

2786(15), 2787. Municipal corporations have power to license, regulate, and prohibit dance halls, and revoke the license. *S. v. Vanhook*, 831.

3311. This statutory notice cannot be supplied by any other notice. *Blacknall v. Hancock*, 369.

3312. Certificate for registration of personal property is not required to be in any certain form. *Finance Co. v. Cotton Mills*, 408.

CONSOLIDATED STATUTES—*Continued.*

SEC.

3351. This section does not affect sec. 2515, requiring the additional certificate in deed of wife of her separate realty to her husband. *Foster v. Williams*, 632.

3963. This section does not apply, the parties being alive. *Haywood v. Russell*, 711.

3378. A promise to pay for or return liquor is sufficient for conviction under this section. *S. v. Lemons*, 828.

3378, 3383. Evidence of bad reputation of defendant is competent with other evidence tending to show his possession of intoxicating liquors for purpose of sale. *S. v. McNeill*, 855.

3379-3385. When an instruction has withdrawn the *prima facie* case of guilt of violating the prohibition law under the first section, a conviction upon having more than one quart of liquor may be had under the second section. *S. v. Campbell*, 911.

3383. The charge of unlawful sale of intoxicants to particular person or persons is unnecessary. *S. v. Lemons*, 828.

3384-3385, respectively, making the carrying and delivery of spirituous liquors unlawful, and the possession of more than one quart unlawful, is not affected by the IVth and Vth Amendments to the Federal Constitution. *S. v. Campbell*, 911.

3407-3409. Motion to dismiss for duplicity after verdict when the indictment charges separate offenses under other two sections is too late. *S. v. Mundy*, 907.

3768. Act consolidating two boards of road commissioners, giving the same powers, impliedly authorizes issuance of bonds with same rate as allowed the old boards. *Honeycutt v. Comrs.*, 319.

3910. *Semble*, county treasurer not entitled to additional compensation for collection of drainage district assessments; if otherwise, he must bring himself within terms of this section. *Comrs. v. Credle*, 442.

4162. Precatory words in a will create a trust unless the testator's intent is otherwise to be construed from the writing. *Springs v. Springs*, 484.

4213-4214. Assault by means of poison comes within the intent of these sections. *S. v. Alderman*, 917.

4226-4227. Conviction may be had on trial under indictment for both offenses, under sufficient evidence as to producing miscarriage or abortion, and testimony of the woman as to defendant's paying physician, with the other evidence, held sufficient. *S. v. Martin*, 846.

4235. *Held*, in this case, evidence sufficient to show deceased had reasonable apprehension that defendant was committing a felony in his presence, which authorized him to arrest him. *S. v. Blackwelder*, 899.

4339. To sustain conviction for seduction, the woman must have been both chaste and virtuous; section not applying when induced by her own lascivious desire; but the defendant would be guilty had she consented

CONSOLIDATED STATUTES—*Continued.*

SEC.

prior to marriage with deceased husband, but afterwards her conduct had been exemplary. *S. v. Johnson*, 883.

4357. Evidence in this case is insufficient for conviction. *S. v. Bradshaw*, 769.

4447-4448. This section, making it a misdemeanor for husband's abandonment of wife and family, strictly construed; wife must show unlawful abandonment; burden of proof is on the State; unchastity of wife is a defense, with burden on State; husband may introduce evidence to avoid adverse verdict. *S. v. Falkner*, 764.

4543. See sec. 4235, *supra*.

4548. Where defendant was not searched when arrested, but voluntarily produces from his person five quarts of liquor before the committing magistrate, the question of search and seizure, and the Federal constitutional question predicated thereon, do not arise. *S. v. Campbell*, 911.

4622. Indictments charging arson and a less offense arising from same transaction may be consolidated. *S. v. Brown*, 761.

4623-4625. Motion to quash indictment for unlawful sale of intoxicants for not charging date of sale is not allowable. *S. v. Lemons*, 828.

4625. Court having jurisdiction, it is unnecessary for indictment to charge date of unlawful sale of intoxicants in the county. *Ibid.*

4625. Though in better form for indictment to charge a violation of the regulations of the Fish Commission, "contrary to the statute in such cases made and provided," it is not held fatally defective when the offense is sufficiently set forth. *S. v. Dudley*, 822.

4643. Goods stolen two days before defendant's possession is shown, and conflicting evidence as to the thief, a question of fact for the jury is presented. *S. v. Jenkins*, 818.

5039. As to relative jurisdiction of the Superior and juvenile courts, and the power of the former to review. *In re Hamilton*, 44.

5274. Applies as to apportionment of costs of enlarging or deepening canal under prescriptive right. *Armstrong v. Spruill*, 1.

5350. Assessments for maintenance of drainage districts should be collected by sheriff as general taxes for county purposes. *Comrs. v. Davis*, 140.

5469-5473. Relates to establishment, etc., of school districts as political or geographical divisions and not to segregation of pupils within these divisions. *Woosley v. Comrs.*, 429.

5488. Section confers duties of judicial nature upon court in event of disagreement between county boards of education and county commissioners, not requiring a jury trial. *Board of Education v. Comrs.*, 571.

5533. Election for voting on special tax in special tax district is void if held within two years from the last voting on the subject, the time being computed from the last valid election. *Weesner v. Davidson*, 604.

CONSOLIDATED STATUTES—*Continued.*

SEC.

5684-5686-5690. These sections do not deprive a school district, created by special act, from exercising control specially given, etc. *Alexander v. Lowrance*, 642.

5947. The requirement to keep the registry open twenty days does not invalidate the bond issue, if the election was fully and definitely known in all respects to the voters, and all afforded opportunity to vote, and there was no opposition, etc. *Hammond v. McRae*, 747.

5784, 5785, 5786. Estate of intestate who leaves no heirs to take, escheats to University of North Carolina. *In re Neal*, 405.

7008-7024. Statutes creating a board of public accountancy are within police powers; the public and certified accountants are interested, and may enjoin *ultra vires* acts; and Attorney-General may become party on motion in Supreme Court. The powers of this board are *quasi*-judicial. *S. v. Scott*, 865.

7380-7381. Misrepresentations in the petition of incorporation that area of rural community proposed embraced in area "one entire school district" is material, though not necessary that it was made with corrupt purpose, and the certificate of the Secretary of State will be declared invalid. *S. v. Rural Community*, 861.

8042. Commissions allowed sheriffs under this section relate to general governmental purposes, and not to assessments in special drainage districts, and such districts are not a political division of the State. *Comrs. v. Davis*, 140.

CONSOLIDATION.

See Criminal Law, 1.

CONSPIRACY.

See Criminal Law, 29.

CONSTITUTION, STATE.

ART.

I, sec. 19. Applies only to cases in which right of trial by jury existed at common law, or now by statute. *Groves v. Ware*, 553.

I, sec. 19. Where statute has provided for trial by jury it is not unconstitutional in not so providing at some subsequent stage of the proceedings. *Combs v. George*, 414.

II, sec. 6. Act abolishing two old boards county road commissioners for constructing, etc., county roads, and giving the same powers to a new board created by the act, is not unconstitutional. *Honeycutt v. Comrs.*, 319.

II, sec. 29. This does not authorize a statute segregating the scholars within an established school district. *Woosley v. Comrs.*, 429.

II, sec. 29. This section inhibits general legislation creating a public school district and providing for its equipment and maintenance with a bond issue. *Robinson v. Comrs.*, 590.

V, sec. 1. The amendment to this article is self-executing, and a requirement of a previous statute that the equation between the property and poll

CONSTITUTION, STATE—*Continued.*

tax be observed should be omitted by the local authorities in calling the election. *Hammond v. McRae*, 747.

VII, sec. 7. Bonds for school purposes are not for a necessary expense, and when the act has not been passed in accordance with the constitutional requirements, they may be validated by a subsequent registry. *Ibid.*

VII, sec. 7. Under the presumption that an act is constitutional, it will be presumed that the requirements of this article has been complied with in submitting the question of school bonds to the approval of a majority vote of the qualified electors as ascertained by a valid registry. *Ibid.*

VII, sec. 14. The delegation of powers to county commissioners to abolish office of county treasurer and appoint bank, etc., is not prohibited by this section. *Tyrrell v. Holloway*, 64.

IX, sec. 3. The question of imperative necessity to levy additional tax for six months term of school does not arise on appeal when nothing is shown as to the apportionment receivable from State Board of Education. *Board of Education v. Comrs.*, 571.

IX, sec. 7. Property of intestate, having no heirs at law to take, escheats to University of North Carolina. *In re Neal*, 405.

CONSTITUTIONAL LAW.

See Actions, 1; Parties, 1; Statutes, 13; Roads and Highways, 1, 4; School Districts, 2, 3; Appeal and Error, 46; Injunction, 4; Escheats.

1. *Constitutional Law—Counties—Treasurer—Statutes—Banks—Trust Companies.*—Sec. 14 of Art. VII of our Constitution should be construed with reference to other sections therein, with certain specified exceptions not relevant to this case, and thereunder the Legislature is given full power to modify, change, or abrogate any and all provisions thereof and substitute others in their place; and though section 1 provides in terms that for the ordinary purposes of general county government there shall be elected a county treasurer, etc., it is yet within the legislative authority to so modify this requirement that they may delegate to the county commissioners the authority to abolish the position of county treasurer and appoint a bank or banks to act in this capacity for the consideration only which may arise to them from a deposit therein of the taxes collected; and C.S. 1389, is constitutional and valid. *Tyrrell v. Holloway*, 64.

2. *Same—General Laws.*—It is not required that the power conferred in sec. 14, Art. VII, of the State Constitution to modify, change, or abrogate any and all provisions of this article, with the exceptions enumerated, should be general in its operation, or that it should in terms formally abrogate any given section therein, and substitute another in its stead, for the act making such change, local in its operation, must be given effect under its provisions, if otherwise valid. *Ibid.*

3. *Same—Government Agencies—Delegated Powers.*—While legislative powers may not ordinarily be granted by our General Assembly, they may be granted under our system of government to municipal corporations for local purposes, where, as such agencies, they are possessed and in the exercise of governmental powers in designated portions of the State territory, whether such localities are the ordinary political subdivisions of the State or local governmental districts created for special and *quasi*-public purposes. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

4. *Constitutional Law—Statutes—Legislature — Municipal Corporations — Street Improvements—Abutting Owners—Street Railways.*—Either directly or through its recognized governmental agencies, it is within the legislative authority to impose upon owners whose lands abut upon the streets of an incorporated city or town, an assessment for the change of grade of such street, grading them and like improvements, and the property and franchise of street railways laid along a given street or designated locality within the effects and benefits of the proposed improvements, may lawfully be brought within this principle as abutting owners. *Durham v. Public Service Co.*, 333.

5. *Same—Exemptions—Taxation.*—The power to impose assessments upon owners whose lands abut upon the streets of a city to be improved, comes within the sovereign right of taxation, and no license, permit, or franchise from the Legislature or a municipal board will be construed to establish an exemption from the proper exercise of this power by future Legislatures, or in derogation of it, unless these bodies are acting clearly within their authority, and the grant itself is in terms so clear and explicit as to be free from substantial doubt. As to whether such powers could be exercised so as to exclude future Legislation, *Quære? Ibid.*

6. *Constitutional Law—Trial by Jury—Courts—Jurisdiction—Investigations —Rights Safeguarded.*—Article I, section 19, of our State Constitution, guaranteeing the right of trial by jury in "controversies at law respecting property," includes equitable and legal elements involved in the determination of the issues made by the pleadings, but it is not required that a trial by jury be had at each stage of the proceedings when this right has elsewhere therein been properly safeguarded by statute. *Comrs. v. George*, 414.

7. *Same—Statutes—Dogs—Damages.*—The ascertainment of damages by three disinterested freeholders, etc., caused by injury to person or property by any dog, upon satisfactory proof, etc., and the payment thereof by county commissioners from the dog taxes, with the right of the county to sue to recover the amount so paid from the owner of the dog if known or discovered, C.S. 1681, reserves to such owner the right to a trial by jury in the action of the commissioners, and does not permit recovery in excess of the sum awarded for the damages caused as ascertained under the provisions of the statute. *Ibid.*

8. *Same—Trial—Procedure.*—C.S. 1681, ascertaining in a certain manner damages caused by the dog of another, etc., is a police regulation not estopping the defendant in the county's action from establishing any defense available to him under the pleadings, nor does it change the method of procedure as to the burden of proof, or otherwise, except that it limits recovery of the injured person, electing to proceed under this statute, to a sum not exceeding the amount thereunder ascertained. *Ibid.*

9. *Same—Estoppel—Election—Waiver.*—In an action by the county to recover damages to the person or property sustained by the dog of another, under C.S. 1681, the reasonable cost of the services of the persons chosen to make the assessment, and paid by the county, is a part of the money paid on account of the injury or destruction caused by the dog, and defendant's exception thereto will not be sustained. *Semble*, the question of the reasonableness of this amount is a question for the jury, when aptly and properly raised and presented. *Ibid.*

10. *Constitutional Law—Statutes — Trial by Jury — Insane Persons — Disability—Statutes—Guardian and Ward—Inquisition of Lunacy.*—The constitutional provision preserving the right to a trial by jury, Article I, section 19, ap-

CONSTITUTIONAL LAW—*Continued.*

plies only to cases in which the prerogative existed at common law or by statute at the time the Constitution was adopted, and C.S. 2287, requiring that only six freeholders shall be summoned to inquire into the sanity of the person alleged to be insane, is constitutional, not requiring a jury of twelve. *Groves v. Ware*, 553.

11. *Constitutional Law—Statutes—Taxation — Trial by Jury — Schools — School Terms.*—C.S. 5488, prescribing the procedure in the event of disagreement between the county board of education and the county board of commissioners, as to the amount to be provided by the county for the maintenance of a six months school term, requiring the judge to hear the same and conclusively find the facts as to the amount needed, confers upon the courts duties of a judicial nature, not requiring a trial by jury to determine the disputed matter upon an issue of fact, and the provisions of this section are not void as being repugnant to Art. I, sec. 19, of the State Constitution. *Board of Education v. Board of Commissioners*, 174 N.C. 469, cited and applied. *Board of Education v. Comrs.*, 571.

12. *Same — Appeal and Error — State Board of Education — Mandamus — Counties—Apportionment of Funds.*—Where a county has levied the full amount of the taxes limited by sec. 4, ch. 146, Public Laws of 1921, it is required by the statute that "it shall receive from the State public school fund for teachers' salaries an apportionment sufficient to bring the school term in every school district to six months"; and where it does not appear that the State Board has acted accordingly in making this apportionment, but has instituted a proceeding to compel by *mandamus* a county to levy an excess of the statutory limitation, the imperative necessity that it should be done in order to meet the requirements of a six months school provided by Art. IX, sec. 3, of the State Constitution does not arise for the determination of the Court. *Ibid.*

13. *Constitutional Law—School Districts—Bonds—Taxation—Burdens and Benefits.*—In order to the validity of the laying off of a school district by statute and the issuance of bonds for school purposes it is necessary that the burden of taxation should rest upon the whole district equally, and when such portions thereof are exempt from taxation and receive the benefits, and other portions are taxed without benefit, the act is unconstitutional and void. *Robinson v. Comrs.*, 590.

14. *Constitutional Laws — School Districts — General Legislation — Special Acts.*—A statute which creates a public school district and allows a bond issue, upon the approval of voters, for its equipment and maintenance, is a local or special act, prohibited by the Constitution, Art II, sec. 29, requiring that legislation of this character must be by general provision of law. *Ibid.*

15. *Constitutional Law—Statutes—Descent and Distribution—Illegitimates —Marriage.*—Only those who would inherit, or have a vested right in the lands, may contest the constitutionality of C.S. 279, providing that a child born out of wedlock may inherit from her father who thereafter married the mother of the bastard. *Bowman v. Howard*, 662.

16. *Constitutional Law—Schools — Statutes — Election — Majority Vote.* — Under the legal presumption that an act passed by the Legislature is valid under the Constitution, an act requiring that the question of bonds be submitted to the voters of a school district, empowering the board of trustees to issue bonds if a majority of the qualified voters at the election to be called for the purpose vote in favor thereof, nothing else appearing, requires for the validity of the bonds, a majority vote of the qualified electors of the district as ascertained by a valid registry, Const., Art. VII, sec. 7. *Hammond v. McRae*, 747.

CONSTITUTIONAL LAW—*Continued.*

17. *Same—Result of Election.*—An issue of bonds for a school district will not be declared invalid because the special act under which they were approved by the voters did not expressly require for their validity that a majority of the qualified voters of the district must vote in their favor, when it appears that such majority, as ascertained from a valid registry, was cast in favor of the issue. *Ibid.*

18. *Constitutional Law—Amendments—Schools—Bonds—Taxation—Equalization.*—Where the question of the issuance of school bonds by a special school district has been authorized by statute to be submitted to the electorate of the district, observing the equation between the property and poll tax as formerly required by our Constitution, Art. V, sec. 1, and since the recent amendment of 1920, and since the recent amendment of 1920, the proper authorities have submitted the question to the electorate, without observing the equation, this amendment or substitution is self-executing and has the effect of repealing the statutory requirement of equalization, under the former organic law; and the action of the proper authorities in eliminating that part of the statutory requirement, does not affect the validity of the issue. *Hammond v. McRae*, 748.

19. *Same—Purchasers—Vested Rights.*—The substitution of a new section for Art. V, sec. 1, of the State's Constitution by the amendment of 1920, eliminating the proportion between property and poll tax, does not interfere with the rights theretofore acquired by the purchasers of State or municipal bonds. *Ibid.*

20. *Constitutional Law—Taxation—Bonds—Schools—Municipal Corporations—Cities and Towns—Elections.*—An act that authorizes the officers of an incorporated city or town within a special school district to submit the question of issuing bonds by the district to its electorate, is not objectionable in not conferring this authority on the officers of the special district. *Woodall v. Comrs.*, 176 N.C. 377; *Smith v. School Trustees*, 141 N.C. 143. *Ibid.*

21. *Constitutional Law—Legislature—Delegated Authority—Administrative Board—Municipal Corporations—Criminal Law.*—While the Legislature may not delegate to a duly legalized administrative board power to make rules and regulations and prescribe a criminal punishment for their violation, it has the power to delegate to such a board the power to establish the pertinent facts or conditions upon the violation of which the statute itself imposes the punishment; and the principles upon which this power to delegate may not be exercised only in case of municipal corporations when in the exercise of governmental functions on local matters, have no application. *S. v. Dudley*, 822.

22. *Same—Fish Commission.*—It is within the power of the Legislature to create a board of fish commissioners and delegate to it the authority to make rules and regulations as to the time, manner, and place of fishing, in the various waters of this State, and make it an offense punishable as a misdemeanor for the violation of such regulations, when well defined and sufficiently advertised and the offense established according to law. *Ibid.*

23. *Constitutional Law—Police Powers.*—The police power is one inherent in the State as an attribute of government, and is not a grant derived from the written organic law. *S. v. Vanhook*, 831.

24. *Same—Statutes—Municipal Corporations—Cities and Towns—Delegated Powers.*—The General Assembly has the authority to delegate legislative power to municipal corporations of limited or local character, relating to their governmental functions, or other proper and legitimate purposes. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

25. *Same—Dance Halls—Statutes.*—Cities have power, among other things, to license, prohibit, and regulate dance halls, by express provision of C.S. 2787, and in the interest of public morals provide for the revocation of such licenses, as a valid exercise of the State's inherent police power, made applicable to cities and towns generally. C.S. 2786, art. 15. *Ibid.*

26. *Same—Sound Discretion—Limited Powers.*—An ordinance requiring the consent of the board of directors of the city before keeping a dance hall therein is not objectionable as an arbitrary exercise of power, or as being at the pleasure of the board, but comes within its limited legal discretion, which the courts will not permit it to abuse, or will disturb in the absence of its abusive use. *Ibid.*

27. *Constitutional Law—Spirituous Liquors—Intoxicating Liquors—Criminal Law.*—The IVth and Vth Amendments to the Federal Constitution impose limitations upon the Federal Government and cannot affect the validity of C.S. 3385, making unlawful the possession of more than one quart of spirituous liquor, or of C.S. 3384, making the carrying and delivery thereof unlawful. *S. v. Campbell,* 911.

CONTEMPT.

See Appeal and Error, 3, 5.

1. *Contempt of Court—Acts and Conduct—Intent as to Effect—Purging from Contempt.*—Where the conduct of the respondent, proven or admitted, as in itself a contempt of court, he may not purge himself of the contempt by denying his intention to show it. *In re Fountain,* 50.

2. *Contempt of Court—Threats—Assaults—Evidence.*—Where, in proceedings as for contempt of court, there is relevant and pertinent evidence that the respondent had put a juror in fear by his acts and conduct, it is sufficient on appeal to sustain a finding of assault by the Superior Court judge. *Ibid.*

CONTENTIONS.

See Instructions, 9, 17; Appeal and Error, 45, 50, 52.

CONTINGENCIES.

See Wills, 1, 21, 22, 27; Attorney and Client, 4, 5, 8, 10, 11.

CONTRACTS.

See Commerce, 1; Evidence, 1; Attorney and Client, 4, 5, 10; Landlord and Tenant, 1; Trusts, 3; Principal and Agent, 1, 5, 8, 10, 11, 13; Actions, 7; Statute of Frauds, 1, 6, 8, 10; Mortgages, 5; Public Sales, 4; Limitation of Actions, 1; Verdict, 4; Married Women, 2; Deeds and Conveyances, 16, 17; Parties, 1; Partnership, 2, 4; Courts, 4, 5; Pleadings, 20; Roads and Highways, 5; Remedies, 1; Vendor and Purchaser, 2, 3.

1. *Contracts—Breach—Actions—Damages.*—The plaintiff bought from the defendant 1,000 bags of seed potatoes for delivery upon his order during specified months of that year, and thereafter, owing to weather conditions and war-traffic congestions, entered into a new contract, in substitution of the old, whereby the defendant was to ship, when ordered out, one-fourth of the potatoes during the other stated intervals. The plaintiff did not order out the first shipment, and thereafter ordered out the shipments in one-half the quantity he had bought, and at different periods from those stated in his contract, and declared the contract at an end before the last shipment was thereunder due. In his action to recover damages for loss of profits; *Held,* he had breached his own contract and could

not recover; and the verdict allowing defendant's counterclaim for damages for loss by reason of the sale of the potatoes under the contract price will not be disturbed. *Milling Co. v. Phillips*, 2.

2. *Contracts—Breach—Performance—Evidence—Burden of Proof.*—A party to a contract must show performance on his part to recover from the other party under its provisions. *Jennings v. Jennings*, 27.

3. *Contracts—Employer and Employee—Master and Servant—Services—Indefinite Agreements.*—A contract for services to be rendered must be certain and definite as to the nature and extent, the place where and the persons to whom it is to be rendered, and the compensation to be paid; and evidence that the plaintiff had been employed by the defendant to render certain services at a fixed price, to be increased at a future time, without more, is too indefinite as to the increase of price to be enforceable, there being no sufficient evidence of the coming together of the minds of the parties to make a binding contract upon the subject-matter. *Croom v. Lumber Co.*, 217.

4. *Contracts—Employer and Employee—Master and Servant—Breach—Services—Measure of Damages.*—Where the employer has, in breach of his contract, discharged his employee before the time of his employment had expired, the damages recoverable by the latter, in his action, is the value of the unexpired term as measured by the compensation agreed to have been paid him therefor, less whatever sum of money he may have since received for his services from other sources, or which he reasonably may have received, considering, in his favor, whatever expense he may have incurred in obtaining other employment, or arising from the breach of the contract sued on. *Ibid.*

5. *Contracts, Written—Warranty—Actions—Vendor and Purchaser—Evidence—Nonsuit—Trials.*—In an action upon the warranty of a written contract for the sale of cotton gins, requiring a written demand upon the seller within ten days, etc., with provision that the contract was complete and excluding all other written or verbal agreements respecting the subject-matter, the plaintiff may not recover thereon after waiting ninety days before making any claim whatever, whether written or oral, and upon evidence of this character a motion as of nonsuit is properly granted. *Ward v. Liddell*, 223.

6. *Contracts, Written—Parol Evidence—Express Warranty.*—A written contract for the sale of cotton gins, signed by the purchaser, and stating that it was the entire agreement between the parties, in the absence of allegation of fraud, excludes parol evidence alone that they did not gin a specified number of bales of cotton a day according to the verbal representations of the sales agent, to the damages of the purchaser, the plaintiff in an action upon the express warranty. *Ibid.*

7. *Same—Implied Warranty.*—An express warranty in an executed contract of sale, subject to a few well recognized exceptions inapplicable to the case at bar, 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. *Ibid.*

8. *Contracts—Deeds and Conveyances—Trusts—Purchase of Land for Resale.*—Where one of the parties for the purchase of lands to resell and divide the profits or share in the loss, has, by written agreement, taken title in himself, he holds it in trust for himself and the other party. *Wells v. Crumpler*, 350.

CONTRACTS—*Continued.*

9. *Same—Cestui Que Trust—Waiver.*—Where the *cestui que trust*, in the purchase of lands for a resale and division of profits or loss, has failed to contribute his agreed part of the purchase money, which the holder of the legal title has been forced to assume and pay in whole, the former may waive all of his rights under the trust by his subsequent declarations and acts, which may be shown by parol, and estop him in an action to recover his alleged share of the profits. *Ibid.*

10. *Same—Equity—Matters in Pais—Estoppel—Parol Evidence—Statute of Frauds.*—Under a written contract for the purchase of lands for the purpose of resale and a division of the profits, etc., one of the parties took title to himself, and was eventually forced to pay the full cash consideration, giving a mortgage to secure the balance due, and became the purchaser at the mortgage sale; and, to secure payment, gave a mortgage on his own separate realty. Thereafter the *cestui que trust* declared he was not further interested, and refused to pay his share of purchase money and expenses, and agreed that the purchaser should have all of the profits of the resale. In an action by him to recover his half of the profits: *Held*, he was estopped by his conduct and other matter *in pais*, which could be shown by parol evidence, and the statute of frauds had no application: *Held, also*, that there was a sufficient consideration to support the transaction. *Ibid.*

11. *Same—Deeds and Conveyances—Powers of Sale.*—A written contract between the parties to purchase certain lands for resale and share in profits or loss, stating that F. should hold in trust for K. one-half interest therein; that the property should be purchased jointly at a certain price, and F. and K. should pay a certain part each, and F. mortgaged the land for the balance of the purchase price: *Held*, under a power in F. to sell the land was at least implied by the terms of the writing; or, if otherwise, such implication could be shown by parol evidence to have arisen from such conduct of K. as created an estoppel upon him to deny it. *Ibid.*

12. *Same—Consent of Cestui Que Trust.*—Where, under a written agreement, the parties have purchased lands with title taken in one of them, for the purpose of resale and a division of the profits or the sharing of the loss, the one holding the legal title does so for the use of them both, and creates a trust in himself, coupled with an interest, and not a mere naked legal title, nor one which would require the deed to be joined in by the *cestui que trust* to convey the legal title; and though it may not be done by the trustee without the latter's consent, this may be implied by his declarations and conduct, which may be shown by parol evidence thereof. *Ibid.*

13. *Contracts—Writing—Conditions Precedent—Parol Evidence.*—Where a contract is reduced to writing to be held subject to the performance of a condition precedent by one of the parties, the existence of the contract depends upon the performance of the condition, and the failure of its performance may be shown by parol, as such does not tend to vary, alter, or contradict a written instrument. *Thomas v. Carteret*, 374.

14. *Same—Written in Part.*—The principle upon which the parol part of a contract may be shown in evidence, when the other part thereof has been reduced to writing, is inapplicable when the law requires a writing in relation to the subject-matter which is sought to be shown by parol. *Ibid.*

15. *Contracts—Writing—Conditions Subsequent—Parol Evidence—Waiver—Mortgages—Deeds and Conveyances—Embezzlement—Criminal Law.*—Where

the plaintiffs have made a note secured by a mortgage on their lands, given on condition that a pardon be unconditionally granted by the Governor to a relative who has embezzled county funds, and the pardon was delivered and the note and mortgage delivered to the proper county officials, and the plaintiffs in their action seek to show by parol as a condition precedent to the validity of the written instruments that the county should first collect from the bondsman of the defaulter, the allegation of a conditional delivery is waived by an admission of the plaintiffs on the trial that the defendant county was entitled to a judgment on their note and mortgage. *Ibid.*

16. *Contracts—Writing — Admissions — Conditions Precedent — Parol Evidence.* — Where a valid delivery of a binding, written contract has been established, or admitted upon the trial, neither a condition subsequent nor a reservation or contemporaneous trust in favor of the grantor resting in parol, may be shown, in direct contradiction to the written terms. *Ibid.*

17. *Contracts—Deeds and Conveyances—Registration—Certificates—Forms —Statutes.*—The certificate for registration of a contract of sale of personal property reserving title need not be in any particular form to meet the requirement for registration, and is sufficient if it conforms to its material parts. C.S. 3312. *Finance Co. v. Cotton Mills*, 408.

18. *Same—Venue—Parties — Acknowledgment.* — Where the certificate for registration of a contract of sale of personal property thereon appears to have been "subscribed before" a notary public, with the seal attached showing the county, and has been certified to for registration by the clerk of the court of that county, and in the caption of the contract also appears the name of the county and state in which it had been registered, and by reference to the certificate and the paper to which it relates the name of the party sufficiently appears: *Held*, the contract is sufficient in form for the purpose of registration as to the venue, the name of the party, and as to its having been sufficiently acknowledged; and the fact that it was sworn to as well as subscribed is regarded as surplusage and immaterial. C.S. 3312. *Ibid.*

19. *Contracts—Action—Breach—Quantum Meruit.*—Where the daughter has contracted with her father to work his farm and take care of him for life, and after many years of such duty the father has moved from the farm, and his conduct has prevented the daughter, without her consent, from further performing her agreement, the latter may not maintain her action to recover the land, the consideration to be given her for her work and care for the period of her father's life; but the law will imply his promise to pay for the services she rendered before his breach, such amount as they were reasonably worth, if she sues, as in this case, before his death. *Hayman v. Davis*, 563.

20. *Same—Pleadings—Remedies—Election.*—Where the complaint sets forth a contract that a daughter will take care of her father during his life, and also alleges that, after years of such service, he has breached his contract so as to render it impossible for her to perform her part in order to get full compensation thereunder: *Held*, upon demurrer, the allegations of the complaint will be liberally construed, and in effect it is an abandonment of her action on the special contract and an election to sue for the reasonable worth of the services the daughter has actually rendered. *Ibid.*

21. *Contracts—Acceptance in Part—Liability.*—Where the defendant has contracted to accept lumber of a certain kind, he is liable for that part he has

actually accepted under the terms of his contract, both that expressly and impliedly accepted. *Maney v. Greenwood*, 580.

22. *Contract—Parol — Statute of Frauds — Breach — Equity — Damages — Lands.*—Upon equitable principles, administered in our courts having jurisdiction of both law and equity, where a contract resting in parol will not be specifically enforced in regard to lands, it is unconscionable for the owner of lands to receive the benefits of permanent improvements made thereon and services rendered in good faith, upon consideration of an agreement to convey them, and not be held to liability therefor upon his pleading the statute of frauds, to the extent that the lands were enhanced in value. *Perry v. Norton*, 585.

23. *Same.*—One who has permanently improved the lands of the owner and continued in his service for a comparatively small wage for years, relying upon a parol agreement that the owner would convey the lands in consideration of the permanent improvements and the services thus rendered, upon the happening of a certain event, which the owner has refused to perform under the plea of the statute of frauds, may recover for the value the services thus rendered, and the increased value of the land by reason of the improvements, though he may not enforce a specific performance of the verbal contract. *Ibid.*

24. *Same—Judgments—Interest—Statutes.*—Where it has been ascertained by the verdict of the jury, upon a trial free from error, that the plaintiff is entitled to recover of the defendant the value of permanent improvements he has put upon the defendant's land under a parol agreement that the latter would convey a part of the lands in consideration thereof, void under the statute of frauds, to the extent that the improvements have enhanced the value of the land, interest is properly allowed in the judgment from the time of the defendant's breach, on the amount ascertained to be due at that time; and objection that the jury may have included the interest in their verdict is untenable when it appears that nothing was said by counsel or court in respect to it, the presumption being to the contrary. C.S. 2309. *Ibid.*

25. *Contracts—Offer of Sale—Acceptance—Correspondence—Mail—Reasonable Time.*—Where one desiring to purchase shares of stock of the other writes for an offer at the lowest price, a reply, by letter, making the offer implies that an acceptance by letter will be in time. *Rucker v. Sanders*, 607.

26. *Same—Acceptance of Terms of Offer—Method of Delivery and Payment.*—An unconditional acceptance of an offer for the sale of stock at a certain price and in accordance with its terms, by correspondence of the parties living at different towns, without stating the method of delivery and payment, does not relieve the owner of his liability for failing to deliver the stock, by a suggestion in the acceptance that the delivery and payment be made by draft on him with the shares attached. *Ibid.*

27. *Same—Mutuality of Contract—Remedy.*—Where an offer to sell shares of stock is unconditionally accepted, leaving open the method by which the shares should be delivered to and paid for by the acceptor, the contract thus made is an executory one with mutuality of obligation and remedy. *Ibid.*

28. *Same—Duty of Acceptor.*—A prompt acceptance by mail of an offer by mail to sell certain shares of stock at a certain price, without provision for the method of delivery and payment requires of the purchaser only that he acts within a reasonable time in finally closing the transaction. *Ibid.*

CONTRACTS—*Continued.*

29. *Same—Intention—Agreement of Minds of Contracting Parties.*—The intention of the parties will control in determining whether an acceptance of an offer to sell shares of stock was identical with the terms of the offer, or created a condition not contemplated by the offerer, or upon which the minds of the contracting parties had not agreed; or was merely a suggestion as to how the stock should be delivered by the offerer and paid for by the acceptor. *Ibid.*

30. *Contracts—Breach — Principal and Agent — Brokers — Commissions—Compensation—Actions—Evidence—Nonsuit—Trials.*—There is no relation of privity or otherwise between the agent or broker who sells lands under contract for compensation by commission with the owner, and the purchaser he has accordingly procured; and when such purchaser has not in any manner obligated to pay anything to the agent or broker, the latter has no cause of action against him to recover the commissions for which the owner has obligated himself, and this is especially so when the owner of the lands has released the purchaser from the obligations of his contract. *Auction Co. v. Brittain*, 676.

31. *Contracts—Agreement of Parties.*—A written contract, to be enforceable, must show that the minds of the parties had come to a valid agreement. *Mfg. Co. v. Mfg. Co.*, 759.

CONTRIBUTORY NEGLIGENCE.

See Evidence, 6, 25; Railroads, 6, 15, 16; Negligence, 12, 17; Actions, 7.

CONTROVERSY WITHOUT ACTION.

See Actions, 5, 6.

CORPORATIONS.

See Injunction, 4.

1. *Corporations — Subscriptions — Unpaid Balance — Statutes — Shares.* — Stockholders of an insolvent corporation are liable *pro rata* for their unpaid subscriptions to an amount necessary to liquidate the corporate debts. C.S. 1160. *Claypoole v. McIntosh*, 109.

2. *Corporations—Directors—Unlawfully Declaring Dividends — Statutes.*— A director of a corporation who has not brought himself within the provisions of C.S. 1179, exonerating him from liability for the payment of dividends to the stockholders when the profits of the business did not justify it, or its debts exceeded two-thirds of its assets, etc., is liable, in the action of the trustee in bankruptcy of such corporation, for the amount of such debts, and the proper court costs and charges, not exceeding the amount of the dividends unlawfully declared. *Ibid.*

3. *Corporations—Certificates—Transfer of Shares—Limitation of Powers —Approval of Directors—Trusts—Telephones—Competitive Service.* — Where a local telephone exchange has been organized for the purpose of excluding its control by trusts or combinations, or corporations hostile to its interests, under a certificate of incorporation obtained from the Secretary of State requiring any transfer of its stocks to be favorably passed upon by its board of directors, and the certificates of stock contain this provision, the action of the directors declining to have the shares paid for by the applicant transferred to him on the books of the company and thus precluding his voting as a shareholder, passed in good faith, is valid, there being nothing therein against public policy, or other provisions of the law; and notwithstanding his averments that he was not interested in companies hostile to this one, or that he has no improper motive therein. *Wright v. Tel. Co.*, 308.

CORPORATIONS—*Continued.*

4. *Corporations—Interpretation of Franchise.*—The franchise granted by statute to a public-service corporation is usually prepared by those interested therein, and submitted to the Legislature with a view to obtain the most liberal grant of power obtainable, and such grants should be written in plain language, certain, definite in their nature, containing no ambiguity in their terms; and they are strictly construed against the corporation. *Durham v. Public Service Co.*, 323.

5. *Corporations—Dissolution — Continuance for Certain Purposes — Deeds and Conveyances—Statutes.*—The certificate of dissolution of a corporation of the Secretary of State continues the corporation for three years, making the directors trustees unless otherwise ordered by the court, with full power, among others specified, to settle its affairs, close its business, etc., C.S. 1193, and the provisions of the following section, 1194, that the directors as trustees may sell and convey the corporate property, does not exclude the idea that they may do so in the name of the corporation in whom the original legal title was originally vested. *Lowdermilk v. Butler*, 502.

*6. *Same—Probate.*—Where the certificate of the probate of a deed from a corporation, dissolved upon certificate of the Secretary of State, made within the time allowed by C.S. 1193, recites as a fact judicially found that the deed was made in the name of the corporation by the order of the directors, the trustee's, under the statute, objection that it was not executed in the method required by C.S. 1194, is untenable; and the signature of the agent in charge, if made upon the mistake that he was in law the assignee of the mortgage, is only surplusage, and harmless. *Ibid.*

*12. *Corporations—Rural Communities—Statutes—Secretary of State—Petitions—School Districts—Certificate of Incorporation.*—Our statutes providing for the incorporation of rural communities require, among other things, that such communities shall embrace "in area one entire school district," and that allegation to that effect be made as a part of the petition for incorporation; and that the Secretary of State shall issue the certificate if the petition is in proper form: *Held*, where it is admitted by the demurrer to the complaint in an action by the State on the relation of the Attorney-General, that though the certificate was in due form and according to the statute, it misstated the extent of the area sought to be incorporated, or that it embraced parts of three school districts, the false representations as to the statutory requirements is of the substance, and the certificate issued thereon will be declared of no effect. C.S. 7380, 7381. *S. v. Rural Community*, 861.

13. *Same—Suits—Actions—Attorney-General—Parties.*—The right of action is given the Attorney-General, on the relation of the State, to annul a certificate of incorporation of a rural community when the petition upon which the Secretary of State has issued the certificate misrepresents that the area of the community to be incorporated extended only to that of "one entire school district." C.S. 7380, 7381, under the provisions of section 1187, authorizing the Attorney-General to bring action when a certificate of incorporation has been procured upon "a fraudulent suggestion or concealment of a material fact by the persons incorporated, or by some of them, or with their knowledge or consent," etc. *Ibid.*

14. *Corporations—Rural Communities—Secretary of State—Certificates—Fraud—Suits—Actions.*—Where it is made to appear that a rural community

*NOTE.—By error the paragraphs were misnumbered. Nothing has been omitted.

CORPORATIONS—*Continued.*

authorized to have been incorporated under the provisions of C.S. 7380-7381, has, contrary to the matter set out in the petition, attempted to incorporate within the area parts of several school districts, it is not necessary in the suit to have the certificate of the Secretary of State declared invalid, that the misrepresentations should have been made with a corrupt purpose or with intent to deceive on the part of the petitioners, for it is sufficient if they have made a false statement of this essential fact, or withheld the correct information with knowledge of its existence, as such would amount to legal fraud in contemplation of the statute. *Ibid.*

15. *Same—Courts—Jurisdiction.*—It is within the jurisdiction of the courts of this State to determine whether the legislative rules and regulations in regard to the incorporation of companies by the Secretary of State have been complied with on the question of whether, as in the case of incorporating rural communities, under C.S. 7380, etc., the procedure has validly been in accordance with the statute, and free from actual fraud, or fraud in law. *Ibid.*

COSTS.

See Courts, 3; Receivers, 2; Canals, 2; Mortgages, 10.

COUNSEL.

See Appeal and Error, 47, 68, 69; Trials, 3.

COUNTS.

See Intoxicating Liquor, 3.

COUNTY TREASURER.

See Schools, 1.

COUNTIES.

See Constitutional Law, 1, 12; *Mandamus*, 1; School Districts, 2, 3; Taxation, 1; Drainage Districts, 6, 8; Roads and Highways, 5.

COURTS.

See Appeal and Error, 3, 5, 11, 14, 74; Bills and Notes, 2; Constitutional Law, 6; Contempt, 1, 2; *Habeas Corpus*, 1; Instructions, 1; Judgments, 5, 6, 8, 11, 15, 16; Mortgages, 6; Parties, 1; Reference, 1; Statutes, 1, 6; Trusts, 10; Criminal Law, 15; Corporations, 15; Public Accountants, 6.

1. *Courts—Justices' Courts—Appeal—Superior Courts—Actions—Damages.*—The sending up an appeal to the Superior Court by the justice of the peace upon the payment of the cost thereof is a judicial act, and no action for damages will lie against him for failing to send up the papers in apt time. *Simonds v. Carson*, 82.

2. *Same—Laches—Statutes.*—It is appellant's duty to docket his appeal in the Superior Court in time, C.S. 660, and his failure to have done so by the next succeeding term of the Superior Court, wherein the motion of appellee to dismiss has been properly allowed, or to apply for a *recordari*, in apt time, is his own laches, which will prevent his recovering damages of the justice of the peace for his failure to send up the case according to his promise, after having accepted his fee therefor, in the absence of a fraudulent intent. *Ibid.*

3. *Courts—Costs—Bankruptcy—Instructions—Trials.*—It appearing in this case that the trustee in bankruptcy had a certain amount of money available to creditors, subject to costs and fees in the bankrupt court: *Held*, there was suffi-

COURTS—*Continued.*

cient evidence to justify the court in instructing the jury to deduct a certain allowance from the amount in the trustees' hands and credit the amount of indebtedness with the difference, leaving the balance due as the costs chargeable to the defendants in the bankrupt court. *Claypoole v. McIntosh*, 110.

4. *Courts—Jurisdiction—Contracts—Waiver.*—A stipulation in a contract that requires future action thereon if any disagreement should arise, must be brought in a certain county wherein one of the parties resides, concerns the remedy created and regulated by law. C.S. 463 *et seq.*, the place of venue being within the discretion of the Legislature; and the principles upon which a defendant is deemed to have waived his right, after action commenced, by not demanding in writing in apt time a removal of the cause to its proper venue, has no application. *Gaither v. Motor Co.*, 498.

5. *Courts—Jurisdiction—Venue—Contracts—Statutes — Removal of Causes —Transfer of Causes.*—There is a difference between the venue of an action, the place of trial, and jurisdiction of the court over the subject-matter of the action, and the parties to a contract may not, in advance of any disagreement arising thereunder, designate a jurisdiction exclusive of others, and confine the trial thereto in opposition to the will of the Legislature expressed by the statutes on the subject, C.S. 463 *et seq.;* and a motion to remove a cause brought in the proper jurisdiction on the ground that the contract otherwise specified it, will be denied. *Ibid.*

6. *Courts—Probate—Motions to Set Aside—Fraud—Jurisdiction.*—A court vested with power and jurisdiction to admit wills to probate, may, on motion and after due notice, set aside such proof in common form and recall the letters testamentary issued thereon, when it is shown that an invalid or spurious will has been imposed upon the court by reason of perjured testimony or other fraudulent means and practices effective in procuring judgment. *In re Johnson*, 522.

7. *Same—Trial by Jury.*—Upon the hearing of a motion before the clerk of the court to set aside a will for fraud, etc., that has been admitted to probate in common form, a jury trial is not allowed as of right, but the matters in dispute are considered and determined as questions of fact by the clerk before whom the action is pending, or the court to which it may have been properly carried on appeal. *Ibid.*

8. *Same—Matter of Right—Laches.*—A petition to set aside a probate to a will for fraud imposed upon the court is not granted as a matter of strict right, but by analogy to the relief afforded in setting aside irregular judgments and orders, and is referred to the sound legal discretion of the court, and to be allowed only on full and satisfactory proof and on condition that the applicant has proceeded with proper diligence. *Ibid.*

9. *Courts—Jurisdiction—Equal Jurisdiction — Superior Courts.* — One Superior Court has no power to revoke or modify the orders and judgments of another when the latter has acquired and holds jurisdiction. *Mitchell v. Talley*, 683.

10. *Courts—General Statutes—Judicial Notice.*—An act withdrawing the operation of a State-wide law within a certain county will be taken judicial notice of by our courts. *Coffey v. Rader*, 689.

11. *Courts—Jurisdiction—Negligence—Foreign Defendants—Lex Loci Contractus.*—An employee of a foreign lumber manufacturing company was injured while engaged in the scope of his duties at one of its plants operated here, and it was properly made to appear that his services had been engaged by the de-

COURTS—*Continued.*

fendant at its home office. The defendant contended that our courts were without jurisdiction, and that its liability depended upon a workman's compensation act of the state of its home office: *Held*, upon the record, as now appears, there was no error in the Superior Court retaining the second, third, and fourth causes of action, relating respectively to the contractual duty of the defendant to provide and keep a physician at the camp where the plaintiff was injured, and its neglect to furnish him transportation to his home, as elements of damage. *Farr v. Lumber Co.*, 725.

12. *Courts—Trials—Bench Warrants—Arrest of Witness—Expression of Opinion.*—Where one of the defendants, on trial for murder, has been released on the granting of a motion as of nonsuit upon the evidence, and ordered arrested, in the presence of the jury by the judge for illicit distilling of spirituous liquor, on evidence given on the trial, and bond required for his appearance, it is not an expression of opinion by the trial judge in the case at bar upon the weight or credibility of the evidence, as it might if he had been held for perjury. *S. v. Slagle*, 895.

COURT'S DISCRETION.

See Physicians, 1; Attachment, 2; Jurors, 1; Trials, 1, 2; Issues, 1; Appeal and Error, 33, 88; Partition, 1; Pleadings, 21; Criminal Law, 21.

CREDITORS.

See Actions, 10; Equity, 7; Partnership, 5.

CRIMINAL LAW.

See Contracts, 15; Equity, 1; Appeal and Error, 71, 85, 94; Evidence, 35; Constitutional Law, 21; Intoxicating Liquors, 10, 11, 12.

1. *Criminal Law—Indictments—Consolidation of Bill.*—Where the grand jury has found two separate indictments, one charging arson and the other the less offense of house burning, both arising from the same transaction, the two may be consolidated and a conviction of the less offense will be sustained on appeal. C.S. 4622. *S. v. Brown*, 761.

2. *Criminal Law—Abandonment of Wife—Husband and Wife—Statutes—Strict Construction.*—C.S. 4447, making it a misdemeanor for a husband to willfully abandon his wife without providing for her support and that of the children of the marriage, should be strictly construed, and its terms may not be extended to include, by implication, cases not clearly within its meaning. *S. v. Falkner*, 793.

3. *Same—Burden of Proof — Defenses.* — The willful abandonment of the wife is an essential element of the offense made criminal by C.S. 1447, and the prosecutrix is required to show beyond a reasonable doubt, upon the issue of defendant's guilt, that he had willfully abandoned her without providing adequate support, from which the jury may infer, if so satisfied, that it had been done intentionally, without just cause or legal excuse. *Ibid.*

4. *Same—Statutes in Pari Materia.*—C.S. 4448, by specifying certain circumstances under which the failure of the husband to provide an adequate support for his wife and children, shall be presumptive evidence that such abandonment and neglect was willful, construed with the preceding section 4447, making his willful abandonment a misdemeanor, evidences that the legislative intent was well considered, and that not the mere abandonment, but the willful abandonment was the criminal act contemplated. *Ibid.*

CRIMINAL LAW—*Continued.*

5. *Same—Evidence.*—In order for the jury to acquit a defendant tried for the willful abandonment of his wife it is not required that he introduce evidence in his defense, nor is his failure to have done so to be taken against him, and the burden of the issue remains on the State throughout the trial. C.S. 4447. *Ibid.*

6. *Same—Wife's Unchastity.*—Upon the trial of the husband for abandonment, C.S. 4447, the wife's unchastity is a defense, which he may put in issue by cross-examination or otherwise, with the burden remaining on the State to show his guilt beyond a reasonable doubt. ***Ibid.***

7. *Same—Burden to Produce—Evidence.*—Upon the trial of the husband for the willful abandonment of his wife, C.S. 4447, the burden of producing evidence of the wife's unchastity is not upon the husband, or within the rule applicable when the facts and circumstances are peculiarly within the knowledge of the party relying upon them. *Ibid.*

8. *Criminal Law—Abandonment—Defense—Evidence—Facts Admitted or Established—Statutes.*—Where the nonsupport and abandonment of the husband are both established or admitted, C.S. 4448, it may be necessary for the defendant to come forward with his evidence and proof to avoid the risk of an adverse verdict. *Ibid.*

9. *Criminal Law—Husband and Wife—Abandonment — Civil Remedies — Statutes.*—Requiring the State to show the husband's willful abandonment of his wife, etc., beyond a reasonable doubt, C.S. 4447, does not deprive the wife of her civil remedies under the provisions of section 1667. *Ibid.*

10. *Criminal Law—Newly Discovered Evidence—New Trial.*—The court will not grant a new trial after verdict for newly discovered evidence in a criminal case. *S. v. Jenkins*, 818.

11. *Criminal Law—Recent Possession—Trials — Evidence — Questions for Jury—Statutes.*—Where the prosecutor's goods have been stolen two days before, they are found in the defendant's possession, with conflicting evidence upon the question of his having stolen them, the case can only be determined by the jury, and the defendant's motion to dismiss, C.S. 4643, must be denied. *Ibid.*

12. *Criminal Law—Instructions — Newly Discovered Evidence — Presumptions—Appeal and Error.*—Where the defendant was being tried for larceny, and the question of "recent possession" had arisen, a mere technical error in the use of an expression as to the burden being upon the defendant of explaining his possession of the stolen articles will not be held reversible error when the court placed upon the State the burden of showing the defendant's guilt beyond a reasonable doubt, and emphasized this part of the charge. *Ibid.*

13. *Criminal Law—Robbery—Felonious Assault—Evidence—Trials — Questions for Jury.*—Under the conflicting evidence in this case and upon a trial free from prejudicial error, the verdict and judgment are upheld on appeal, finding the three defendants guilty of robbing the prosecuting witness and his wife at their home, and one of them also guilty of a criminal assault on him with a pistol. *S. v. Dorsett*, 826.

14. *Criminal Law—Indictment—Spirituous Liquors—Intoxicating Liquors—Statutes.*—The validity of an indictment for the unlawful sale of intoxicating liquors does not depend upon a charge of a sale to any particular person or to persons unknown. C.S. 3383. *S. v. Lemons*, 828.

CRIMINAL LAW--*Continued.*

15. *Same—Jurisdiction—Courts.*—When it appears that the court has jurisdiction of the offense charged against the defendant of violating our prohibition law, it is not necessary for conviction for the indictment to charge the date of the transaction or that the offense was committed in that county. C.S. 4625. *Ibid.*

16. *Same—Waiver.*—Where an indictment for the violation of our prohibition law has been found by the grand jury of the county, the defendant, as to jurisdiction, waives the omission of the indictment to charge that the offense had been committed in that county, by failing to enter a plea in abatement at the trial. *Ibid.*

17. *Same—Statutes.*—A motion in arrest of judgment will not be allowed after conviction for omission of the bill of indictment to charge the date of the offense or its failure to show the venue thereof. C.S. 4623, 4625. *Ibid.*

18. *Criminal Law—Verdict — Jurors — Explanation -- Recommendation of Clemency.*—The verdict in a criminal case should either be "guilty" or "not guilty," and the trial judge may properly see that it is so rendered, it being in his discretion to hear the jurors state their reasons for their verdict of guilty; and a recommendation for clemency is but surplusage. *Ibid.*

19. *Criminal Law—Evidence—Motions—Nonsuit.* — Defendant's motion to dismiss a criminal action as in case of nonsuit upon the evidence will be denied when the State's evidence, taken alone or with the other evidence in the case, is sufficient in law for a conviction. *S. v. Crouse*, 835.

20. *Same — Circumstantial Evidence — Inferences -- Questions for Jury — Trials.*—Where there is absence of direct proof of the defendant's guilt on the trial of a criminal action, the jury may not only find the basic facts, but make the permissible inferences therefrom in determining the question of the defendant's guilt of innocence, which enters into the consideration of the court upon defendant's motion to dismiss as in case of nonsuit. *Ibid.*

21. *Criminal Law—Larceny and Receiving—Severance—Motions—Court's Discretion—Appeal and Error.*—Where the indictment charges several defendants with larceny or receiving goods from the warehouse of the prosecutor in a connected manner, a motion to sever the trials is addressed to the sound discretion of the trial judge and his refusal of the motion is not reviewable on appeal. *S. v. Pannil*, 838.

22. *Criminal Law—Larceny and Receiving—Evidence—Intent—Knowledge.* Where there is evidence that the warehouse of the prosecutor was broken into in the night and a large quantity of oats was taken therefrom, as charged in the bill of indictment, and wagon tracks led therefrom to the barns of the several defendants, wherein bags of oats were found early the next morning, with marks thereon tending to identify them as the property of the prosecutor, evidence that bags of "sweet feed" were also found there with identifying marks is competent as tending to show ownership of the goods and knowledge and intent upon the two counts in the bill of indictment of larceny and receiving of the oats. *Ibid.*

23. *Criminal Law—Larceny—Evidence—Nonexpert — Opinion Upon Collective Facts.*—Where there is evidence that a witness tracked a stolen automobile to the house of the accused, where he found both him and the car, his further testimony descriptive of the defendant's appearance, that "his clothes were damp, shoes muddy, looked like. Didn't look like they had been unlaced in several days," is not objectionable as opinion evidence of a nonexpert witness, but admissible under the rule that such instantaneous and ordinary conclusion of the

CRIMINAL LAW—*Continued.*

mind may be received as a short-hand method of giving the facts as they appeared to the witness, or were presented to his senses at one and the same time. *S. v. Skeen*, 844.

24. *Criminal Law—Larceny—Aiding and Abetting—Accessory—Evidence—Instructions.*—Where there is evidence that the defendant stole the automobile of which he was accused, and that his appearance or muddy condition indicated he had been riding therein, and he contends, with his evidence, that some one else had stolen the car and left it in his yard, where it was found, an instruction to the jury is not erroneous that the defendant would be guilty if he had stolen the car or abetted others therein, upon the principle that one who aids and abets another in the commission of a crime is equally guilty with him. *Ibid.*

25. *Criminal Law — Producing Abortion — Evidence — Motion to Dismiss — Statutes.*—Where the defendant is tried under C.S. 4226 and 4227, for producing a miscarriage or abortion of a pregnant woman, the action will not be dismissed upon the evidence if it is sufficient for a conviction upon either count. *S. v. Martin*, 846.

26. *Same—Questions for Jury—Trials.*—Upon the trial in this action, wherein the defendant was indicted for procuring the miscarriage or abortion of a pregnant woman, under the provisions of C.S. 4226 and 4227, testimony of the relation between the defendant and the woman, his paying half of the doctor's fees, and his concern as to the result, is *held* sufficient to sustain the verdict of guilty, taken in connection with the other evidence in the case. *Ibid.*

27. *Criminal Law—Indictment—Time Not of the Essence.*—Ordinarily it is not required that an indictment for larceny and receiving charge the exact time of the alleged offense, this not being of the essence thereof. *S. v. Overcash*, 889.

28. *Same—Evidence—Variance—Indictment.*—Where the trial upon two indictments have been consolidated; and the time of the offense charged as to the appellants is prior to the time alleged as to the other defendants in the second bill of indictment; and the evidence tends to show that the appellants were guilty, at the latter time, this variance between the time charged and the proof is immaterial, and a verdict of guilty will be sustained on appeal. *Ibid.*

29. *Criminal Law—Larceny — Accessories — Principals — Conspiracy — Instructions.*—Where the appellants entered a prearranged plan, with others, for the others to enter a certain warehouse and steal goods therefrom, which the appellants were to receive and pay for, and this was accordingly done, the appellants, having aided, abetted, advised, or procured the crime, are guilty with the others as principals, and an exception that the judge adverted to them in his charge as accessories, on the facts presented in this case could have worked no harm to appellants, and is untenable. *Ibid.*

30. *Criminal Law—Sentence—Judgment—Pending Sentences — Commencement of Sentence.*—A sentence, upon conviction in a criminal action, which recognizes an existing sentence of the same defendant then pending on appeal to the Supreme Court, and makes the term of imprisonment to begin at once, or immediately after the expiration of the former sentence, according to the outcome of the appeal, is not void for uncertainty, indefiniteness, or being alternative or contingent; and when a pardon has been obtained from the Governor, in the meanwhile, the present sentence will take effect at once. *S. v. Satterwhite*, 892.

CROPS.

See Insurance, 1; Landlord and Tenant, 2.

CROSSINGS.

See Railroads, 14, 15.

CURTESY.

See Wills, 28.

CUSTOM.

See Negligence, 18.

DAMAGES.

See Courts, 1; Equity, 2; Contracts, 1, 22; Roads and Highways, 4; Landlord and Tenant, 1; Waters, 1; Statute of Frauds, 5; Constitutional Law, 7; Evidence, 10, 22; Express Companies, 1; Injunction, 3; Principal and Agent, 2, 5; Vendor and Purchaser, 2.

1. *Damages—Punitive Damages—Public Policy.*—Punitive damages are allowed in proper cases on the ground of public policy for example's sake, and given to the plaintiff because it is awarded in his suit. *Ford v. McAnally*, 419.

2. *Same—Verdict—Discretion of Jury—Excessive or Arbitrary—Appeal and Error.*—Where punitive damages are allowable, their award is in the sound discretion of the jury, and the amount so ascertained will not be disturbed on appeal, unless excessively disproportionate to the circumstances of contumely and indignity present in each particular case, and in the instant case the verdict therefor is not regarded as being arbitrarily or harshly rendered, upon the facts appearing of record. *Ibid.*

3. *Damages—Evidence—Instructions—Profits—Punitive Damages.* — In an action to recover damages for an alleged personal injury negligently inflicted by the driver of defendant's motor bus operated for hire, evidence as to the defendant's profits is harmless, or not prejudicial to the defendant when the charge of the court is correct as to the measure of damages, excludes recovery for punitive damages, and it appears that no profit was derived from the enterprise. *Jordan v. Motor Lines*, 559.

4. *Damages—Railroads—Negligence — Personal Injury — Measure of Damages.*—Where there is evidence that the plaintiff, in his action for damages, has been negligently injured by the defendant railroad company so as to impair his judgment and cause pecuniary loss in his management of his affairs, it is competent to show upon the issue of his damages that before the injury he had made and accumulated money, and since, in consequence of the injury, he has become embarrassed in his affairs and deeply involved. *Vann v. R. R.*, 567.

DEADLY WEAPON.

See Assault, 1.

DEATH.

See Evidence, 8.

DECLARATIONS.

See Evidence, 8, 27, 28, 31; Appeal and Error, 91, 95.

DECISIONS.

Decisions—Dissenting Opinion—Authority.—The decisions of the courts of other states are entitled only to the persuasive weight given on account of the force or correctness of their reasoning, and this may be accorded to the force or correctness of the reasoning of a dissenting opinion therein filed. *Hipp v. Dupont*, 9.

DEEDS AND CONVEYANCES.

See Contracts, 8, 11, 15, 17; Estates, 1; Trusts, 4, 6; Instructions, 10, 16; Judgments, 15; Wills, 2; Tenants in Common, 2; Banks and Banking, 7; Corporations, 5; Insane Persons, 1; Evidence, 31; Married Women, 4; Statute of Frauds, 11; Easements, 1.

1. *Deeds and Conveyances—Boundaries—Evidence—General Reputation.*—Where the location of the boundary line between adjoining owners of land is in controversy, in an action of trespass involving title, and it appears from the call in one of the deeds, from a common source, that it is a certain distance from a certain street calling in question the width of the street, it is competent to show the general reputation of the width of the street by a witness who has known it for thirty years, commencing at a time before any question relating to it was in controversy, or any of the land was owned by the parties to the action. *Barnhill v. Hardee*, 85.

2. *Deeds and Conveyances—Principal and Agent—Repudiation of Agency—Title to Lands.*—Where defendant claims title to land as taken by plaintiff in his own name when, in fact, he was acting for defendant, to whom it should have been conveyed, but there is evidence that the defendant had repudiated such agency, the verdict of the jury in plaintiff's favor, under a correct instruction of the court, settles this question adversely to the defendant. *Bradford v. Bank*, 225.

3. *Deeds—Tenants in Common—Limitations.*—To ripen title to lands under a deed from a tenant in common adverse possession for twenty years is necessary, and this applies to one to whom the alienee of a tenant has attempted to convey the entire estate. C.S. 430. *Ibid.*

4. *Deeds and Conveyances—Registration—Color—Title—Common Source.*—An unregistered deed is not color of title when the parties to an action for the recovery of land are claiming under the same source. *Ibid.*

5. *Deeds and Conveyances—Tenants in Common—Partition—Evidence—Instructions—Appeal and Error.*—The claim of title to the lands in controversy under a division thereof by tenants in common does not arise in the Supreme Court, on appeal, when the trial judge has charged the jury, without exception taken, that there was no evidence to show a legal division between the tenants in common. *Ibid.*

6. *Deeds and Conveyances—Registration—Notice.*—No notice, however full or formal, can supply that of the registration of conveyances of land required by statute to give priority over creditors or purchasers for value. C.S. 3311. *Blacknall v. Hancock*, 369.

7. *Same—Liens—Priorities—Filing—Indexing.*—The priorities between two mortgages or deeds of trust on land, appearing upon the index of the register of deeds to have been registered on the same month, exact date not given, nothing else appearing, may be determined by the time of filing for registration, and their relative position on the index. Attention is called to ch. 68, Laws 1921, amending C.S. 3553, though not applicable to the instant case. *Ibid.*

8. *Same—Liens—Priorities—Mortgages—Registration.*—Where there is an implied agreement between the mortgage debtors that the one taking a subsequent mortgage should pay off and discharge the first one and acquire the benefits of the lien, and it appears that the prior mortgage was never registered, but that a third mortgage had also been given on the same lands and registered prior to the second mortgage, there is no existent equity in favor of the first and un-

registered mortgage upon which subrogation can rest in favor of the second mortgagee whose mortgage has been registered subsequent to the registration of the third one. *Ibid.*

9. *Deeds and Conveyances—Mortgages—Prior Mortgages—Registration—Liens—Recitation in Warranty of Prior Liens.*—Where the lands have been subjected to three mortgages, one for the balance of the purchase price, which has not been registered, and the third merely refers to the first mortgage lien in omitting it from the warranty clause, and is recorded before the second, the mere reference to the first mortgage in the third one, is not such a recognition of its valid existence and binding effect as to postpone the third mortgage lien to that of the second and last registered mortgage. *Hinton v. Lee*, 102 N.C. 28, cited and distinguished. *Ibid.*

10. *Deeds and Conveyances—Mortgages—Judgments—Execution Sales—Title.*—The owner of land conveyed to A., taking immediately a mortgage to secure the purchase price, and thereafter the land was sold in execution of a judgment against A., under which the defendants claim title by deed accordingly made; and the plaintiff claims as a purchaser under the executed power of sale contained in the mortgage: *Held*, the title remained in the mortgagee and the purchaser at the mortgage sale and his grantee obtained a good title as against that claimed under the execution sale, notwithstanding the mortgage note may have been assigned to a third person. *Semble*, the title passed immediately from A., under the mortgage, leaving none upon which the execution under the judgment could take effect. *Lowdermilk v. Butler*, 503.

11. *Deeds and Conveyances—Title by Estoppel—Feeding an Estoppel—Purchasers for Value—Notice—Registration.*—The principle upon which title by estoppel, called feeding an estoppel, is allowed where a person having no title to lands assumes to convey it by deed with warranty and thereafter acquires the title, does not prevail against that acquired by a purchaser for full value, without notice, under a prior registered conveyance of his chain of title, and such purchaser is not affected with constructive notice of deeds or claims against his immediate or other grantor prior to the time when such grantor acquired the title. *Door Co. v. Joyner*, 518.

12. *Same—Equity.*—The principle upon which title by estoppel may be acquired against one conveying land by deed with warranty, at a time he had no title and has afterwards acquired it, called feeding an estoppel, is an equitable one, not available against purchasers who have acquired the legal title by prior registered deed for value without notice. As to whether title by estoppel would prevail against one holding by a prior registered conveyance with or without notice, *Quære? Ibid.*

13. *Same—Married Women—Statutes.*—As to the doctrine of title by estoppel applying to a married woman under the provisions of C.S. 250, who has joined with her husband in a deed to his lands with warranty, the wife's interest not appearing on the face of the instrument, but which title the wife afterwards acquired. *Quære? Ibid.*

14. *Deeds and Conveyances—Married Women—Husband and Wife—Void Deeds—Purchaser Without Notice—Descent—Partition.*—Where, under a void deed from his wife of her separate realty, the husband has conveyed the lands to a third person, the purchaser cannot acquire any right under his deed as a purchaser without notice against the child or heir at law of the deceased wife, but only as against the life estate of his grantor as tenant by the curtesy in his wife's

lands; and the heirs at law of the wife, after the expiration of the husband's life estate, are entitled to actual division of the lands as tenants in common or a sale for division, as the case may be, in proceedings for partition. *Foster v. Williams*, 632.

15. *Same—Infants—Ratification—Consideration Restored.*—Where the infant is entitled to the separate realty of his mother by descent, which the father has attempted to convey to another under a void deed and received and still holds the full consideration, the principle that the infant is put to his election to restore the consideration, etc., has no application, and he may avoid the deed of his father within three years after coming of age. *Ibid.*

16. *Deeds and Conveyances—Contracts—Timber—Extension Period—Condition.*—Where a deed to standing timber grants a further extension of time for cutting and removing the timber in case of death or fire, neither the grantee nor his assigns can claim any right under the extension clause without showing that a delay in cutting and removing the timber has been caused under the conditions stated in the deed. *Wilcox v. McLeod*, 637.

17. *Deeds and Conveyances—Contracts—Timber—Assignments—Parol Contract—Powers—Revocation.*—Where the vendee under a deed to standing timber has assigned his rights thereunder by a parol agreement, his assignee, at most, can only cut and remove the timber from the owner's land until stopped by his assignor, the grantee in the deed; and where he has done so within the life of the original contract, and after his death, his right under his deed has expired, his assignee cannot claim any extension right under the original contract to continue to cut and remove the timber that is conditioned upon the death of his grantor, the grantee in the original deed, or any one else. *Ibid.*

18. *Same—Executors and Administrators—Wills—Heirs at Law—Powers of Attorney.*—The executor cannot exercise a power for the sale of lands not conferred by the will, except for the payment of debts in accordance with the method prescribed by law; and a power of attorney executed by the devisees respecting other lands than the *locus in quo* cannot have the effect of restoring a right to cut and remove timber from it which had expired in the lifetime of their ancestor. *Ibid.*

19. *Deeds and Conveyances—Married Women — Free Trader — Probate — Consideration—Equitable Title—Legal Title.*—Where a married woman conveys her land without the written consent of her husband under an invalid registration as a free trader, and has received the full consideration therefor, a part before and a part after her husband's death, it vests the equitable title in her grantee and those claiming under him, which, under a consent judgment between the parties, may vest the legal title to the lands in him. *Mills v. Tabor*, 722.

20. *Same—Registration—Liens—Judgments—Mortgages.*—Where there is a lien by judgment against the holder of an equitable title, C.S. 614, to lands subject to his registered mortgage to secure the balance of the purchase price, his deed registered after the lien of the judgment had taken effect, cannot render the lien under the mortgage superior to the judgment lien, and equity will remove the lien of the mortgage as cloud upon the title of the purchaser at the execution sale holding the sheriff's deed. *Mayo v. Staton*, 137 N.C. 680. *Ibid.*

21. *Same—Estoppel.*—Where the judgment creditor and a mortgagee under a prior registered mortgage claim the land from the same person, they are ordinarily estopped to deny the title of their common source, but where the deed

from this common source, upon which the mortgagor's title depends, has been registered after the judgment lien has taken effect, this element of estoppel does not apply to the purchaser at the execution sale. *Ibid.*

22. *Deeds and Conveyances—Descriptions—Boundaries.*—The principle upon which a deed to lands must be construed most strongly against the grantor does not extend to including lands not embraced in the description. *Ferguson v. Fibre Co.*, 731.

23. *Same—Specific Descriptions—General Descriptions.*—The principle upon which a general description may enlarge the boundaries embraced in a more definite description of lands which it follows, depends upon the intent as gathered from the deed that it should do so, and it appears that the grantor intended that the general description was inserted in an attempt to make the specific description more certain. *Ibid.*

24. *Deeds and Conveyances—Leases—Interpretation—Easements.*—In construing a written instrument of lease, the whole thereof will be considered in order to effectuate the intention of the parties as gathered from the words employed; and where, in a lease of land, the word "appurtenances" has inappropriately been used only in the warranty, it may be considered as bearing upon the intention of the lessor to pass an easement when construed with other appropriate words appearing in the writing. *Meroney v. Cherokee Lodge*, 739.

25. *Deeds and Conveyances — "Color" — Adverse Possession — Evidence — Chain of Title.*—Where plaintiff shows title by *mesne* conveyances of land in question from a State grant, with evidence of possession, and defendant claims under a prior grant from the State, without connecting himself therewith with only evidence of three years possession, it is insufficient to ripen the defendant's title, and an instruction to the jury to that effect saying it would require seven years adverse possession, etc., under color, is correct. *Fellows v. Dowd*, 776.

26. *Deeds and Conveyances—"Color" — Adverse Possession — Evidence.*—Where the defendant claims title to land by seven years adverse possession under "color," evidence alone that he had a boiler and engine on ten acres of the land at some indefinitely stated length of time, for the purpose of pumping water through pipes to a sawmill on an adjoining tract, is too indefinite to ripen his title. *Ibid.*

DELEGATION OF POWERS.

See Constitutional Law, 3, 21, 24; Employer and Employee, 2.

DELIVERY.

See Bills and Notes, 3; Contracts, 26; Evidence, 31.

DEMURRER.

See Evidence, 2; Pleadings, 6, 9, 10, 13, 20; Vendor and Purchaser, 1; Injunction, 7.

DENIAL.

See Evidence, 35.

DEPENDENTS.

See Actions, 1.

DERAILMENTS.

See Pleadings, 15.

DESCENT AND DISTRIBUTION.

See Constitutional Law, 15; Deeds and Conveyances, 14; Wills, 28; Estates.

Descent and Distribution—Illegitimates — Slaves — Marriage — Evidence — Hearsay Evidence—Traditions.—Where one claims lands of his father by descent by reason of the subsequent marriage of his parents, the child so born is recognized as legitimate for the purpose of inheriting, and this may be shown by evidence of the declarations of the parents, or by family traditions *ante litem motam*, this being an exception to the rule excluding hearsay evidence. C.S. 279, 2417. *Bowman v. Howard*, 662.

DESCRIPTION.

See Deeds and Conveyances, 22, 25.

DIRECTOR GENERAL.

See Appeal and Error, 17, 36; Evidence, 17; Judgments, 8; Statutes, 8; Express Companies, 1; Parties, 2; Railroads, 3, 4, 5.

DIRECTORS.

See Corporations, 2, 3.

DISABILITY.

See Constitutional Law, 10; Guardian and Ward, 2; Insane Persons, 1.

DISCOVERY.

1. *Discovery—Evidence—Statutes.*—To obtain an order for the inspection of papers, C.S. 1823, it is necessary for the party desiring their use to set forth the facts or circumstances in his affidavit from which their materiality and necessity may be seen by the court, and an allegation merely that an examination, etc., is material and necessary is but a conclusion of law of such party or his own opinion thereof, and is insufficient. *Mica Co. v. Express Co.*, 669.

2. *Same—Trials—Orders—Judgments.*—An order of the court under the provisions of C.S. 1823, 1824, for the inspection of papers by the adverse party to the action, or their necessity for being produced on the trial, is fatally defective when requiring them to be filed with the clerk of the court at a certain time and leaving them there indefinitely, beyond the control of the party to whom they belong, it being required that the order should either designate a certain time for their inspection by the applicant or produce them upon the trial, if a previous inspection of them is not desired. *Ibid.*

DISCRETION.

See Municipal Corporations, 2; Roads and Highways, 4; Constitutional Law, 26.

DISCRETION OF JURY.

See Damages, 2.

DISCRIMINATION.

See Commerce, 1.

DISMISSAL.

See Appeal and Error, 11, 13, 14, 17, 29, 33, 53, 61, 68, 70, 93; Actions, 4; Homicide, 3; Judgments, 8; Pleadings, 14, 19; Railroads, 1, 4; Injunction, 6.

DISSOLUTION.

See Corporations, 5; Limitation of Actions, 5.

DIVIDENDS.

See Corporations, 2.

DIVISION OF STATE.

See School Districts, 2; Injunctions, 1.

DIVORCE.

See Appeal and Error, 1.

Divorce—Separation—Insanity—Suit of Party at Fault.—Our statute, C.S. 1659(4), amended by ch. 63, Laws 1921, making a separation of husband and wife for five years a ground for absolute divorce, does not extend to granting the decree upon the suit of the party in fault, or where the other party has been forcibly separated by infirmity; nor will the divorce be granted at the suit of the husband when the separation of the wife has been occasioned by her incarceration in a hospital for the insane. *Lee v. Lee*, 61.

DOCKET.

See Appeal and Error, 39, 61, 65, 66, 70, 93.

DOGS.

See Constitutional Law, 7; Evidence, 18.

DOMICILE.

See Guardian and Ward, 3.

DRAINAGE DISTRICTS.

See Waters, 1.

1. *Drainage Districts—Maintenance—Assessments—Sheriffs — Commissions —Statutes.*—Under the provisions of the statute creating the Mattamuskeet Drainage District, ch. 442, Laws 1909 (C.S. 5350), the control thereof, after its completion, is continued in the board of drainage commissioners for the purpose of its maintenance, and authority is given it to levy assessments therefor on the lands benefited in the same manner and in the same proportion as the "original assessments" were made, and collected by the same officers as those by whom the State and county taxes are collected: *Held*, the term "original assessments" refers to those made for construction work or bonds issued therefor, and the assessments for maintenance should be collected by the sheriff of the county for the purpose of maintenance, as taxes for general county purposes are to be collected by him. *Comrs. v. Davis*, 140.

2. *Same—Compensation Implied.*—The policy of our State is to give just compensation for services rendered by its agencies, and while it is within the power of the legislature to impose further duties upon its sheriffs or tax collectors without increased compensation, in this case the right to commissions upon the collection of assessments for the maintenance of a drainage district, where there is no express provision to this effect, is implied from the language of the statute when construed as a whole. *Ibid.*

3. *Same—Taxation.*—By ch. 67, Laws 1911, certain sections of the general drainage act of ch. 442, Laws 1909, were repealed, and certain other sections substituted, leaving in force section 29 of the latter act, providing for the continuance of a drainage district established thereunder, under a board of commissioners, for maintenance, with authority to levy assessments for that purpose to be collected by the sheriff or tax collector of the county: *Held*, Rev. 5245 (now C.S. 8042), under the title of sheriffs and tax collectors, allowing them a commission of 5 per cent on "assessments collected," refers only to taxes collected for general governmental purposes, and not to assessments in drainage districts imposed for the special benefits to the lands therein, and commissions on assessments for maintenance are limited to 2 per cent by Laws 1909; and this con-

struction is not affected by the repeal of sec. 36, Laws 1909, by ch. 152, sec. 2, Laws 1917. *Ibid.*

4. *Same—Government—Political Subdivisions.*—A drainage district is not a political division of the State, and assessments to be levied for their maintenance differs from a tax to be levied and collected for State, county, township, and school districts, "and other purposes whatsoever," such other purposes being construed as meaning taxes collected for purposes of general government, and do extend to drainage assessments. Rev. 5245 (C.S. 8042). *Ibid.*

5. *Drainage Districts—Government—Taxation—Assessments.*—Assessments made for the maintenance of a drainage district, incorporated under the provisions of the statute, are not "taxes," though they may be so incorrectly denominated therein; being only assessments made for the special benefits to the land within the district and not imposed for the purpose of general revenue. *Ibid.*

6. *Drainage Districts—Counties—Treasurer—Compensation — Commissions —Statutes.—Semble*, C.S. 3910, cannot be construed to allow additional compensation to the county treasurer for receiving and disbursing money of a drainage district under sec. 36, ch. 442, Laws of 1909, the acts being unrelated; but, of otherwise, the county treasurer must bring himself within the provisions of sec. 3910 by showing the amount claimed was allowed to him in the discretion of the county commissioners, within the limit fixed by the statute, and that the regular procedure followed as to the drawing of the warrants by the drainage commission upon funds on hand derived from collections for the benefit of the drainage district alone, etc. *Comrs. v. Credle*, 442.

7. *Same—Expressio Unius, Est Exclusio Alterius.*—Sec. 13, ch. 67, Laws 1911, dealing with the compensation to be allowed the county treasurer for disbursing the revenue obtained from the sale of bonds of a drainage district, provides but one compensation for all services, *i. e.*, 2 per cent of the revenue derived from the sale of the drainage bonds, and expressly denies compensation for certain other services mentioned, and if not, then under the doctrine of *expressio unius est exclusio alterius* the treasurer is not entitled to compensation by way of commissions on the moneys derived from assessments for maintenance. *Ibid.*

8. *Drainage Districts—County Treasurer—Commissions—Bonds.*—The claim of the treasurer of the county for commission derived from assessments in Mattamuskeet Drainage District is not allowed on this appeal, under the decision of *Comrs. v. Credle, ante*, 442, which also covers the question as to commissions on the receipt and disbursement of canal tolls by him. *Comrs. v. Brim*, 447.

9. *Drainage District—Discretionary Powers—Statutes—Assessments.* — The Legislature, in authorizing the establishment of a drainage district, may very largely commit to the commissioners the exercise of their judgment as to what should be done in carrying out the general provisions specified by the statute, and the special act of the Legislature creating the Gaston County Drainage Commission, ch. 427, Public-Local Laws of 1911, thus construed, does not relieve a landowner therein from paying his authorized assessments for benefits solely because the commission failed to strictly and literally divide the lands into the number of classes therein set out. *Mitchem v. Drainage Com.*, 511.

10. *Same—Meetings—Notice—Exceptions—Actions— Injunction.* — Where a drainage district has been formed under the provisions of statute, a landowner therein may not attend a meeting regularly had by the commissioners for the purpose of assessing the landowners for benefits, etc., make no objection or take

no exception to that placed upon his own land, or fail to proceed in the manner prescribed by the statute, and instead collaterally, by injunction, restrain the collection of these assessments by sheriff's sale; and this applies to his grantee, who knew that the lands were situate within the district and subject to the assessments. *Mabry v. Drainage District*, 163 N.C. 24, cited and applied. *Ibid.*

11. *Same—Appearance—Waiver.*—Where the owner of land in a drainage district, formed under the provisions of statute, appears at a meeting of the commissioners held for the purpose, and is silent, making no objection or exception to the assessment imposed upon his land, the question as to whether he had been sufficiently served with notice of the meeting becomes immaterial, his appearance being construed as a waiver thereof, or rather as dispensing with formal notice. *Ibid.*

12. *Drainage Districts—Proceedings—Presumptions—Notice.*—The presumption is in favor of the regularity of the official proceedings of the commissioners of a drainage district, and applies as to the sufficiency of notice to a landowner within the district of a meeting duly had to assess such owners according to benefits received from the improvements therein. *Ibid.*

13. *Same—Waiver—Assessments—Benefits.*—The question as to whether an owner of land within a drainage district has realized the benefits anticipated is eliminated when there is the establishment of the district upon the report; and where such owner remains silent or makes no objection or exception at the proper time as to the proceedings of the board, his silence is a waiver of any right he may have therein had, and the independent remedy by injunction is not open to him. *Ibid.*

14. *Drainage District—Benefits—Formation of District—Presumptions.*—The claim of the plaintiff, an owner of land within a drainage district, established by authority of statute, that his land had received no benefit, is held untenable upon the record in this case, as he is concluded by the report and judgment of the commissioners, to which no exception was taken at the proper time. *Ibid.*

DRUNKENNESS.

See Negligence, 13.

DUE COURSE.

See Banks and Banking, 1.

DUE PROCESS.

See Injunction, 4.

DUTIES.

See Trusts, 5; Contracts, 28; Appeal and Error, 69.

DUTY OF MASTER.

See Employer and Employee, 2.

DYING DECLARATIONS.

See Evidence, 7.

EASEMENTS.

See Judgments, 17, 18; Deeds and Conveyances, 24.

1. *Easements—Implication—Necessity—Deeds and Conveyances—Severance of Title.*—Where there is an easement upon the lands of the owner in continuous necessary use by the lessee, having a right thereto, of such character as to be open and visible or readily seen or known, upon the severance of the title it will remain an easement upon the land of the purchaser upon which it is situated

EASEMENTS—*Continued.*

during the continuance of the lease without the use of the word "appurtenances" therein. *Meroney v. Cherokee Lodge*, 739.

2. *Same—Presumptions*—To create an easement by implication under a lease upon the severance of the lands by the owner, the intention of the parties will be presumed that the lessee of the premises shall continue to enjoy such right or easement when it is necessary to the beneficial use of the premises, and to its convenient and comfortable enjoyment, as it existed at the time of the execution of the lease, and when known and visible. *Ibid.*

3. *Same—Outside Stairways.*—The owner of lands with a building thereon leased an upper story thereof to be used by a fraternal order for its place of meeting, with the only means of ingress and egress by a stairway on the outside, and then conveyed the title to a part of his lands whereon the stairway was situate at the time of the lease and the severance of the title: *Held*, the lessees held an easement by implication in the lands severed, for the necessary enjoyment of the leased premises. *Ibid.*

EDUCATION.

See School Districts, 2.

EJECTMENT.

See Partition, 1.

1. *Ejectment—Landlord and Tenant—Notice to Tenant.*—A verbal notice to terminate a lease given by the landlord, in conformity with the statute, is sufficient. *Poindexter v. Call*, 366.

2. *Same—Term of Lease—Issue.*—Where the controversy in a summary proceeding in ejectment between landlord and tenant, is whether the contract is by the month or by the year, as to the landlord's notice to terminate it, only one issue is required, as to the expiration of the lease at the time of the commencement of the action, with the burden of the issue on the plaintiff. *Ibid.*

3. *Same—Immaterial Issues—Burden of Proof—Appeal and Error—Harmless Error.*—Where two issues are submitted to the jury in the landlord's action of ejectment, one as to the expiration of the term of the lease, as being by the month as plaintiff claimed; or by the year, as the defendant claimed, the second issue will be regarded as surplusage on appeal, and an instruction placing the burden of proof on this last issue on the defendant will be regarded as harmless error, it appearing that the jury, in answering the first issue in the affirmative, understood and intended to render their verdict in favor of the plaintiff. *Ibid.*

ELECTION.

See Statutes of Frauds, 5; School Districts, 4, 5; Constitutional Law, 9, 16, 17, 20; Contracts, 20; Remedies, 1; Equity, 6.

1. *Elections — Schools — Timber — Registration — Statutes — Bonds — Taxation.*—The failure to keep the registry, for the question of the issuance of bonds in a special school district, open for twenty days, etc., C.S. 5947, does not of itself render invalid the issuance of the bonds accordingly approved, when it appears that the matter was fully known and discussed, opportunity offered every voter to register, there was nothing to show that every elector desiring to vote had not done so, and there was no opposition to the measure manifested. *Hammond v. McRae*, 747.

2. *Elections—Schools—Bonds—Floating Debt—Ratification.*—Where a special school district has included a floating debt previously incurred for school

ELECTION—*Continued.*

purposes, in an issuance of bonds for like purposes under an act authorizing the issuance of the bonds, approved by the electors of the district, though this is not for a necessary expense, Const., Art. VII, sec. 7, the validity of the bonds may not be successfully assailed on that account, it being within the legislative authority to validate by ratification the indebtedness thus incurred, and this principle including ratification by the electorate. *Ibid.*

EMBEZZLEMENT.

See Contracts, 18.

EMINENT DOMAIN.

See Injunction, 4.

EMPLOYER AND EMPLOYEE.

See Contracts, 3, 4; Railroads, 5; Nuisance, 2.

1. *Employer and Employee—Master and Servant—Dangerous Machinery—Safe Place to Work—Negligence—Evidence—Questions for Jury.*—It was the sole duty of the plaintiff, an employee of the defendant, to keep its power-driven and dangerous machinery in repair, and under the defendant's rules, to notify those operating the engines to stop when he was about to make repairs; and, also, when he had made them. There was a system of signals for starting and stopping the large engine operating the main machinery, but none as to an engine operating a smaller portion, which started without warning, and caused the injury to the plaintiff while in the course of his employment: *Held*, sufficient evidence to be submitted to the jury on the issue of defendant's actionable negligence, in not equipping the smaller engine with a similar system of signals to that of the larger one. *Cook v. Mfg. Co.*, 205.

2. *Same—Duty of Master—Delegated Authority.*—Where the plaintiff was employed to work among dangerous machinery in repairing it while it was not running, it is the duty of the employer to warn him, while engaged in this duty, that the machinery was to be started again, and when an injury is thus proximately caused by the neglect of the employer or his agent, it is evidence of actionable negligence, from which the employer may not escape liability by having delegated this duty to another. *Ibid.*

3. *Same—Vice Principal.*—The duty of the employer to furnish his employee a safe place to work among dangerous machinery and surroundings is one implied in the contract of hiring, and if he commits to any other employee or servant the duty of maintaining and keeping it safe, the agent delegated to perform this duty *pro hac vice*, stands in the place of the employer, who may not escape liability for damages because he has delegated this duty to another. *Ibid.*

4. *Employer and Employee—Master and Servant—Negligence—Rule of the Prudent Man.*—It is not alone sufficient that the master has furnished his servant such machinery, tools, and appliances as are usually furnished for doing the work under dangerous conditions similar to those in which the servant is required to work, that are known, approved, and in general use, but he must further take such precautions for his servant's safety as an ordinarily prudent person charged with a like duty should and ought to have foreseen were necessary and proper under the circumstances. *Ibid.*

5. *Employer and Employee—Master and Servant—Safe Place to Work—Defects—Actual and Implied Knowledge—Inspection.*—The defect in an apparatus which an employer has furnished to his employee to do the work required of

EMPLOYER AND EMPLOYEE—*Continued.*

him is not sufficient of itself to charge the employer, the defendant in the action, with negligence, causing the injury, for the plaintiff must show that the defect was either known to the defendant or had existed so long that the law will impute such knowledge through the failure of the defendant to have discovered it by reasonable inspection required of the employer at proper intervals to secure safety in its use by his servants. *Smith v. R. R.*, 290.

6. *Same—Railroads—Instructions—Appeal and Error.*—Where an employee of a railroad required to place water in its locomotive at a water tank, has been injured while doing so by an explosion in the pipe through which the water was being carried for the purpose, and the evidence is conflicting as to whether the employee was acting therein in the proper manner and whether the employer had had the apparatus properly inspected, or should have previously discovered the defect of which it was unaware by the use of ordinary care, a charge of the court omitting these requisites upon the issue of defendant's negligence, and in effect making the defendant's liability to depend altogether upon whether or not there was a defect that proximately caused the injury, is reversible error. *Ibid.*

7. *Same—Federal Employers' Liability Act.*—Under the Federal Employers' Liability Act it is not every accident which may occur in causing a personal injury to an employee while working with the machinery and appliances furnished by the employer, a railroad company, for him to do the work that will make the employer liable, but only for those "due to its negligence" under the rule of actual or implied notice. *Ibid.*

8. *Employer and Employee—Master and Servant—Negligence—Rule of the Prudent Man.*—It is not the absolute duty of an employer to furnish his employee a reasonably safe place for the latter to do his work, the rule being that he must provide for him such a place, under the rule of the prudent man, in the exercise of ordinary care. *Ibid.*

9. *Employer and Employee—Master and Servant—Safe Place to Work—Negligence—Evidence—Motions—Nonsuit—Trials.*—Where there is evidence tending to show that the plaintiff was injured while in the scope of his employment, by the neglect of the defendant in not furnishing him sufficient help and proper appliances, which resulted in the personal injury complained of in the action, a motion as of nonsuit thereon by the defendant is properly denied. *Green v. Lumber Co.*, 681.

EQUALIZATION.

See Taxation, 1; Constitutional Law, 18.

EQUITY.

See Bills and Notes, 2; Judgments, 6, 7; Deeds and Conveyances, 12, 19; Contracts, 10, 22; Trusts, 10; Receivers, 2; Attorney and Client, 10; Actions, 10.

1. *Equity—Injunction—Criminal Law—Municipal Corporations—Cities and Towns—Ordinances.*—The enforcement of the criminal law, whether by statute or valid ordinance, made punishable as a misdemeanor under general statute, cannot be interfered with by the equitable remedy by injunction. *Thompson v. Lumberton*, 260.

2. *Same—Damages.*—Where the violation of a town ordinance is made a misdemeanor, its validity may be tested by the one who is tried for violating it as a matter of defense, and he cannot invoke the equity jurisdiction of the court by injunction on the ground that his remedy is inadequate because an incorporated city or town cannot be made liable in damages in such matters. *Ibid.*

EQUITY PRACTICE—*Continued.*

3. *Same—Statutes—Automobiles.*—An ordinance providing for the examination of the character and ability of one applying for the license for running an automobile upon the streets of the city, and the issuance of a license if proven or adjudged satisfactory by the municipal authorities, upon the payment of an annual license fee of $5, comes within the valid legislative powers conferred on municipal corporations by general statute in regard to their well government, for the protection of the citizens from danger of collisions, and for the morals of the community, Laws 1907, ch. 343, secs. 45 and 46, and is further sustained by the express provisions of the act of 1919, relating to the subject. *Ibid.*

4. *Same—Licenses—Automobiles.*—An ordinance of a municipality regulating the issuance of licenses to permit the running of automobiles upon their streets is not invalid because they require a license fee, but is enforceable for the protection of the pedestrians and others from collisions, and for the better morals of the citizens, and being in part a police regulation, an injunction will not lie. *Ibid.*

5. *Equity—Subrogation.*—The principle of subrogation does not prevail in favor of a mere volunteer. *Blacknall v. Hancock*, 369.

6. *Equity—Election—Remedies.*—The doctrine of election between existing remedies arises either in the course of the litigation or from matter *in pais*, upon contract or from the operation of the law, only when these remedies are inconsistent or repugnant to each other, and in such instances a choice of one will preclude a recovery upon the other. *Irvin v. Harris*, 647.

7. *Same—Partnership—Retiring Partners—New Firm—Creditors—Waiver.* Where a new firm has succeeded the old upon the retirement of one or more of its members and under agreement between themselves, but not concurred in by the creditors, the new concern has assumed liability for the debts of the old, the liability of the retiring partners continues, and when a creditor files his proof of claim in bankruptcy proceedings of the new concern, it does not alone amount to an election of remedies, or a waiver of right to proceed in the State court, against the retiring partner, for whatever sum that remains due on the old firm's note, each of these remedies being consistent with the other. *Ibid.*

ESCALLOPS.

See Fish Commission, 2.

ESCHEAT.

Escheat—University of North Carolina—Statutes—Constitutional—Law—Descent and Distribution.—The University of North Carolina, under its charter, since confirmed by our State Constitution, Art. IX, sec. 7, and now embraced in C.S. 5784-5-6, has the right by escheat to the property of a decedent, who has died intestate, leaving no one else to whom it would go under our statutes of descent and distribution. *In re Neal*, 405.

ESTATES.

See Wills, 1, 3, 5, 6, 21, 22, 27; Married Women, 2; Public Administrators, 1.

Estates—Restraint Upon Alienation—Fee Simple—Deeds and Conveyances. Where a life estate is given to B., and then to his heirs, after a reservation of a life estate in the grantor, "with no right to him to convey the same," the attempted restraint upon alienation of the estate is void, and it being the same as an estate to B. and his heirs, B. takes a fee simple after the falling in of the previous life estate, and may then convey the fee. *Stokes v. Dixon*, 323.

ESTOPPEL.

See Judgments, 2, 7, 16, 18, 19; Malicious Prosecution, 3; Constitutional Law, 9; Contracts, 10; Deeds and Conveyances, 11, 21.

EVIDENCE.

See Appeal and Error, 2, 4, 6, 7, 20, 54, 58, 59, 60, 71, 72, 86, 88, 89, 91, 92, 95; Contracts, 5; Accord and Satisfaction, 1, 2; Descent and Distribution, 1; Automobiles, 1; Issues, 2; Contracts, 2, 30; Deeds and Conveyances, 1, 5, 25, 26; Contempt, 2; *Habeas Corpus*, 4; Instructions, 2, 3, 5, 11; Actions, 5, 8; Malicious Prosecution, 2, 5, 6; Banks and Banking, 2; Negligence, 3, 16, 17; Pleadings, 6, 15, 17; Principal and Agent, 1; Attorney and Client, 4, 8; Bailment, 1; Criminal Law, 5, 7, 8, 11, 13, 19, 20, 22, 23, 24, 25, 28; Employer and Employee, 1, 9; Limitation of Actions, 2; Military, 3; Railroads 3, 5, 13, 14; Bills and Notes, 5; Reference, 1; Trusts, 2, 4, 8; Vendor and Purchaser, 1; Wills, 8, 10, 14; Nuisance, 3; Damages, 3; Injunction, 6, 7; Express Companies, 1; Partnership, 1, 2; Guardian and Ward, 2; Municipal Corporations, 7; Discovery, 1; Negligence, 7, 10; Verdict, 2; Intoxicating Liquor, 1, 3, 4, 5, 6, 8, 9; Witness, 1; Seduction, 1; Physicians, 1; Assault, 2, 5; Homicide, 1, 2, 3, 4.

1. *Evidence—Trusts—Parol Trusts—Contracts—Parol Evidence.—Held*, in this case, the evidence was sufficient to establish a valid parol agreement, or parol trust in the purchase of land for resale for a division of profits between the parties. *Newby v. Realty Co.*, 35.

2. *Evidence—Demurrer—Nonsuit.*—Upon appeal from the granting of defendant's motion to nonsuit or his demurrer to the evidence, the latter must be construed most favorably to the plaintiff, rejecting that to the contrary, and every fact essential to the cause of action which it tends to prove, must be taken as established. *Ibid.*

3. *Evidence—Writing—Genuineness—Jury — Statutes.* — The principle, formerly recognized in this State, that confined the proof of handwriting to the testimony of a competent witness in comparing that sought to be established with handwriting either admitted or proven as that of the party, has been changed by statute, C.S. 1784, and where the disputed writing has been rendered competent under this principle, it may now be submitted to the jury, together with that admitted or proven since 5 March, 1913. *Newton v. Newton*, 54.

4. *Evidence—Books—Records—Race Horses.*—Upon an action to recover damages for the false and fraudulent representations of the age of a race-horse, which induced the purchase by the plaintiff, a book entitled a year book, purporting to give the ages of race-horses and tending to establish the defendant's defense, may not be properly received in evidence, unless it is shown to be an authentic record and received and regarded by persons conversant with racing matters as official; and when such does not appear in the evidence, parol evidence of its contents is also properly excluded. *Buchan v. King*, 171.

5. *Evidence—Nonsuit—Trials—Questions for Jury.*—A motion to nonsuit upon the evidence will be denied when it is sufficient to sustain the plaintiff's action, though his witnesses may have given contradictory testimony at the trial. *Franck v. Hines*, 251.

6. *Evidence—Nonsuit—Contributory Negligence—Questions for Jury—Measure of Damages.*—Both under our statute and the Federal law, an employee of a railroad company is not barred of his recovery for damages from a personal injury negligently inflicted on him, because of his contributory negligence, such being considered only upon the *quantum* of damages he may recover, when the

EVIDENCE—*Continued.*

defendant's negligence has been properly established; and a motion for nonsuit in defendant's behalf may not be granted. *Wyne v. R. R.*, 253.

7. *Evidence—Dying Declarations—Wrongful Death—Statutes.* Under the provisions of C.S. 160, amended by the Legislature of 1919, permitting dying declarations in actions to recover damages for a wrongful death, in like manner and under the same rule as such declarations in criminal actions for homicide, are admissible, the dying declarations of the deceased in an action against a railroad company to recover damages for his negligent killing while crossing the defendant's tracks at a public crossing, that "I am going to die. I am broken all to pieces. I want you to see that they pay you for this. I did not see the train," are competent, when the attendant circumstances are fully in evidence, without question as to the death having been caused by a collision with the defendant's train at the crossing. *Williams v. R. R.*, 268.

8. *Same—Approaching Death—Integral Parts of Full Declaration.*—Under the evidence of this case a part of the dying declarations of the deceased that he was broken all to pieces, and he wanted the railroad company to pay, was competent as expressing his conviction that he knew that death was rapidly approaching and had abandoned hope, and as being an integral part of the whole of his declaration. *Ibid.*

9. *Evidence — Statutes — Change of Procedure — Vested Rights — Rules Changed at Legislative Will.*—The amendment of 1919 to C.S. 160, enlarging the rule of the admissibility of evidence of dying declarations to instances of wrongful death, does not change any vested rights, and is applicable in cases where such death was caused before its passage. *Ibid.*

10. *Evidence—Mental Capacity—Negligence—Receipt for Damages.*—Where a receipt in full of damages has been signed by the plaintiff's ward in his action to recover damages of a railroad company for its negligent injury to the ward, it is competent to show that at the time the mental condition of the ward, resulting from the injury, was insufficient for him to have understood what he was doing, or its effect. *White v. Hines*, 275.

11. *Evidence—Opinion Upon the Facts—Nonexpert Witnesses—Mental Capacity.*—Where the sufficient mental capacity of one who has signed a receipt in full for damages caused by the negligent acts of another is at issue in an action, a nonexpert witness who has had personal observation of the acts and conduct of the one who has signed, and has had conversations with him, may thereon state whether he, at the time of signing, was crazy or abnormal, and such is not objectionable as his opinion upon the facts. *Ibid.*

12. *Same.*—It is competent to show, as the basis of a nonexpert opinion as to mental incapacity of a party who has receipted in full for damages for a personal injury, the manner in which such person treated his family before and after the injury, his disregard to his physician's advice, his declarations and conduct, and his former mentality and physical vigor, with the other evidence in the case, when tending to sustain the opinion of the witness. *Ibid.*

13. *Evidence—Expert Opinion.*—The opinion of a physician, testifying as an expert to the mental incapacity of a person, relevant to the inquiry, may be given in evidence when based upon his own observation. *Ibid.*

14. *Evidence—Rebuttal—Mental Capacity.*—Where the mental incapacity of the ward to give a receipt for damages is relevant to the inquiry in plaintiff's action to recover damages for an injury alleged to have been negligently inflicted

on him, which was relied upon as a defense to the action, and the defendant's witness has testified that he was in sound mental condition when he received the check therefor, it is competent for the plaintiff's witness to testify in contradiction of the testimony of the defendant's witness, that the ward was not of sufficient mental capacity at that time. *Ibid.*

15. *Evidence—Photographs—Accuracy—Witnesses.*—Where a photograph of a place where a personal injury occurred is evidence in an action for a personal injury which occurred at the place, it is not required that the photographer himself should testify as to the accuracy of the picture, for this may be done by another witness who knows of the fact. *Ibid.*

16. *Evidence — Opinions — Expert Witnesses — Facts Within Their Own Knowledge.*—Objection to the testimony of a medical expert on the question of insanity involved, upon trial in this case, that the questions eliciting it were not sufficiently definite, and that they contained hypotheses for the support of which there was no evidence, are found to have been untenable upon a careful examination of the record by the Court. *Ibid.*

17. *Evidence—Nonsuit—Trials—Railroads—Director General—War — Railroads—Questions for Jury.*—In an action for a wrongful death, C.S. 160, against the Director General of Railroads and a railway company under his control as a war measure, there was evidence tending to show that a wood yard had its warehouse located about five feet from an industrial track of defendant, continuing from which was a platform extending up to within ten inches from the passing trains, and a truck several feet long and four feet wide, used for hauling the wood about, was customarily left there by day and night, when not in an actual use, sometimes on the platform and at others on the ground. In pursuance of his duty and under the immediate order of his superior, the plaintiff's intestate, a brakeman, was required, at night, to cross over between the cars of defendant's freight train and to get upon the cars by end ladders thereon; and after a backing movement of the train, without light on the lead end of the car, was found dead, badly mutilated, at the end of a car where was also found the truck which had been caught on one of these ladders and splintered to pieces on an edge of the platform which had been broken into by the impact. Viewing this evidence most favorably to the plaintiff, as required on a motion as of nonsuit: *Held*, the evidence was sufficient as to the Director General, but the motion was properly allowed as to the railroad company. *Mo. Pac. R. R. Co. v. Ault*, U. S. Supreme Court (opinion filed 1 June, 1921). *Transou v. Director General*, 402.

18. *Evidence—Nonexpert Witness—Sheep — Dogs — Statutes.* — Where the time that has elapsed between the death and discovery of sheep is relevant to the inquiry in the county's action against the owner of the dog to recover damages it has paid. C.S. 1681, testimony of the judgment of a nonexpert witness upon the personal observation of the carcass of the sheep, as to the length of time it had been killed, is not erroneous as the expression if a theoretical or scientific opinion. *Comrs. v. George*, 415.

19. *Evidence—Pleadings—Nonsuit.*—The pleadings will be liberally construed and the evidence taken in the light most favorable to plaintiff, on defendant's motion for judgment thereon. *Ford v. McAnally*, 419.

20. *Evidence—Nonsuit—Trials—Statutes.*—Where exception is taken to the refusal of the court to dismiss the action, as in case of nonsuit, both after the close of plaintiff's evidence and after the defendant's evidence has been introduced, only the exception taken after the close of all the evidence will be con-

sidered on appeal, under the express provision of C.S. 567, and, so considered, the evidence must be accepted as true and construed in the light most favorable to the plaintiff. *Butler v. Mfg. Co.*, 547.

21. *Evidence—Expert—Opinion.*—Where there is evidence that the negligence of the defendant caused the physical injury to the plaintiff, the testimony of a physician, having qualified as an expert, is competent that following the injury the plaintiff complained of soreness in her side, which he, upon examination, found to have been caused by her ribs there being in a concaved condition. *Jordan v. Motor Lines*, 559.

22. *Evidence—Damages—Health—Contradiction.*—Where the plaintiff's action is to recover damages for injury to her health caused by defendant's negligence, and a witness in her behalf, on cross-examination, has testified to her having had a "fainting spell" before the injury, tending to show that she was then in bad health, it is competent, upon the redirect examination, for the witness to explain why she, on this occasion, had the "fainting spell," in contradiction of the defendant's contention. *Ibid.*

23. *Evidence—Negligence — Automobiles — Questions for Jury — Trials.* — *Held*, in this case, there was sufficient evidence to take the case to the jury that the driver of defendant's jitney motor bus was negligent in not exercising ordinary care in driving between the automobiles on the highway and thus causing a personal injury to the plaintiff in the action. *Ibid.*

24. *Evidence—Opinions—Experts—Qualifications—Appeal and Error—Presumptions—Burden of Proof.*—Where a witness has testified as an expert upon the trial in the Superior Court, the presumption on appeal, without more, is that he had qualified as such, or he had been admitted as an expert in the matter, or that no question had been made as to his being one; and the appellant, not having shown error, is concluded. *Vann v. R. R.*, 567.

25. *Evidence—Negligence — Contributory Negligence — Nonsuit — Trials.* — Where defendant's negligence is the ground alleged for plaintiff's damage to recover for a personal injury, contributory negligence being a matter of defense, cannot be considered upon a motion as of nonsuit upon the evidence. *Lapish v. Director General*, 593.

26. *Same—Railroads—Signals — Warnings — Public Crossings.* — Evidence that the defendant's train came around a sharp curve without signal or warning while plaintiff was attempting to go around defendant's other train on a different track at a public crossing, and that plaintiff had looked and listened for the train that injured him, but was prevented from knowing its approach by the negligence of the defendant's employee on the train, to give proper warnings, is sufficient to take the case to the jury upon a motion of nonsuit upon the evidence. *Ibid.*

27. *Evidence—Declarations—Ante Litem Motam—Adverse Possession—Limitation of Actions—Appeal and Error—Harmless Error.*—Where it is claimed that the former owner of lands, under whom a party claims by descent, has acquired title by adverse possession, it is competent to show, as substantive evidence, by a witness owning adjoining lands that *ante litem motam* his grantor staked out a corner therein for the purposes of a survey, which the ancestor of the party acknowledged to be the true line; and the further statement that the ancestor showed the witness the "common corner" is *held* too indefinite to be material, under the facts of this case. *Bowman v. Howard*, 662.

EVIDENCE—*Continued.*

28. *Evidence—Adverse Possession—Boundaries—Declarations—Ante Litem Motam.*—Where the title of a party to the action depends upon her legitimacy under a subsequent marriage of her parents, with evidence of family traditions to that effect, the words "reputed father," used in the statute, are construed to mean "considered, or generally supposed, or accepted by general or public opinion" to be such, and an exception claiming that they should be considered to mean "actual father" is without merit. *Ibid.*

29. *Evidence—Deceased Persons—Statutes—Title—Common Source—Parol Trusts.*—Where a suit seeks to engraft on the title of the grantee in the deed to land a parol trust in favor of the plaintiff, upon condition that he pay the purchase price and receive the title, the grantor, after the death of the holder of the legal title, is incompetent as a witness in plaintiff's favor to testify to the facts relied upon by him, being the common source of title of the plaintiff and the deceased, under whom the defendant claims. C.S. 1795. *Sherrill v. Wilhelm*, 673.

30. *Evidence—Hearsay—Principal and Agent — Brokers — Commissions.*—When the controversy is whether or not the owner was to pay his selling agent or broker a commission upon the sale of his lands at a certain price, or whether the price was to be net to him, a witness who has had a conversation with the owner respecting it does not render his evidence incompetent as hearsay, by the use of the words "my impression" or "my understanding," etc., these words referring more or less to the uncertainty of the memory of the witness; nor will the evidence be objectionable as uncertain of the source of this recollection when it may be seen by reference to his answers to other questions that he was testifying to what he had heard the owner say. *Shepherd v. Sellers*, 701.

31. *Evidence — Deeds and Conveyances — Delivery — Fraud — Self-serving Declarations—Deceased Persons.*—Where the plaintiff claims title to the lands in dispute under a deed from his father, since deceased, conditioned upon support, etc., and seeks to set aside a prior deed given by the same grantor to his son of a former marriage, as a cloud upon his title, and introduced this deed for that purpose, evidence of declarations of the grantor testified to by the plaintiff's attorney seven years afterwards that the defendant's deed, though absolute in form, was not delivered pending an agreement for support as its consideration, and that it was taken secretly by the defendant, and fraudulently registered by him, is inadmissible as a self-serving declaration of the declarant in his own favor and against the right of the defendant, under his deed. *Reece v. Woods*, 703.

32. *Evidence—Surveys—Maps.*—Where the plaintiffs and defendants claim title to the same lands by prior and junior grants from the State, respectively, the latter under color, and the ownership of the *locus in quo* depends upon the lappage of the plaintiffs' lands upon that of the defendant, it is competent for one who has surveyed a part of the lands to locate on his map the remaining part from a map that had been since made by another, properly in evidence, as illustrating his own survey, and to testify that the defendants, taking the other evidence as true, had cut timber from the plaintiff's land if the map made by the second survey was correct as to certain lines marked as boundaries. *Roane v. McCoy*, 727.

33. *Evidence—Grants—Maps.*—Where the plaintiff claims title to the *locus in quo* under a grant from the State, testimony of a witness upon the question as to whether he knew the location of the grant was properly excluded when the grant had not been introduced in evidence. *Ibid.*

34. *Evidence—Motions to Dismiss.*—A motion to dismiss a criminal action will be denied if the evidence favorable to the State is sufficient to sustain a con-

EVIDENCE—*Continued.*

viction, without considering that upon which the defendant relies. *S. v. Martin*, 846.

35. *Evidence—Statements—Denials—Criminal Law—Miscarriage—Statutes.* The testimony as to the statement of a woman on whom the defendant was charged with bringing on a miscarriage or abortion, in violation of the provisions of C.S. 4226-4227, that the defendant had paid the physician one-half of the $200 fee he had charged for such services, and uttered in the defendant's presence, is *held* competent with the other evidence in this case; and whether the defendant, under the circumstances, was so intoxicated that he did not understand, presented a question for the jury to determine as to whether the woman's statement was made in the hearing as well as in the defendant's presence; whether they were understood by him, or he denied them or remained silent. *Ibid.*

36. *Evidence—Homicide—Murder—Res Gestæ.*—Upon a trial for murder, circumstantial evidence, forming a part of the *res gestæ*, is properly admitted. *S. v. Slagle*, 894.

EXAMINATION.

See Pleadings, 1.

EXCEPTIONS.

See Drainage Districts, 10; Pleadings, 21; Appeal and Error, 87, 90.

EXECUTORS AND ADMINISTRATORS.

See Deeds and Conveyances, 18; Guardian and Ward, 3; Limitation of Actions, 6; Public Administrators; Actions, 10; Limitation of Actions, 5.

EXECUTION.

See Appeal and Error, 30; Deeds and Conveyances, 10; Judgments, 21; Wills, 10, 13.

EXEMPTIONS.

See Constitutional Law, 5.

EX MALIFICIO.

See Trusts, 3, 4.

EXPENSES.

See Receivers, 2.

EXPRESS COMPANIES.

See Appeal and Error, 35, 36; Parties, 2.

Express Companies—Director General—Government—Railroads—Measure of Damages—Evidence—Diminution of Damages.—In an action against the Director General of Railroads while in control of express companies, as a war measure, for the complete destruction, by negligence, of a shipment by express, the defendant may show, if he can, that there remained value in the damaged shipment, in diminution of the amount of recovery, but not having attempted to do so in this case, he must be satisfied with the damaged shipment, which is left with him for whatever benefit he may derive therefrom. *Cauble v. Express Co.*, 449.

EXTENSION.

See Deeds and Conveyances, 6; Appeal and Error, 63.

FACTS.

See Appeal and Error, 16; Contracts, 1; Actions, 5; Evidence, 11, 16; Judgments, 10.

FALSE ARREST.

See Appeal and Error, 28; Military, 3: Principal and Agent, 3.

FATHER AND SON.

See Automobiles, 1.

FEDERAL DECISIONS.

See Railroads, 1.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Employer and Employee, 7.

FEDERAL LAW.

See Railroads, 1; Statutes, 8.

FEES.

See Attorney and Client, 4, 5, 6, 8, 10, 11.

FEE SIMPLE.

See Estates, 1; Wills, 1, 15, 22.

FILING.

See Deeds and Conveyances, 7.

FINDINGS.

See Appeal and Error, 3; *Habeas Corpus*, 4; Reference, 1.

FIRES.

See Mortgages, 4.

FIRM.

See Equity, 7.

FISH COMMISSION.

See Constitutional Law, 22; Indictment, 1.

1. *Fish Commission—Jurisdiction—"Waters of the State"—Specific Localities—Statutes—Interpretation.*— The jurisdiction of the board of fish commissioners over "the several waters of the State" is not confined to those specifically mentioned in C.S. 1878, for they are only mentioned because the Legislature thought it desirable or necessary to make special provision for those places. *S. v. Dudley*, 822.

2. *Fish Commission—Jurisdiction—Escallops — Words and Phrases — Statutes.*—The taking of escallops from the "several waters of the State" expressly comes within the authority conferred by statute on the board of fish commissioners, and is also likewise included in the expression "mollusca," being "of the species pectinidae." C.S. 1865 to 2078. *Ibid.*

FLIGHT.

See Appeal and Error, 92.

FORECLOSURE.

See Trusts, 7.

FOREIGN DEFENDANT.

See Courts, 11.

FORGERIES.

See Banks and Banking, 7.

FORM.

See Instructions, 4.

FRANCHISE.

See Corporations, 4; Municipal Corporations, 1, 4.

FRAUD.

See Judgments, 12; Corporations, 14; Trusts, 3; Attorney and Client, 9; Courts, 6; Wills, 23, 25, 26; Evidence, 31.

FREE TRADER.

See Deeds and Conveyances, 19.

FUNCTUS OFFICIO.

See Taxation, 1.

FUNDS.

See Constitutional Law, 12; Highways, 1.

GOVERNMENT.

See Constitutional Law, 3; Pleadings, 2; Drainage Districts, 4, 5; Railroads, 1, 3, 4; Appeal and Error, 35, 36; Cities and Towns, 2; Express Companies, 1.

GRANTS.

See Evidence, 33; Instructions, 16.

GUARDIAN AND WARD.

See Constitutional Law, 10; Limitation of Actions, 4.

1. *Guardian and Ward—Clerks of Court—Summons—Personal Service on Ward—Valid Process—Statutes.*—Where a guardian *ad litem* has been duly appointed to represent a party to an action under disability, the court will protect his interest, and though our statute specifies that a summons must be served on such person, no practical harm would result therefrom to the ward where a guardian *ad litem* has been appointed, and he accepts the service of the summons and presumably performs his statutory duties; and the proceedings will not be declared void as to the ward when such has been done. C.S. 451. *Groves v. Ware*, 553.

2. *Guardian and Ward—Disability—Insane Persons—Clerks of Court—Appointment—Certificates—Public Institutions—Statutes—Evidence—Officers.*—The certificates of the superintendents of hospitals for the insane, which are to be received as sufficient evidence for the clerk of the Superior Court to appoint a guardian for an insane person, etc., when duly sworn to and subscribed before the clerk of the Superior Court, notary public, etc., C.S. 2236, relates to the superintendents of such hospitals under governmental control, and do not include within the meaning of the statute superintendents of private institutions of this character, and the appointment by the clerk of guardians *ad litem* on their certificates is void. *Ibid.*

3. *Guardian and Ward—Where Appointed—Wills—Testator—Domicile—Executors and Administrators.*—Where the infant grandchildren of the testator take upon a contingency, as directed by the will, properly probated here, it is required that the guardian appointed be a resident of this State, according to our law, unless the funds have been properly removed to another state, C.S. 2195, 2196; and the laws herein govern the interpretation of the will when the testator died domiciled here. *Cilley v. Geitner*, 714.

GUESTS.

See Negligence, 1.

HABEAS CORPUS.

See Appeal and Error, 5.

1. *Habeas Corpus—Parent and Child—Courts—Juvenile Courts—Superior Courts—Jurisdiction.*—The Juvenile Court act, C.S. 5039 *et seq.*, gives exclusive original jurisdiction to the Superior Court where the custody of a child less than sixteen years of age is in question, and establishes the juvenile courts as separate, though not necessarily independent parts of the Superior Courts for the administration of the act, and makes the clerks of the Superior Courts judges of the juvenile courts. *In re Hamilton*, 44.

2. *Same—Appeal.*—The Juvenile Court act, C.S. 5039 *et seq.*, provides in a later section that the term "court," when used without modification, shall refer to the juvenile court, and provides for an appeal from any judgment of that court to the Superior Court. *Ibid.*

3. *Same—Review—Superior Court.*—Where the Superior Court judge has referred a proceeding brought by a husband in that court for the custody of his child, less than sixteen years of age, and the matter comes on appeal to the Superior Court again, the validity of the order sending or transferring the petition to the juvenile court for original investigation does not present a controlling question, or affect the jurisdiction of the Superior Court on the appeal, for thereon the judge thereof has ample authority to hear the case, either because it was properly instituted in the first instance or by virtue of the appeal. C.S. 5039 *et seq. Ibid.*

4. *Habeas Corpus—Appeal and Error — Findings — Evidence.* — Where the proceedings for the custody of a child under sixteen years has been transferred to the juvenile court, and comes again to the Superior Court judge on appeal, the judge of the latter court has authority to review the findings of fact and the judgment of the former court, under the supervision and control given him by the statute, C.S. 5039 *et seq.*, and his findings upon competent evidence are conclusive on appeal to the Supreme Court. *Ibid.*

5. *Same—Interest of Child—Grandparents.*—While *prima facie* the parent has the right to the custody of his child in preference to others, this right is not an absolute one and must yield when the best interest of the child requires it; and when the father has filed his petition in *habeas corpus* proceeding for the custody of his child in the possession of his deceased wife's parents, the award of the Superior Court judge for the respondents upon findings, sustained by the evidence, that the father was an unsuitable person, and that the best interest of the child required that she should remain with her grandparents, will not be disturbed in the Supreme Court on appeal. *Ibid.*

HARMLESS ERROR.

See Evidence, 27; Instructions, 15; Intoxicating Liquor, 5.

HEALTH.

See Evidence, 22; Injunction, 6.

HEARSAY EVIDENCE.

See Descent and Distribution, 1.

HEIRS.

See Wills, 6, 21; Deeds and Conveyances, 18.

HIGH SCHOOLS.

See School Districts, 2.

HIGHWAYS.

See Roads and Highways.

HOMICIDE.

See Appeal and Error, 79, 80, 81, 92; Evidence, 36.

1. *Homicide—Fircarms—Evidence.*—Where there is evidence, on the trial of an indictment for homicide, that the defendant and several others were congregated at the place where the shooting occurred, attracting public attention, which caused the sheriff to go and take two others with him, including the witness, it is competent for this witness to testify that he saw the defendant firing the pistol which resulted in the homicide, both as contradicting the defendant's evidence that he did not have a pistol, and as showing that the witness, who accompanied the sheriff in an attempt to prevent a general row, was rightfully on the premises. *S. v. Hairston*, 851.

2. *Homicide—Murder—Evidence—Nonsuit—Trials.*—Where, upon the trial for murder, there is direct evidence of the actual shooting of the deceased by the defendants, and circumstantial evidence that they afterwards loaded the deceased's body in a wagon and took it to the place where he was afterwards found dead, a motion as of nonsuit was properly denied. *S. v. Slagle*, 894.

3. *Homicide—Murder—Evidence—Nonsuit — Trials — Dismissal as to One Defendant—Instructions—Prejudice—Appeal and Error.*—Where two defendants are tried for committing the same crime, the court, upon the evidence, eliminates one of them from the trial upon nonsuit, and a part of the evidence is only admissible as to the one thus discharged, it will not be held as prejudicial to the other when the judge instructed the jury, unmistakably, that this evidence must not be considered against the defendant remaining on trial. *Ibid.*

4. *Homicide—Murder—Circumstantial Evidence—Questions of Law—Questions for Jury—Trials.*—Whether the accumulated and connected strength of circumstantial evidence is sufficient as a whole to sustain a verdict of the jury of guilty in a criminal action, is for the court to decide as a matter of law, and when so held, it is for the jury to determine whether they are satisfied thereon of the defendant's guilt beyond a reasonable doubt. *S. v. Blackwelder*, 899.

5. *Same—Arrest Statutes.*—There being direct evidence upon this trial for murder that at night the deceased heard his garage on his premises, wherein was his automobile, being broken into, and upon going there saw several men, whom in the dark he did not recognize; and sufficient circumstantial evidence that the prisoner was one of these, whom he endeavored to arrest with his gun, and who fired upon him, inflicting the mortal wound, it is *held* sufficient to submit to the jury on the question whether the deceased had reasonable ground to believe the prisoner had committed a felony in his presence, under the provisions of C.S. 4235, 4543, and a verdict of murder in the second degree is sustained in this case. *Ibid.*

HOTELS.

See Negligence, 1.

HUSBAND AND WIFE.

See Actions, 1, 15; Assault, 3; Judgments, 3; Criminal Law, 2, 9; Married Women, 1, 3; Bills and Notes, 4; Deeds and Conveyances, 14; Wills, 28; Appeal and Error, 85.

ILLEGITIMATES.

See Constitutional Law, 15; Descent and Distribution, 1.

IMPROVEMENTS.

See Constitutional Law, 4; Cities and Towns, 1, 2, 3; Roads and Highways, 4.

INDEX.

See Deeds and Conveyances, 7.

INDICTMENT.

See Criminal Law, 1, 14, 27, 28; Intoxicating Liquors, 3, 10.

Indictment—Form—Fish Commission—Statutes.—Where the indictment sufficiently sets forth the facts under which the defendant is charged with the offense of violating the regulations of the board of fish commissioners, passed at various times, contrary to the form thereof, it is sufficient to sustain a conviction, though in better form had it added "contrary to the statute in such case made and provided," but this is not required under the provisions of C.S. 4625. *S. v. Dudley*, 822.

INDORSEMENT.

See Bills and Notes, 5.

INFANTS.

See Deeds and Conveyances, 5.

INJUNCTION.

See Bills and Notes, 2; Schools, 1; Equity, 1; School Districts, 3; Drainage Districts, 10.

1. *Injunction—Surface Water—Division of Stream.*—An injunction will lie against an upper proprietor of lands diverting the natural flow of water thereon to the damage of the lower proprietor. *Rhyne v. Mfg. Co.*, 489.

2. *Same—Pollution of Stream—Property.*—Where a cotton mill and settlement has diverted the natural flow of water on its lands containing sewage and filth from its mill upon the lands of the adjoining lower proprietor so as to pollute his springs and cause him to cease to use it for his cattle and his land for pasture, a permanent injunction will lie. *Ibid.*

3. *Same—Health—State Board of Health—Sewage—Treatment—Injunction—Damages.*—Where a cotton mill and settlement has polluted a stream upon its own land and diverted its flow upon the lands of a lower proprietor, which caused him to abandon his spring for watering his cattle and his pasture, the fact that the mill company had constructed a septic plant in accordance with plans furnished by the State Board of Health, C.S. 7179 *et seq.*, will not exonerate the defendant from injunction or liability for damages. *Ibid.*

4. *Same—Private Corporations — Eminent Domain — Property — Constitutional Law—Due Process.*—The action of the State Board of Health in directing the establishment of a septic tank by a cotton mill and settlement for the treatment of sewage of a stream which the mill company diverted to the land of the lower proprietor, the compliance by the company cannot have the effect of concluding the right of the lower proprietor for injunctive relief and damages caused thereby to his lands, as that would be to permit a private corporation, without the right of eminent domain, to take the property of another without his consent or giving him a day in court. *Ibid.*

5. *Same—Actions and Defenses—Offer to Purchase—Inconvenience.*—A cotton mill corporation which has unlawfully diverted its polluted stream upon the

INJUNCTION—*Continued.*

lands of a lower proprietor, amounting to the taking of property and menace to health, may not successfully defend a suit for injunction and damages by offering to buy a part of the plaintiff's lands, or on the ground that a permanent injunction would work an inconvenience in the operation of its mill. *Ibid.*

6. *Injunction—Labor Unions—Strikes — Evidence — Dismissal.* — The evidence in this action to restrain the "strikers" individually and as printers' unions from such acts and conduct as are alleged to prevent the plaintiff printing establishments and certain of their employees, nonunion printers, from exercising their rights to employ and receive employment, etc., is *held* not sufficient to sustain an injunction granted to the hearing, by the trial judge, and the injunction is dissolved without prejudice to the rights of any of the parties. *McGinnis v. Typo. Union*, 770.

7. *Injunction—Pleadings—Demurrer—Evidence.*—In a suit asking for an injunction, a demurrer admits the allegations of the complaint, and the Supreme Court, on appeal, will not settle the controversy on conflicting evidence; and where the defendant's admissions upon the demurrer justifies it, the injunction should be continued to the hearing. *S. v. Scott*, 866.

8. *Injunction—Ultra Vires Acts—Public Accountants — Acts Committed — Continuing Powers.*—Where an injunction is sought to restrain an *ultra vires* act of the State Board of Public Accountancy in holding an examination for the applicants for license as public accountants, beyond the boundaries of the State, the courts, upon sufficient evidence or admissions, will continue the restraining order to the hearing, to prevent the commission of such acts in the future, and the objection cannot be successfully maintained, that the specific act complained of has been committed and leaves nothing for such order to operate upon, nor will the declaration by the board that they will not do so in the future affect the matter. *Ibid.*

IN PAIS.

See Contracts, 10.

IN PARI MATERIA.

See Criminal Law, 4; Statutes, 11.

INQUISITION.

See Constitutional Law, 10; Insane Persons, 1.

INSANE PERSONS.

See Divorce, 1; Constitutional Law, 10; Guardian and Ward, 2; Limitation of Actions, 4.

Insane Persons—Disability—Statutes — Inquisition of Lunacy — Partition—Ratification—Deeds and Conveyances—Statutes.—Where the clerk of the court has unlawfully appointed a guardian *ad litem*, upon insufficient evidence, in proceedings to partition land, and thereafter the ward has been adjudged sane under the proceedings of C.S. 2287, the ward may ratify the division of land allotted in the proceedings by receiving the benefits thereof, and executing interchangeable deeds with the other parties. *Groves v. Ware*, 554.

INSPECTION.

See Employer and Employee, 5.

INSTALLMENTS.

See Judgments, 14.

INSTRUCTIONS.

See Courts, 3; Trusts, 4; Negligence, 3, 10, 19; Wills, 9, 13, 14; Appeal and Error, 19, 27, 41, 42, 44, 45, 50, 52, 59, 79, 80, 81, 82, 83, 84, 89, 92: Deeds and Conveyances, 5; Employer and Employee, 6; Pleadings, 18; Cities and Towns, 1; Intoxicating Liquor, 11; Damages, 3; Partnership, 2; Verdict, 1, 2; Criminal Law 24, 29; Seduction, 3, 5; Assault, 4; Homicide, 3.

1. *Instructions—Courts—Improper Remarks—Prejudice—Statutes—New Trials.*—In an action to recover damages for personal injury, where a release from liability is set up and relied upon, with evidence to support it, it is reversible and ineradicable error for the judge, during the trial and in the presence and hearing of the jury, to stop the testimony of the defendant's witness, a nonresident attorney who had procured the release, and question him upon the professional ethics involved and the standard in his own state of such conduct: which reflected on the witness, and no effort being made on his part to remove, by instruction or admonition to the jury, the prejudice thus necessarily occasioned, a new trial before another jury will be ordered on appeal. C.S. 564. *Morris v. Kramer*, 87.

2. *Instructions—Trials—Evidence—Admissions.*—Where the defendant, an employee of plaintiff, in the latter's action to recover a certain amount of the former's overdraft on account of services rendered, admits this amount, but sets up a counterclaim in a certain sum, which would more than cover the plaintiff's demand, and the stipulation as to the salary showing this difference, is the only disputed fact, an instruction to the jury that if they find that the plaintiff had promised to pay the defendant the amount claimed by him, to find the issue for the defendant in the amount of the counterclaim, less the plaintiff's claim, is not erroneous. *Wilson v. Batchelor*, 93.

3. *Instructions—Verdict Directing—Evidence.*—An instruction that directs a verdict upon the evidence in favor of one of the parties to the action is reversible error to the prejudice of the other when there are such reasonable inferences therefrom as would justify the verdict of the jury in his favor. *Brooks v. Mill Co.*, 258.

4. *Same—Form—Appeal and Error—Prejudice.*—The language of a direction by the trial judge of the verdict upon the evidence in favor of a party to the action, that "if you believe the evidence testified to by the witnesses in the case" they should so find, is inexact and contrary to the form suggested by the Supreme Court, and will constitute reversible error when to the prejudice of the other party appealing therefrom. *Ibid.*

5. *Instructions—Evidence—Testimony of One Witness—Excluding Testimony—Trials—Appeal and Error.*—Where the dividing line, or lines, between the lands of the plaintiff and defendant are in dispute in an action of ejectment, and deeds and maps of survey relating thereto are in evidence, together with the testimony of the surveyor, an instruction, in effect, that the jury render their verdict accordingly, without regard to the oral testimony offered by either side to show the proper location of the lines, is erroneous in singling out the testimony of one witness by name, and also in taking his evidence out of its proper setting in its relation to the other evidence, which may have tended to modify or explain it. *Taylor v. Meadows*, 266.

6. *Instructions—Correct as a Whole—Erroneous Portions.*—The charge of the court must be construed connectedly as a whole, presuming that the jury considered every portion thereof; and if it presents the law fairly and correctly, it will not be held erroneous because of some of its expressions, standing alone, may be regarded as erroneous. *White v. Hines*, 276.

INSTRUCTIONS—*Continued.*

7. *Same—Res Ipsa Loquitur—Prima Facie Case.*—Where the charge of the court, under the doctrine of *res ipsa loquitur*, places the burden of the issue of negligence on the plaintiff, and gives the proper effect to the *prima facie* case, if established, the defendant is required to go forward with his evidence in explanation or take the chances of an adverse verdict. *Ibid.*

8. *Instructions—Material Omissions—Appeal and Error.*—A material omission in the charge of the trial court to the jury of the principles of law involved upon a phase of the case he has assumed to instruct them upon is affirmative and reversible error. *Smith v. R. R.*, 290.

9. *Instructions—Contentions—Appeal and Error—Objections and Exceptions.*—An exception relating to the statement of the contentions of the parties by the trial judge in his charge to the jury will not be considered on appeal unless the alleged error had been brought to his attention at the time and before the case has been given to the jury. *Walker v. Burt*, 326.

10. *Instructions—Construed as a Whole—Trusts—Trustee—Deeds and Conveyances—Parol Evidence—Statute of Frauds.*—The words of a deed or other written instrument should be so construed in their relation to each other as to reasonably give effect to the intention of the parties to be thus ascertained, requiring in certain instances that it be taken more strongly against the grantor; and where an instrument, so construed, shows this intent to be that one of the parties should take title to lands in himself creating an active trust, coupled with an interest, for the purposes of a resale for the purpose of sharing of the profits, or losses, as the case may be, an expression used, to wit, "the property is to be sold by us," considered in its relation with the context, does not, when he has been estopped by matters *in pais*, require that the *cestui que trust* join in the deed of the trustee to convey a valid title to the purchasers at the resale, or fall within the inhibition of the statute of frauds. Upon a fair construction of the instrument, a sale, and deed by the trustee to the purchaser, were all sufficient. *Wells v. Crumpler*, 352.

11. *Instructions—Theory of Trial—Evidence—Context.*—Instructions to the jury are considered with reference to the theory upon which the case is tried, and the evidence and contentions of the parties, and are construed with the context. *Poindexter v. Call*, 367.

12. *Instructions—Verdict Directing—Arguments — Jury — Courts — Appeal and Error.*—A direction of the verdict upon the evidence renders immaterial an exception that the appellant had been deprived of the right to the last speech to the jury. *Anderson v. Albemarle*, 434.

13. *Instructions—Appeal and Error—Harmless Error—Negligence—Automobiles—Collision—Joint Tort Feasors.*—A charge of the court will not be construed disjointly, but as a whole, in relation to each subject-matter, and where the defendant's liability depends upon the concurrent negligence of the driver of his own automobile and the negligence of the driver of another one, in proximately causing a personal injury to a passenger in his machine, an instruction by the court on the issue of defendant's negligence which leaves out the question of the proximate, sole, and efficient cause, though error in itself, will not be considered for reversible error, if immediately followed by an instruction correcting this omission, and so repeated elsewhere in the charge that the jury must have understood the correct principle for their guidance in rendering their verdict. *White v. Realty Co.*, 536.

INSTRUCTIONS—*Continued.*

14. *Instructions—Interpretation—Connected Whole—Unconnected Parts.*—The instruction of the court upon the trial of this action to recover for lumber sold and delivered, laid down the correct rules of law for the guidance of the jury, properly construing the charge as a related whole, and not as to its unconnected parts. *Maney v. Greenwood*, 580.

15. *Same—Appeal and Error—Harmless Error.*—In this action to recover for sound merchantable lumber sold and delivered under a contract, an instruction that the defendant could not reject "any," if some of it was of the required kind, is held to mean that "all" could not be rejected if some of it was of that kind, it appearing, under a proper interpretation of the charge, as a connected whole, that this was the intention of the judge, and that the jury could not have been thereby misled, but that they so understood the charge from the context. *Ibid.*

16. *Instructions—Deeds and Conveyances—Adverse Possession—Color—Boundaries—State Grants.*—Where the title to the *locus in quo* is dependent upon the allegation in the answer that the lands under the plaintiff's grant from the State overlapped the land claimed by adverse possession under color, and this is the only disputed fact, an instruction to the jury that defendant's possession, outside of the plaintiffs' boundaries, would not be extended to defeat the latter's title, and putting the burden on the plaintiff to show his title, and on the defendant to show the lappage upon his own land, is not reversible error. *Roane v. McCoy*, 728.

17. *Instructions—Contentions—Disagreement Between Judge and Attorney—Jury.*—When the counsel and judge disagree as to a part of the evidence introduced during the trial, in the charge to the jury while stating the contentions of the parties, it is proper for the court to instruct the jury to depend upon their own recollection of the evidence. *S. v. Slagle*, 895.

INSURANCE.

See Principal and Agent, 5, 8.

1. *Insurance—Landlord and Tenant—Crops—Insurable Interests.*—The interest of the tenant in the undivided crops, and housed in the landlord's barn, is insurable. *Batts v. Sullivan*, 129.

2. *Same—Insurance Taken Out by Tenant—Payment of Policy.*—Where the undivided crop of the landlord and tenant has been housed in the latter's barn, and while insured by the tenant for his sole benefit has been destroyed by fire, and the insurance company has paid the loss, in the landlord's action the tenant is entitled to the full amount of the loss so paid; and the question as to the validity of the policy and the extent of the landlord's interest in the crop does not arise. *Ibid.*

INTENT.

See Contempt, 1; Trusts, 3; Assault, 1, 4; Wills, 4, 18; Contracts, 29; Criminal Law, 22; Intoxicating Liquors, 8.

INTEREST.

See Insurance, 1; Trusts, 8; Contracts, 24.

INTERVENTION.

See Attorney and Client, 7; Actions, 14; Attachment, 6.

INTOXICATING LIQUOR.

See Criminal Law, 14; Witness, 1; Appeal and Error, 95; Constitutional Law, 27.

INTOXICATING LIQUOR—*Continued.*

1. *Intoxicating Liquor—Manufacture—Evidence—Questions of Law—Nonsuit—Trials.*—The legal sufficiency of evidence to be submitted to the jury to convict the defendant of the illicit manufacture of intoxicating liquor is a question for the court to first determine; and where it raises only a mere conjecture, or shows only a bare possibility of guilt, the burden of proof beyond a reasonable doubt being on the State, it is insufficient; and defendant's motion to nonsuit thereon should be granted. *S. v. Prince*, 788.

2. *Same.*—Evidence that a still operated on a path leading to a public road which passed defendant's dwelling, but was not on his premises, and indications that at a remote period spirituous liquor had been manufactured in that vicinity, without evidence that it had been made on his lands and that nothing was found on his premises to indicate his violation of the law, and there being no other evidence that he was operating the still, is merely conjectural and insufficient to show the defendant's guilt in the unlawful manufacture of spirituous liquor, and his motion to nonsuit thereon, under the statute, was properly granted. *Ibid.*

3. *Intoxicating Liquor—Unlawfully Keeping Liquor for Sale — Evidence — Indictment—Counts.*—Where the trial is upon an indictment with two counts, one for the unlawful sale of spirituous liquors, and the other for unlawfully keeping it for sale, evidence of the sale to various persons not named in the bill is competent upon the second count. *S. v. Haywood*, 815.

4. *Intoxicating Liquor—Sales Through Another—Evidence.*—Upon the count in the indictment that the defendant unlawfully kept spirituous liquor for sale, evidence that it was sold by defendant to a certain person through another who went for it and paid the price is competent thereon, though it may not be upon a separate count alleging the unlawful selling of spirituous liquor by the defendant. *Ibid.*

5. *Intoxicating Liquor—Return in Kind—Barter—Payments—Evidence — Appeal and Error—Harmless Error.*—A loan of intoxicating liquor upon a promise that it should be returned in kind is a violation of our prohibition law, and where there is further evidence that the buyer had promised to pay in money, rejection of testimony as to whether the defendant had eventually been paid is immaterial either the barter or the promise to pay being sufficient. C.S. 3378. *S. v. Lemons*, 828.

6. *Intoxicating Liquor—Nonsuit—Motions—Evidence—Questions for Jury.* Evidence tending to show that a furnace for a still had been found in the vicinity of the defendant's home, from which the still had been removed, but found nearer defendant's residence, with other evidence that spirituous liquor had been made and found there, and also found at defendant's home to which was a pathway, with the other evidence in this case: *Held*, sufficient to sustain a verdict of the defendant's guilt in unlawfully manufacturing spirituous liquor and having it in possession for the purposes of sale. *S. v. Crouse*, 835.

7. *Same—Instructions—Expression of Opinion—Statutes—Appeal and Error.*—Where there is evidence sufficient to convict the defendant for unlawfully manufacturing spirituous liquor and keeping it on his premises for sale, the giving of a requested instruction that the jury should consider the fact that the still was not on the defendant's premises as tending to show his innocence, would be an expression of the judge's opinion upon the weight and effect of the evidence, and is properly refused. *Ibid.*

8. *Intoxicating Liquor—Evidence—Scienter—Correlated Facts — Intent.* — Where there is evidence that the still and liquor were found in the possession of

the defendant, charged with the unlawful manufacture and sale of intoxicants, and under his control, the question of his intent or purpose becomes both relevant and material, and it may be shown as throwing light on that question, but not as a separate offense, that about ninety days before the trial a still was found near the defendant's house, giving indication that it had been operated the preceding night. *Ibid.*

9. *Intoxicating Liquor—Spirituous Liquor—Unlawful Sale—Statutes—Evidence—Reputation.*—Where there is substantive evidence tending to show the guilt of the defendant in having spirituous liquor for sale in violation of C.S. 3378, and his defense, supported by his evidence, is that some one else had taken the jugs and bottles of whiskey to his home in his absence, without his knowledge, where the officer had found them, the general bad reputation of the defendant for unlawfully selling whiskey may be shown as a circumstance in corroboration of other evidence tending to show guilt, C.S. 3383. *S. v. McNeill*, 855.

10. *Intoxicating Liquors—Statutes—Criminal Law—Indictments—Separate Offenses—Motions—Verdict—Appeal and Error.*—Objection to a bill of indictment on account of duplicity comes too late after verdict, and where it is to the charge of two separate offenses in the same bill, one under C.S. 3407, for unlawfully permitting a still to be set up for operation on the defendant's land; and the other for unlawfully manufacturing spirituous liquor, C.S. 3409, and there is sufficient evidence on the latter count, a judgment upon the verdict on that count will be sustained. *S. v. Mundy*, 907.

11. *Intoxicating Liquors—Spirituous Liquors—Statutes—Possession—Prima Facie Case—Instructions—Criminal Law.*—Where the judge has withdrawn from the consideration of the jury the question of *prima facie* guilt of violating the statute from the possession of more than one gallon of spirituous liquor, C.S. 3379, a conviction under C.S. 3385, in having more than one quart thereof in possession, will be sustained when supported by competent evidence. *S. v. Campbell*, 911.

12. *Intoxicating Liquors—Spirituous Liquors—Criminal Law—Warrant for Arrest—Statutes.*—Where the defendant has been arrested for violating our prohibition law, and at his own request he is not searched, but voluntarily produces five pints of spirituous liquor concealed in different places on his person, before the committing magistrate, the question of search and seizure without a warrant and the Federal constitutional question predicated thereon does not arise; and he may be convicted under C.S. 3385, 3384, by the provisions of C.S. 4548, relating to an arrest without a warrant for offenses committed in the presence of the officer, etc. *Ibid.*

INVESTIGATION.

See Constitutional Law, 6.

INVITATION.

See Negligence, 6.

INVITEE.

See Negligence, 1.

ISSUES.

See Pleadings, 6, 17; Attachment, 6; Accord and Satisfaction, 4; Appeal and Error, 26, 41; Ejectment, 2, 3; Verdict, 1; Statutes, 9.

1. *Issues—Court's Discretion.*—Where the issues submitted by the trial judge are directed to the material facts arising upon the pleadings, and afford full opportunity to the parties of presenting the various phases of the controversy,

ISSUES—*Continued.*

without prejudice, their number is within the discretion of the court. *Walker v. Burt*, 326.

2. *Same—Evidence—Appeal and Error.*—Where it is not controverted that the plaintiff had received the defendant's check stated to be in full of a part of a disputed account between them, and later a check stating that it was in full of the balance, evidence offered by the plaintiff as to the status of the affairs between them at each of these times is properly excluded, in the absence of fraud, imposition, or mistake. *Long v. Guaranty Co.*, 178 N.C. 507, cited and distinguished. *Ibid.*

JOINT TORT FEASORS.

See Instructions, 13; Negligence, 8.

JUDGMENTS.

See Attorney and Client, 2, 5, 11; Malicious Prosecution, 1, 3, 4, 5, 6, 7; Appeal and Error, 14, 17, 29, 31, 32, 39, 40, 55; Railroads, 2, 4; Receivers, 1; Statutes, 6; Deeds and Conveyances, 10, 20; Bills and Notes, 5; Contracts, 24; Discovery, 2; Criminal Law, 30.

1. *Judgments—Irregular Judgments—Judgments Set Aside—Malicious Prosecution.*—Where a court of competent jurisdiction has, upon orderly procedure and sufficient evidence, entered judgment against the defendant in the action and ordered execution against his person, as provided in C.S. 673, and accordingly the defendant has been arrested, the subsequent recalling the execution or setting aside of the judgment in the course and practice of the courts, for irregularity, do not of themselves so disturb the facts established or the judgment rendered thereon as to permit the defendant thereafter to maintain his action for malicious prosecution against the plaintiff in the former one. *Overton v. Combs*, 5.

2. *Judgments—Estoppel—Parties—Privies—Actions.*—A judgment in an action is not effective as a bar or estoppel in any other action unless between the same parties or privies, for the same cause of action. *Hipp v. Dupont*, 9.

3. *Same—Married Women—Husband and Wife—Statutes—Negligence—Torts.*—Under the married woman's act, the wife is not a necessary party or privy to her husband's action to recover damages for a personal injury negligently inflicted on him by a third person, and an adverse judgment rendered in the court of another state, wherein she was not a party, does not bar her recovery in her action brought in the courts of this State for the damage she has independently and individually sustained, which was proximately caused by the same injury alleged to have been negligently inflicted on her husband. *Ibid.*

4. *Judgments Set Aside—Motions—Attorney and Client—Consent of Client—Procedure.*—Where the court has entered a judgment appearing by record as upon the consent of the parties, and thereafter it is properly made to appear on motion and by affidavits that the plaintiff's attorney not only did not have his client's consent, but had acted contrary to her instructions, substantially impairing her rights in the subject-matter of the litigation, the Superior Court judge, at a subsequent term, in proper instances, may pass upon the question, and the fact that the former judge has regularly entered the judgment as upon the consent of the parties does not affect the power of the subsequent judge, hearing the motion, to set the judgment aside. *Bizzell v. Equipment Co.*, 99.

5. *Same—Verdicts—Conditions Imposed by Court.*—Where the plaintiff in ejectment is suing for possession and the recovery of a certain amount of rent money and the jury has found the issue as to possession in her favor and awarded

JUDGMENTS—*Continued.*

a recovery for rental in a certain less amount, and the judge has said he would set the entire verdict aside unless the plaintiff agreed to a still less sum than the amount of the verdict, and her attorney without her consent and against her instruction has agreed thereto, and the judgment was accordingly entered, appearing on its face to be by consent of the parties, on a subsequent motion and affidavits to set the verdict aside, the plaintiff may not take advantage of the verdict on the issue in her favor, and repudiate the verdict on the second one, as to the amount of recovery for the rent, and the judge hearing the motion and so finding the facts should set the entire verdict aside. *Ibid.*

6. *Judgments Set Aside—Motions—Terms of Court—Equity.*—C.S. 591, requiring that a motion to set aside a verdict be made before the judge who tried the cause, and in term, refers to motions made in the ordinary course and practice of the courts, and does not impair or interfere with equitable principles controlling the conduct of the litigant in the subsequent course of a proceeding. *Ibid.*

7. *Judgments Set Aside—Verdict—Attorney and Client—Consent—Estoppel—Equity.*—Where the trial judge has announced his decision to set aside a verdict unless the parties should agree in a certain particular, to which the plaintiff's attorney agreed without the consent of his client and against her instructions, and the judgment so agreed upon has been accordingly entered, the plaintiff may not thereafter repudiate the agreement made in her behalf by her attorney, and also repudiate the result thereby attained, and she is estopped from resisting the entry of judgment setting aside the verdict *nunc pro tunc*. *Ibid.*

8. *Judgments—Courts—Law and Equity—Parties—Railroads—Director General—Dismissal of Action—Affirmance—Appeal and Error.*—Under our present code of civil procedure, administering both principles of law and equity in the same court, with express statutory provision that judgment may be given for or against several plaintiffs or defendants in the same action, determining the ultimate rights of all parties between themselves, leaving the action to be proceeded with whenever a several judgment is proper, it is *held* that where an action is properly brought against the Director General of Railroads, under Government management, and against the railroad company, and a judgment has been obtained against both, the setting aside on appeal of the judgment against the railroad company and affirming it as to the Director General does not necessarily prejudice any of the rights of the latter, especially does it not do so when it appears that separate issues have been submitted as to each, and answered adversely to each of them by the jury. *Wyne v. R. R.*, 254.

9. *Judgments—Process—Service—Record—Void Judgments—Motions to Set Aside—Procedure.*—A judgment *in personam* without voluntary appearance or service of process within the jurisdiction is void, and when such facts appear upon inspection of the record it may be treated as a nullity or set aside on motion, and the party charged allowed to make his defense. *Graves v. Reidsville*, 330.

10. *Same—Facts Proven.*—Where a judgment has been entered against a defendant, who has neither been served with summons or waived service thereof, he may, upon the establishing of the fact, have the same set aside on motion in the cause, and his defense considered and passed upon by the court, according to law. *Ibid.*

11. *Same—Courts—Justices' Courts.*—The principle both as to the right and procedure for a defendant against whom service of summons has not been made, or the same waived, to have the judgment set aside applies to the courts of justices of the peace as well as to those of more extensive jurisdiction. *Ibid.*

JUDGMENTS—*Continued.*

12. *Same—Fraud—Jurisdiction.*— The ground upon which a judgment may be set aside on defendant's motion in the cause for lack of proper service is not affected by any element of fraud that may have been alleged to have entered therein; and the justice's court, notwithstanding that it has no jurisdiction where fraud enters into the controversy, may entertain a motion in the cause to set aside its own judgment for the lack of the required service of summons, the question of fraud being but an incident and not the ground upon which the motion was made. *Ibid.*

13. *Same—Statutes—Limitation as to Time of Motion.*—Our statutes requiring a motion for a rehearing before a justice of the peace within ten days, etc., C.S. 1500, rule 12, and 1530, allowing fifteen days for appeal from the justice's judgment, etc., apply to final judgments regularly entered, and not to judgments irregularly taken upon defective service, or void for lack of service of summons on the defendant, or other proper process to bring him before the court. *Ibid.*

14. *Judgments—Street Improvements—Assessments — Payment by Installments—Statutes.*—Where the abutting owner of land on the streets has refused to pay the assessments lawfully made on him for street improvements, a judgment allowing him to pay by installments may be entered. C.S. 2617. *Durham v. Public Service Co.*, 335.

15. *Judgments—Statutes—Mortgages — Deeds and Conveyances — Sales — Confirmation of Sales—Courts—Appeal and Error.*—A judgment appointing commissioners to sell land under mortgage and apply the proceeds to the defalcation of a county official of county funds, which the mortgage was given to secure, will be modified on appeal to provide for a report and confirmation of the sale by the court, when this provision of the statute has not been incorporated therein. *Thomas v. Carter*, 374.

16. *Judgments—Estoppel—Courts—Jurisdiction.*—Judgments may not operate as an estoppel as to such matters as extend beyond the jurisdiction of the court to determine the rights of the parties, though embraced within the scope of the pleadings and inquiry. *Nash v. Shute*, 528.

17. *Same—Clerks of Court—Dividing Line — Statutes — Easements.* — The clerk of the Superior Court, under a statute controlling proceedings to determine a dividing line, has no jurisdiction as to title or character of the possession of the claimants on either side of the dividing line of lands authorized to be ascertained or determined by him under the provisions of C.S. 361 *et seq.*, the occupancy alone being sufficient to confer jurisdiction, sec. 361; and where the clerk has acted within his jurisdiction in such proceedings, his judgment may not estop a party in a separate action to show the character or extent of his possession, or to establish an easement by adverse possession in the lands occupied by the other. *Ibid.*

18. *Judgments—Estoppel—Lands—Ownership—Easements.*—A judgment in processioning proceedings as to ownership of the land in dispute does not necessarily include the question of an easement by adverse possession under the statute of limitations, defined to be "a liberty, privilege, without profit in the land of another, existent distinct from the ownership of the soil," and such conclusion does not of itself necessarily work an estoppel on the question of an outstanding easement in the land claimed by a party in an independent action. *Ibid.*

19. *Judgments—Consent—Estoppel.*—A consent judgment, like any other, does not go beyond the matters embraced in the action, to estop other and inde-

pendent transactions existing between the parties, and not necessary to its determination, or within the scope of the inquiry. *Church v. Vaughan*, 574.

20. *Same — Unrelated Judgments — Principal and Surety — Mortgages — Powers—Void Sales.*—A surety on a note whose liability was secured by a mortgage given by the maker on his land, attempted to foreclose under the power of sale, without having paid the note, and thereafter having paid the debt of the maker, judgment was entered by consent of the parties, whereunder a commissioner sold and conveyed to the plaintiff, and the surety was reimbursed from the proceeds. Prior to the entry of the consent judgment, one of the parties obtained by assignment from another and different judgment creditors two judgments taken in unrelated matters: *Held*, the attempted sale by the surety was void, and the party to the action, who had obtained the judgments by assignment, was not estopped by the consent judgment to have execution issue thereunder on the lands. *Ibid.*

21. *Judgments—Execution—Prior Liens—Purchaser—Notice — Sales — Appeal and Error—Former Appeal.*—A purchaser at the sale of land under execution takes with notice of prior registered judgments, and a sale of the lands under execution on these judgments will not be enjoined when the element of estoppel does not exist; nor will the appellant be concluded by the affirmation of the judgment in a former appeal upon which this phase of the controversy was not presented. *Ibid.*

22. *Same—Waiver.*—The agreement in a consent judgment that the commissioner appointed for the sale of the lands of the judgment debtor to reimburse the surety on the note in suit shall convey to the purchaser will not be construed as a waiver by a party of his existing lien under judgments that were independent of and not considered in the proceedings. *Ibid.*

JUDICIAL NOTICE.

See Courts, 10.

JUDICIAL SALES.

See Mortgages, 2, 10.

JURISDICTION.

See *Habeas Corpus*, 1; Pleadings, 5; Corporations, 15; Appeal and Error, 14; Constitutional Law, 6; Judgments, 12, 16; Mortgages, 9; Courts, 4, 5, 6, 9, 11; Criminal Law, 15; Fish Commissioners, 1, 2; Public Accountants, 3.

JURORS.

See Appeal and Error, 4, 24; Trials, 2; Criminal Law, 18.

Jurors—Challenges—Waiver—Verdict—Court's Discretion—New Trials—Appeal and Error—Attorney and Client.—While the relationship of a juror to a party to an action may be ground for challenge in certain cases, the appellant is deemed to have waived his right to object to the verdict for that reason where his objection has been made after the verdict was returned; even though the juror has, unintentionally, so far as appears, misled the appellant's attorney by remaining silent when the general question as to relationship was addressed to the jurors before they were impaneled. It is within the sound discretion of the trial judge, though, to set the verdict aside, the exercise of which is not reviewable on appeal. The question as to whether the relation of attorney and client between the juror, having a cause at issue at the term, and opposite counsel in the pending case, is a sufficient ground of challenge, is not decided. *Wilson v. Batchelor*, 93.

JURY.

See Evidence, 3; Constitutional Law, 10, 11; Courts, 7; Instructions, 12, 17; Seduction, 2.

JUSTICE'S COURT.

See Pleadings, 2; Judgments, 11; Appeal and Error, 39, 74.

JUVENILE COURT.

See *Habeas Corpus*, 1.

KNOWLEDGE.

See Employer and Employee, 5; Evidence, 16; Nuisance, 1; Criminal Law, 22.

LABOR UNIONS.

See Injunction, 6.

LACHES.

See Courts, 2, 8; Wills, 23, 26; Actions, 8; Appeal and Error, 48, 66, 75.

LANDLORD AND TENANT.

See Ejectment, 1; Insurance, 1.

1. *Landlord and Tenant—Leases—Contracts—Notice—Tenant Holding Over —Damages.*—Where the written contract of rental provides that the landlord may increase the rental of the premises at any time during the life of the lease without further notice, and there is evidence that subsequently, by parol, the parties have agreed that in consideration of the tenant's having put valuable improvements on the premises the rental should not be increased within the year, and that within that period the landlord has notified him of an increase and he had continued for a time in possession: *Held*, the tenant so holding over under a reasonable claim of right is not as a matter of law held to the payment of the increase of rental demanded by the plaintiff in ejectment, as no contract, express or implied, has been established for a greater rental than a fair and reasonable value of the property, and this is the measure of damages if a wrongful holding over of the defendant has been established. *Bizzell v. Equipment Co.*, 99.

2. *Landlord and Tenant—Crops—Title—Possession.* — The possession and title to all crops raised by a tenant or cropper, in the absence of a contrary agreement, are deemed vested in the landlord until the rent and advancements have been paid. *Batts v. Sullivan*, 129.

LANDS.

See Statute of Frauds, 1, 6, 10; Deeds and Conveyances, 2; Trusts, 8; Judgments, 18; Actions, 10; Contracts, 22.

LARCENY.

See Criminal Law, 21, 22, 23, 24, 29.

LAST CLEAR CHANCE.

See Railroads, 16.

LAW AND EQUITY.

See Judgments, 8.

LAW OF THE CASE.

See Appeal and Error, 73.

LEASES.

See Landlord and Tenant, 1; Railroads, 11, 12; Ejectment, 2; Deeds and Conveyances, 24.

LEGISLATION.

See Constitutional Law, 4, 14, 21; Evidence, 9; Statutes.

LESSOR AND LESSEE.

See Railroads, 8, 11.

LETTERS.

See Wills, 15.

LEX LOCI CONTRACTUS.

See Courts, 11.

LICENSES.

See Equity, 4; Negligence, 5, 10; Nuisance, 1.

LIENS.

See Deeds and Conveyances, 7, 8, 9, 20; Actions, 15; Receivers, 2; Attorney and Client, 11; Banks and Banking, 8; Judgments, 21.

LIMITATION.

See Corporations, 3; Deeds and Conveyances, 3; Judgments, 13; Wills, 21, 22.

LIMITATION OF ACTIONS.

See Tenants in Common, 1; Wills, 25, 26; Verdict, 3.

1. *Limitation of Actions—Contracts.*—The statute of limitations does not begin to run against one claiming a right under a parol contract to share in the profits of land from a resale, until the time agreed upon as that upon which the division thereof shall be made; and he has his election to await therefor until the time specified. *Pinnix v. Smithdeal*, 410.

2. *Limitation of Actions—Pleadings—Evidence — Burden of Proof.* — The burden of pleading the statute of limitations is upon the defendant relying thereon, but when properly pleading the burden of proof is on the plaintiff to show that his cause of action comes within the statutory period, and it is reversible error for the judge in his charge to place this burden on the defendant. *Ibid.*

3. *Limitation of Actions—Statutes—Writing—New Promise — Continuing Liability.*—A new note embracing an old indebtedness of the maker is a sufficient writing signed by the parties to be charged to bring the old indebtedness within the operation of C.S. 416, and repel the bar of the statute of limitations. *Irvin v. Harris*, 648.

4. *Same—Administration—Insane Persons—Guardian and Ward.*—C.S. 412, prescribing a time limit within which actions may be commenced against administrators or executors of the decedent's estate, commences to run against an insane claimant only from the time of the qualification of his guardian. C.S. 407. *Ibid.*

5. *Limitation of Actions—Partnership — Dissolution — New Partnership — Continuing Obligations—Deceased Partner.*—Where a new partnership is formed after the death of a partner under a partnership arrangement between the survivors and the devisee of the deceased, assuming to pay the debts and obligations of the old concern, a payment made by the surviving partner on a debt of the old concern will not have the effect of repelling the bar of the statute of limitations which would otherwise run against the partnership assets and the separate property of the deceased member of the firm, for upon the dissolution of the partnership by death, this authority ordinarily ceases in the surviving partner, and becomes vested in the personal representative of the deceased one. C.S. 417 *Irvin v. Harris*, 656.

LIMITATIONS OF ACTIONS—*Continued.*

6. *Same—Administration—Executors and Administrators.*—Where a member of the firm has died and the surviving partners take in his devise and form a new concern assuming the debts of the old, claims against the deceased as a member of the old concern which have been barred by the statute of limitations since the decedent's death, are suspended by the express provision of the statute until an additional period of one year from the qualification of his administrator if within the period of ten years from the decedent's death, and until the expiration of this further time of one year, the bar of the statute will be repelled. C.S. 412. *Ibid.*

LUNATICS.

See Constitutional Law, 10.

LOCAL LAWS.

See Roads and Highways, 1; School Districts, 3.

MACHINERY.

See Employer and Employee, 1.

MAIL.

See Contracts, 25.

MAINTENANCE.

See Drainage Districts, 1; Actions, 15.

MALICE.

See Appeal and Error, 28.

MALICIOUS PROSECUTION.

See Judgments, 1.

1. *Malicious Prosecution—Actions—Judgments.*—In order to sustain an action for malicious prosecution it must be shown that an action has been instituted by the defendant without probable cause and from malice, causing wrongful interference with the person or property of the complainant, and that the former action has terminated in complainant's favor, before suit brought. *Overton v. Combs*, 4.

2. *Same—Malice—Probable Cause—Evidence—Questions of Law—Questions for Jury—Trials.*—While in an action for malicious prosecution the existence or nonexistence of defendant's malice in the former action is a question of fact for the jury upon competent evidence, it is a question of law for the court to determine, on the issue as to probable cause, and on the facts admitted or as found by the jury, whether its existence or nonexistence has been sufficiently established. *Ibid.*

3. *Malicious Prosecution—Judgments—Estoppel—Actions.*—Where it appears, in an action for malicious prosecution, that a trial court having jurisdiction has decided the essential features of the former action in favor of the plaintiff therein, on proper proof or admission, that finding is conclusive in his favor on this question of probable cause, and he may not be held liable in a subsequent action for malicious prosecution. *Ibid.*

4. *Same—Arrest—Execution Against the Person—Statutes—Judgment—Reversal—Appeal.*—Where a trial court of competent jurisdiction has regularly determined that the plaintiff in the action had the right to arrest the defendant on personal execution, and accordingly the defendant has been taken into custody, C.S. 673, the plaintiff in said action is not liable in damages in defendant's

MALICIOUS PROSECUTION—*Continued.*

subsequent action for malicious prosecution, though the verdict and finding of the jury or finding for plaintiff in the former suit is thereafter set aside or reversed on appeal or other ruling in the orderly progress of the cause. *Ibid.*

5. *Same—Evidence.*—The complaint in an action in a court of competent jurisdiction alleged an indebtedness of defendant to the plaintiff; and that defendant had disposed of an amount of personal property embraced in a mortgage securing the debt, with the purpose of hindering, delaying, and defrauding the plaintiff in the collection of the debt, and the action proceeded to judgment upon competent evidence as to each allegation in the plaintiff's favor, under which the defendant was taken into custody under personal execution after execution against his property had been returned unsatisfied, C.S. 673: *Held*, to establish existence of probable cause and to conclude the defendant's subsequent action to recover damages for malicious prosecution against the plaintiff in the former action. *Ibid.*

6. *Malicious Prosecution—Evidence—Punitive Damages.*—The requisites of maliciousness, wantonness, and recklessness, and want of probable cause, in order to recover punitive damages in an action for malicious prosecution, is sufficiently evidenced when the testimony tends to show that the defendant caused the plaintiff to be arrested, cursed him, had policemen to arrest and incarcerate him without a warrant, and appeared before the committing magistrate and participated in the prosecution, which resulted in acquittal, taxing the plaintiff, as prosecutor, with the cost. *Ford v. McAnally*, 419.

MANDAMUS.

See Constitutional Law, 12: Public Officials, 1, 2.

1. *Mandamus—Counties—Treasurer — Public Funds.* — Where, under the power of a valid statute, C.S. 1389, the county commissioners have abolished the office of county treasurer, and have vested the duties of the office in certain banks and trust companies which have qualified thereunder, *mandamus* will lie to compel the treasurer, seeking to hold over and denying the validity of the statute, to turn over to the proper party the moneys that he has received and attempts to hold by virtue of his former office. *Tyrrell v. Holloway*, 65.

2. *Same—Statutes—Questions for Court—Demand for Jury Trial—Waiver.* An action to enforce the turning over of public funds by the ex-treasurer of the county to the present financial agents regularly appointed, and who have qualified to act in that capacity according to the terms of valid statutes directly applicable, C.S. 1400, 3205, 3206, 4385, is not in strictness a money demand, under sec. 867, which must be proceeded with as an ordinary civil action, requiring a finding of disputed facts by a jury, but comes under sec. 868, providing that the summons may be returnable before the judge at chambers or in term, who shall determine all issues of law and fact unless a jury is demanded by one or both of the parties, which, in the instant case, comes too late, being taken for the first time without exception in an additional brief allowed to be filed after the argument of the case in the Supreme Court has been made. *Ibid.*

MANUFACTURE.

See Intoxicating Liquors, 1.

MAPS.

See Evidence, 32, 33.

MARRIAGE.

See Actions, 1; Constitutional Law, 15; Descent and Distribution, 1.

MARRIED WOMEN.

See Actions, 1; Judgments, 3; Deeds and Conveyances, 13, 14, 19.

1. *Married Women—Husband and Wife—Actions — Negligence — Torts — Measure of Damages—Mental Anguish.*—Under the married woman's act, the wife may recover such damages as she has proximately sustained independently of those caused alone to her husband in tort or by the negligence of a third person, including expenses paid by her made necessary by her husband's injuries, services she has performed in nursing and caring for him, loss of support and maintenance, and of *consortium*, and for mental anguish in proper instances. *Hipp v. Dupont*, 9.

2. *Married Women—Separate Property—Services—Statutes — Contracts — Actions.*—Since the Martin Act, C.S. 2507 and 2513, the separate earnings of a married woman belong to her, and she may sue and recover them alone; and where the evidence tends only to establish the fact that the employer was to pay them each a certain and different amount for services, the husband may not recover the whole upon the theory that the amount he was to receive was augmented by what she was to receive for her separate services. *Croom v. Lumber Co.*, 217.

3. *Married Women—Deeds and Conveyances—Probate—Statutes—Certificate—Husband and Wife.*—In order for a married woman to make a valid conveyance of her separate real property to another than her husband, it is required by our statute that it must be with the written assent of her husband, and when the conveyance thereof is direct to her husband, it is further required that the probate officer certify that it is not unreasonable or injurious to her (C.S. 2515); and when this statutory requisite has been omitted, the deed of the married woman to her separate realty is void. *Foster v. Williams*, 632.

4. *Same—Remedial Statutes.*—It is not within the meaning or intent of C.S. 3351, purporting to cure defective execution of deeds of married women, free traders, that it should apply to deeds made directly to the husband, or annul the requirement that the probate officer certify that it was not unreasonable or injurious to her; but this should only apply to such conveyances made to third persons in respect to the husband's assent, etc., coming within the provisions of the section referred to, when the grantor is a free trader; whether section 3351 would be constitutional otherwise, *Quœre? Ibid.*

MASTER AND SERVANT.

See Contracts, 3, 4; Employer and Employee; Railroads, 5; Nuisance, 2.

MEASURE OF DAMAGES.

See Married Women, 1; Contracts, 4; Evidence, 6; Appeal and Error, 35; Damages, 4; Express Companies, 1.

MEMORANDA.

See Statute of Frauds, 3, 6.

MENTAL ANGUISH.

See Married Women, 1; Appeal and Error, 4.

MENTAL CAPACITY.

See Evidence, 10, 11, 14; Wills, 10, 14.

MERITORIOUS DEFENSE.

See Appeal and Error, 75.

MERITS.

See Appeal and Error, 33.

MILITARY.

1. *Military—Civil Authority.*—The civil authority is superior to that of the military, and the latter can act only by authority and in execution of the power of the former. *Allen v. Gardner*, 425.

2. *Same—Citizenship.*—A soldier in the United States Army going, at the invitation of the officers of a military organization, to take part as a bugler in a local celebration, is to be regarded as a citizen while so doing. *Ibid.*

3. *Same—False Arrest—Evidence—Questions for Jury—Trials.*—Evidence that the commanding officer of militia in a city under the orders of the Governor to quell a threatened riot, caused the plaintiff, in the action for false imprisonment, and a soldier in the regular Army, there at the request of the officers of the militia to take part as a bugler in certain festivities to be held there, to be arrested with curses, and incarcerated in the city jail, because, though perfectly respectful, he did not at once comply with his orders to go back to the barracks, when, not being prepared to stay there, he was on his way to a hotel to secure a room for sleeping, and while he was in his regular uniform, differing from that of the militia, is sufficient as to the arrest being willful, malicious, and arbitrary, and without probable cause, to be submitted to the jury on the issue of the defendant's guilt, there being no necessity shown for the order given to the plaintiff. *Ibid.*

MISCARRIAGE.

See Evidence, 35.

MISCONDUCT.

See Appeal and Error, 24; Trials, 2.

MISJOINDER.

See Actions, 2; Pleadings, 7.

MORTGAGES.

See Bills and Notes, 1; Appeal and Error, 11, 12; Trusts, 7; Contracts, 15; Deeds and Conveyances, 8, 9, 10, 20; Judgments, 15, 20; Banks and Banking, 7, 8.

1. *Mortgages—Sales of Lands—Powers of Sale—Statutes.*—The provisions of C.S. 2591, concerning the sale of land under a power thereof contained in a mortgage or deed of trust, enter into and control the sale under such instruments. *In re Sermon's Land*, 122.

2. *Same—Proposed Bidder—Judicial Sales.*—Under the provisions of C.S. 2591, requiring that a sale of land under a mortgage or deed of trust be left open for ten days for the acceptance of an increased bid, under certain conditions, and a resale if these conditions are complied with, the bidder at the sale during such period acquires no interest in the property itself, but only a position similar to a bidder at a judicial sale, before confirmation. *Ibid.*

3. *Same—Title—Possession.*—Before the expiration of the ten days required by C.S. 2591, for the sale of land under a mortgage or deed of trust, the sale shall not be deemed closed, and the successful bidder thereat acquires no title or right of possession during that time, but is only considered as a preferred bidder, his right depending upon whether there is an increased bid and a resale of the land ordered under the provisions of the statute. *Ibid.*

MORTGAGES—*Continued.*

4. *Same—Value Substantially Diminished—Fires.*—Where the mortgaged premises has been materially diminished in value by the loss by fire of a house thereon, which has been sold under a power contained in the instrument, the bidder at such sale having no title or right of possession, or control over the property from its preservation or protection, within the ten days provided by C.S. 2591, the loss occurring within that time falls on the owner, and the preferred bidder is not chargeable therewith, or required by law to take the property at the price he has bid therefor. *Ibid.*

5. *Same Contracts—Specific Performance.*—The principle upon which specific performance of a binding contract to convey lands is enforceable, has no application to the successful bidder at a sale under the power contained in a mortgage or deed of trust of lands, during the ten days allowed by C.S. 2591, in which an increase of bid may be received and a resale ordered, for, within that time, there is no binding contract of purchase, and the bargain is incomplete. *Ibid.*

6. *Same—Courts—Clerks of Court—Resales.*—C.S. 2591, controls as to ordering a resale of lands sold under a power of sale contained in a mortgage or deed of trust, and confers no power on the clerk to make such order, unless within the ten days allowed there shall be an increased bid, etc., and does not extend to instances wherein a material loss has been sustained by destruction of a house on the lands, within the stated period. *Ibid.*

7. *Mortgages—Deeds in Trust—Sales—Powers of Sale—Assignments.*—A written assignment, under seal, of a mortgage on lands transferring to the purchaser the interest of the mortgagee therein, the power of sale and the property of the mortgagee therein, confers the right of foreclosure on the assignee. *Williams v. Teachey*, 85 N.C. 402, cited and distinguished. *Ibid.*

8. *Mortgages—Deeds in Trust—Powers of Sale—Resale—Statutes.*—A sale of land under the power in a mortgage or deed of trust is given the same status as if made under a judgment or decree of court, by the provisions of C.S. 2951, requiring the sale to be kept open for ten days and a resale ordered by the clerk of the court if within that period a raised bid has been offered in compliance with the statutory provisions. *Pringle v. Loan Asso.*, 316.

9. *Same—Clerks of Court—Jurisdiction.*—C.S. 2951, does not require that all sales of land under mortgage or deed in trust be reported to the clerk of the court, but only where the advanced bid has been made and is properly safeguarded or paid into the office of the clerk of the court. *Ibid.*

10. *Same—Judicial Sales—Commissions—Allowances—Costs.*—Upon the ordering by the clerk of the court of a resale of lands sold under the power contained in a mortgage or deed of trust. C.S. 2951, the original sale, under the power, becomes a nullity, and that part of the instrument providing a certain per cent as selling commission to the mortgagee or trustee is inoperative; and in lieu thereof he is only entitled to the costs and expenses of the sale and such sum to compensate him for his services actually rendered as may be approved by the clerk, subject to review on appeal, or by the court direct where a restraining order has issued. *Ibid.*

11. *Mortgages—Deeds of Trust—Sales—Commissions.*—Where lands have been sold under a mortgage or deed of trust, *semble*, the per cent stated therein as commissions is allowable in conformity with the spirit of our statute, only on the amount of money collected and paid over on the indebtedness, and not upon the price the land may have brought at the sale. C.S. 2951. *Ibid.*

MOTIONS.

See Evidence, 34; Intoxicating Liquor, 6, 10; Parties, 3.

MOTIVE.

See Assault, 5.

MUNICIPAL CORPORATIONS.

See Constitutional Law, 4, 20, 21, 24; Equity, 1; Cities and Towns, 1, 2; Statutes, 12.

1. *Municipal Corporations—Cities and Towns—Franchise—Street Improvements—Assessments.*—A city ordinance granting a franchise to a street railway to operate upon its streets, requiring that it do certain grading and other things enumerated in its construction at its own expense, and further states in direct and continuous connection with this subject that "nothing herein contained shall be construed to require said company to pave its road," is held to apply only to conditions then existing, and will not be construed to exempt the corporation from paying its part of future assessments that may be levied upon abutting owners for the paving and improvements of the streets. C.S. 2708. *Durham v. Public Service Co.*, 334.

2. *Municipal Corporations—Cities and Towns—Street Improvements—Assessments—Discretion.*—The necessity of proposed improvements upon the streets of a city and the apportionment of the assessments among the owners of lands abutting thereon, including street railways, are largely within the discretionary powers of the Legislature, and its subordinate agencies in charge and control thereof. *Ibid.*

3. *Same—Appeal and Error—Presumptions.*—The presumption, on appeal, is against error committed in the Superior Court; and under the circumstances of this case, in which a street railway company attacks the validity of an assessment levied on its property as an abutting owner for street improvements, as being disproportionately large to those levied on other such owners, *it is held* that the evidence is insufficient to overcome the presumption. *Ibid.*

4. *Municipal Corporations—Cities and Towns—Street Improvements—Street Railways—Value of Franchise.*—In making an assessment on the property of a street railway company as an abutting owner on the street improved, not only the value of its tangible property, such as tracks, etc., should be considered, but, also, the estimated value of the company's franchise under which it is operating, and which by fair apportionment should be included in the estimate. *Ibid.*

5. *Municipal Corporations—Cities and Towns — Street Railways — Assessments—Statutes.*—C.S. 2708, specifying that the burden imposed upon a street railway company in assessing its property for street improvements shall not exceed "the space between the tracks, the rails of the track, and eighteen inches in width outside of the tracks," is not violated if including the length of the cross-ties, the statutory limitation of the width has not been exceeded. *Ibid.*

6. *Same—"Railroad Track."*—The term "railroad track" includes both the rails and cross-ties upon which they are placed and extend to the roadbed. *Ibid.*

7. *Municipal Corporations — Cities and Towns — Streets and Sidewalks — Negligence—Ordinances—Evidence—Questions for Jury—Trials.*—In an action to recover damages for a personal injury alleged to have been negligently caused by the defendant contractor at night, in failing to properly safeguard concrete work on a sidewalk of a city, having in force an ordinance specifying the kind of guard rails, post lights, etc., that were to be used at such places dangerous to

MUNICIPAL CORPORATIONS—*Continued*

pedestrians, the requirements of the statute prevail in these respects, as the test of defendant's responsibility, and evidence offered in defendant's behalf as to what other such contractors were in the habit of doing there under like conditions, is irrelevant, and properly excluded. *Stultz v. Thomas*, 470.

8. *Same—Nonsuit.*—It is a question for the jury to determine whether or not a concrete contractor left at night a dangerous part of a sidewalk safe for pedestrians according to the requirements of an existing valid ordinance, in an action to recover damages for an alleged negligent injury therein caused the plaintiff, and upon this motion to nonsuit, construing the evidence in the light most favorable to the plaintiff, it is held the issue was properly submitted to the jury. *Ibid.*

9. *Same—Negligence Per Se—Proximate Cause.*—Where a valid ordinance imposes a specific duty upon contractors as to the protection of pedestrians of a city from injuries from dangerous places on the sidewalks where paving has been done by them, their failure to discharge this affirmative duty is negligence *per se*, leaving for the determination of the jury the question of whether or not such negligence is the proximate cause of the injury. *Ibid.*

MURDER.

See Evidence, 36; Homicide, 2, 3, 4.

NECESSITY.

See Easements, 1.

NEGLIGENCE.

See Automobiles, 1; Evidence, 10, 23, 25; Judgments, 3; Appeal and Error, 35, 44, 67; Married Women, 1; Pleadings, 15; Bailment, 1; Banks and Banking, 4, 6, 8; Employer and Employee, 1, 4, 8, 9; Railroads, 1, 3, 5, 13, 14, 15, 16; Damages, 4; Municipal Corporations, 7, 9; Instructions, 13; Principal and Agent, 5, 8; Courts, 11.

1. *Negligence—Hotels—Guests—Invitee—Ordinary Care.*—Where one enters a hotel as an invitee of a guest, the owner or proprietor owes him the duty of ordinary care for his safety. *Jones v. Bland*, 70.

2. *Same—Prima Facie Case—Res Ipsa Loquitur.*—Where there is evidence tending to show that the plaintiff was an invitee at the defendant's hotel and received the injury complained of by falling through an open door in the elevator shaft, while going to the room of the guest who had invited him, such injury not ordinarily occurring, in the exercise of proper care, and the elevator being under the sole control and management of the hotel, raises a *prima facie* case of defendant's negligence under the doctrine of *res ipsa loquitur*. *Ibid.*

3. *Same—Instructions—Burden of Proof—Evidence—Appeal and Error.*—Where an invitee of a hotel has made out a *prima facie* case of negligence in his action against the proprietor, under the doctrine of *res ipsa loquitur*, this alone would justify a verdict in plaintiff's favor on that issue, the burden of the issue remaining with the plaintiff, but it is reversible error for the court to place the further burden on plaintiff to show by affirmative proof the special grounds of negligence attributable to defendant. *Ibid.*

4. *Same.*—Where an invitee of a hotel has been injured by falling through a door left open in a passenger elevator shaft, and a *prima facie* case of negligence has been established, it is reversible error for the trial judge to charge the jury that in order to recover the plaintiff must show further by affirmative proof that

the elevator was either in charge, at the time of the injury, of an employee of the defendant's hotel, or had been left open by another for a sufficient time for the proprietor to have discovered it in time, in the exercise of ordinary care. *Ibid.*

5. *Same—Trespasser—Licensee—Wanton or Willful Injury.*—An invitee of a hotel loses his character as such when on the premises for the unlawful purpose of gambling at cards in the room of a guest, and when he has been injured while on the premises and on his way for this unlawful purpose, the only duty owed him by the owner or proprietor is not to willfully or wantonly injury him, of which the trial judge properly held there was no evidence in this case. *Ibid.*

6. *Same—Scope of Invitation.*—Where one enters a hotel at the invitation of a guest for the unlawful purpose of going to his room to gamble, he is beyond the scope of an invitee of the hotel, and becomes a trespasser or mere licensee, and as such may not recover of the proprietor for an injury received by him in falling through an open door in the elevator shaft when the carriage was at some upper portion of it, by the mere failure of the employees of the hotel to exercise ordinary care for his safety. *Ibid.*

7. *Negligence—Evidence—Nonsuit—Trials — Railroads.* — Where the plaintiff's driver stopped his team of mules at a garage across a 50-foot street from the defendant's railroad track, and while he was in the garage, the mules, without apparent fright or other cause, suddenly turned and ran across the track in front of the defendant's running train, and thereby a mule was killed and the wagon injured the sole, efficient, and proximate cause of the alleged injury was the negligence of the plaintiff's servant, and he cannot recover in his action for damages. *Sasser v. R. R.*, 469.

8. *Negligence—Proximate Cause—Concurrent Negligence—Joint Tort Feasors—Actions.*—Where an injury to a third person is proximately caused by the negligence of two persons, to whatever degree each may have contributed to the result, the negligence of the one may not exonerate the other, each being a joint tort feasor, and the person so injured may maintain his action for damages against either one or both. *White v. Realty Co.*, 536.

9. *Same—Automobiles—Collisions—Passengers.*—The negligent acts of the driver of an automobile in which the plaintiff was riding at the time of receiving a personal injury thereby caused, is not imputable to the plaintiff, who is neither the owner nor exercises control over the driver, and where this injury is proximately caused by the negligence of the driver of this machine and that of another one concurrently causing the injury complained of, and not solely by the negligence of the one in which he was riding, the plaintiff may maintain his action against the owner of the other automobile responsible for the negligence of the driver. *Ibid.*

10. *Negligence — Evidence—Automobiles—Licenses—Instructions — Appeal and Error—Harmless Error.*—Where the defendant's liability for a personal injury depends upon the negligence of one of its drivers of a jitney motor bus for hire, evidence that the driver was without license, if erroneous, is without prejudice to the defendant, where, under the instructions of the court, the jury was excluded from considering it in determining the issues, and the law was correctly charged as to the defendant's responsibility, under the evidence. *Jordan v. Motor Lines*, 559.

11. *Negligence—Principal and Agent—Automobiles.*—The owners of a jitney motor-bus line for hire are responsible in damages for the actionable negligence

NEGLIGENCE—*Continued.*

of their drivers in causing injury while acting within the scope of their employment. *Ibid.*

12. *Negligence—Contributory Negligence—Pleadings — Burden of Proof.* — The defendant must plead and prove contributory negligence when it relies upon it as a defense in plaintiff's action to recover damages for an injury alleged to have been negligently inflicted. *Vann v. R. R.*, 567.

13. *Same—Drunkenness—Questions for Jury — Nonsuit* — Where there is evidence tending to show that the plaintiff was drunk at the time he received an injury while attempting to cross defendant's railroad track in an automobile at a public crossing alleged to have been negligently left there at night in bad condition, an instruction leaving it for the jury to say whether the plaintiff was drunk at the time, or whether such condition of the plaintiff caused the injury, is a proper one, on the issue of contributory negligence. *Ibid.*

14. *Same—Instructions—Rule of Prudent Man.* — One who approaches a public crossing in an automobile at night, for the purpose of going across, may assume that the railroad company has kept its track reasonably safe for such purpose, it being required of him to exercise that degree of care and prudence characteristic of the ideal prudent man, which is ordinary care under the circumstances. *Ibid.*

15. *Same—Proximate Cause—Comparative Negligence.* — Contributory negligence, to bar the plaintiff's right to recover damages in his action, must be the direct and proximate cause of his injury, and his contribution to his own injury will not prevent his recovery if there was negligence by the defendant, which, when compared with that of the plaintiff, was the proximate cause thereof. *McNeill v. R. R.*, 167 N.C. 390, cited and applied. *Ibid.*

16. *Negligence—Evidence—Nonsuit—New Action—Second Appeal—Appeal and Error.*—It appearing in this case, involving the question of defendant's negligence, that a motion of nonsuit on the evidence has been affirmed on a former appeal (180 N.C. 612), and another action has been brought between the same parties for the same cause, and again nonsuited upon substantially the same evidence, the Superior Court having followed the former decisions of the Supreme Court in the former action, the judgment is affirmed on the appeal in the subsequent action, for the reasons stated in the former decisions. *Butner v. Brown*, 692.

17. *Negligence—Contributory Negligence — Due Care — Evidence.* — Where there is evidence that the plaintiff, the head miller in a grist mill, observing that the mill did not grind properly, and in order to remedy it, had his hand injured by putting it in the first brake while in operation; that the trouble with the mill was caused by the defendant's employees while repairing it, without the knowledge of the plaintiff, it is competent and material for the defendant making the repairs to show plaintiff's want of due care in so doing. *Snyder v. Asheville*, 708.

18. *Same—Custom—Opinion—Experts—Questions for Jury.*—Where it is competent for the defendant to show the plaintiff's want of due care in placing his hands upon a roller in the grist mill he was employed by another to operate, to ascertain why it did not properly operate, experienced witnesses may testify as to the custom in this respect in other like mills; but the question of its necessity or danger under the evidence of the case at bar is one for the jury, upon which the witness may not express his opinion.. *Ibid.*

NEGOTIABLE INSTRUMENTS.

See Bills and Notes, 3.

NEWLY DISCOVERED EVIDENCE.

See Criminal Law, 10, 12.

NEW PROMISE.

See Limitation of Actions, 3.

NEW TRIALS.

See Jurors, 1; Instructions, 1; Appeal and Error, 10, 24, 26, 33, 34, 38; Criminal Law, 10.

New Trials—Appeal and Error—Rights of the Parties.—Where the Supreme Court has set aside a judgment upon the pleadings entered in the court below, in the plaintiff's favor, on two of the causes of action alleged in his complaint, the third having been reserved for trial, a new trial will be ordered, leaving the matter open to both parties as *res nova. Cement Co. v. Phillips*, 438.

NEXT OF KIN.

See Wills, 20.

NOMINAL DAMAGES.

See Actions, 9.

NONRESIDENT.

See Attachment, 1.

NONSUIT.

See Appeal and Error, 2, 41, 58, 71; Automobiles, 1; Vendor and Purchaser, 1; Evidence, 2, 5, 6, 17, 19, 20, 25; Pleadings, 6; Principal and Agent, 1, 4; Contracts, 5, 30; Municipal Corporations, 8; Intoxicating Liquors, 1, 6; Negligence, 7, 13, 16; Railroads, 14; Employer and Employee, 9; Homicide, 2, 3; Nuisance, 3; Criminal Law, 19; Assault, 2.

NOTICE.

See Attachment, 1; Nuisance, 1; Bills and Notes, 1; Judgments, 21; Landlord and Tenant, 1; Deeds and Conveyances, 6, 11, 14. Ejectment, 1; Drainage Districts, 10, 12; Appeal and Error, 62.

NUISANCE.

1. *Nuisance—Licensor and Licensee — Knowledge — Notice.* — In order to create a liability of the owner of land for an injury caused by his licensee thereon, it is necessary that such act amounted to a nuisance, and that the owner had actual or implied notice or knowledge thereof. *Brooks v. Mills Co.*, 719.

2. *Same—Employer and Employee—Master and Servant.*—Where a cotton mill company lays out a baseball park on its own land for the use and benefit of its employees, the relation of licensor and licensee is created. *Ibid.*

3. *Same—Amusement Parks—Evidence—Nonsuit—Trials.*—Where the relation of licensor and licensee is created between the owner of a mill and a baseball club of its employees, and the latter has sole control and charges entrance fees for its exclusive benefit, without pecuniary profit to the owner, the owner is not liable in damages occasioned by the employees stretching a rope across a roadway on its premises to aid in collecting the entrance charges, which caused the injury in suit to one traveling by automobile on the roadway, without the owner's knowledge, express or imputed; and in the absence of evidence thereof a judgment as of nonsuit is properly granted. *Ibid.*

OBJECTIONS AND EXCEPTIONS.

See Appeal and Error, 1, 23, 25, 42, 45, 50, 52, 72, 77, 82, 87, 88, 89, 90, 91; Instructions, 9; Trusts, 8.

OFFER.

See Award and Satisfaction, 1; Injunction, 5; Contracts, 25, 26.

OFFICERS.

See Taxation, 1; Public Officials.

OPINIONS.

See Decisions, 1; Intoxicating Liquor, 7; Appeal and Error, 13, 22, 39; Evidence, 11, 13, 21, 24; Negligence, 18; Criminal Law, 23; Courts, 12.

"OR."

See Wills, 1, 19.

ORDINANCES.

See Equity, 1; Municipal Corporations, 7.

OUSTER.

See Tenant in Common, 2.

PARENT AND CHILD.

See *Habeas Corpus*, 1.

PARKS.

See Nuisance, 3.

PAROL AGREEMENTS.

See Statute of Frauds, 1, 7, 8; Contracts, 22; Deeds and Conveyances, 17; Appeal and Error, 68; Tenants in Common, 1.

PAROL EVIDENCE.

See Evidence, 1; Contracts, 10, 13, 15; Instructions, 10; Principal and Agent, 6.

PARTIES.

See Actions, 2, 4, 10; Corporations, 13; Judgments, 2, 8; Statutes, 8; Pleadings, 1, 7, 13; Trials, 1; Appeal and Error, 14, 17, 36; New Trials, 1; Contracts, 18, 29, 31; Railroads, 4; Vendor and Purchaser, 1.

1. *Parties—Courts—Pleadings—Constitutional Law—Contracts.*—Where a township road district has been reincorporated by statute, and included in a newly formed county road district, with a decrease in the taxes formerly allowed to be levied to such an extent as to be insufficient to meet the contract obligations already incurred by the former district to several creditors, and one of them seeks by *mandamus* to compel the collection of the taxes formerly authorized to be levied by the township district, the same to be applied to the payment of his debt alone, and not to be pro rated among them all: *Semble*, the effect of the later act was to impair the obligation of a contract, prohibited by section 10, clause 1, Article I, of the Constitution of the United States; but the case will be remanded for making all like creditors parties, so that they may be bound by the final judgment, as they are interested therein, and with such amendments to the pleadings as the trial judge may deem proper to be allowed. *Smith v. Comrs.*, 149.

2. *Parties—Express Companies—Director General—Government—Pleadings—Process—Appeal and Error—Record.*—It appearing of record on appeal in this case that the name of the Director General of Railroads, having charge of express companies, was named in the summons, accordingly served on the local

PARTIES—*Continued.*

agent, and that his name as well as that of the express company was set out in the pleadings alleging negligence, etc., and that the jury considered the evidence upon the separate issues accordingly: *Held* as untenable, the exception that only the express company and not the Director General was a party to the action, and that a verdict as to the latter was invalid, both the Director General and the express company being substantially parties. *Cauble v. Express Co.*, 449.

3. *Parties—Motions—Appeal and Error—Supreme Court—Attorney-General.* Where an injunction is sought in a suit brought against the State Board of Public Accountancy by a certified public accountant under the provisions of our statute, alleging that the defendant was attempting to do an *ultra vires* act in holding an examination beyond the boundaries of the State, and unlawfully diverting the funds, and exception has been taken in the lower court, that the suit should have also been brought State *ex rel.* the Attorney-General, etc., an amendment to this effect may be allowed in the Supreme Court, so that the case may be heard on its merits, it appearing that the defendant will not thereby be prejudiced. C.S. 7008 to 7024, inclusive, *S. v. Scott*, 865.

4. *Same.*—The Attorney-General may of his own motion, or upon the complaint of a private party, become a party to a suit that seeks to prevent an *ultra vires* act or the misapplication of a fund in which the public is interested. *Ibid.*

PARTITION.

See Insane Persons, 1; Deeds and Conveyances, 5, 14.

Partition — Pleadings — Ejectment — Court's Discretion.—The plea of sole seizin in proceedings to partition lands converts them into an action of ejectment; and where the pleadings have become complicated and involved it is within the discretion of the trial judge to order the filing of new pleadings to present the clear-cut issue, as such does not change the cause of action. *Bowman v. Howard*, 662.

PARTNERSHIP.

See Actions, 3; Bills and Notes, 4; Equity, 7, 8; Limitation of Actions, 5; Appeal and Error, 56.

1. *Partnership—Evidence.—Held*, in this action upon contract, there was sufficient evidence that the defendants were partners, and liable as such, among other things, their contract among themselves, the admissions of some of them, their putting their refusal to pay the contract price upon a different ground than a denial of the partnership, and the admission in their answer of the allegation of the complaint that they were partners, etc. *Maney v. Greenwood*, 579.

2. *Partnership — Contracts — Lumber — Evidence—Instructions—Trials.*—In an action to recover the contract price of merchantable and sound lumber, bargained, sold, and delivered to the defendant partnership, an instruction of the court placing the burden of proof on plaintiff to show that he had delivered the lumber to the defendants according to his contract was correct, there being evidence to sustain the verdict. *Ibid.*

3. *Partnership—Undisclosed Partner—Liability.*—A partnership liability on a contract by one whose name is not signed thereto may be established upon competent evidence in an action thereon for the purchase price of goods sold and delivered, with the burden of proof on the plaintiff, that such person was in fact a partner in the enterprise. *Ibid.*

PARTNERSHIP—*Continued.*

4. *Same—Contracts—Principal and Agent.*—Where one partner enters into a contract in behalf of the partnership, without the signature thereto of all the partners, and it is established on the trial that they were all partners in the enterprise, they will all be bound by its terms, through those who have, with the proper authority, signed the agreement in their behalf. *Ibid.*

5. *Partnership—Retiring Partners—New Firm—Creditors.*—Where a new partnership is formed upon the retirement of some of the members of the old, who agree among themselves to assume the debts of the old without the concurrence of the creditors, the agreement does not relieve the retiring partners from liability to creditors of the old concern. *Irvin v. Harris*, 647.

PASSENGERS.

See Negligence, 9.

PAYMENT.

See Intoxicating Liquor, 5; Insurance, 2; Judgments, 14; Statute of Frauds, 8; Contracts, 26; Principal and Agent, 12; Bills and Notes, 5.

PERSONAL INJURIES.

See Railroads, 1, 5; Damages, 4.

PETITIONS.

See Corporations, 12.

PHOTOGRAPHS.

See Evidence, 15.

PHYSICIANS.

Physicians—Evidence—Privilege—Statutes—Compelling Testimony—Court's Discretion.—The principle by which a physician may not be compelled to divulge communications and other matters which have come to his knowledge by observation of his patient is regulated by statute, and under the provisions of our C.S. 1798, the privilege is qualified, and it rests within the discretion of the trial judge, in the administration of justice, to compel the physician, called as a witness, to testify to such matters when relevant to the inquiry. *S. v. Martin*, 847.

PLEADINGS.

See Appeal and Error, 7, 29, 31, 36; Attachment, 5, 6; Evidence, 19; Commerce, 1; Limitation of Actions, 2; Statutes, 6; Vendor and Purchaser, 1; Contracts, 20; Negligence, 12; Parties, 1, 2; Bills and Notes, 5; Partition, 1; Public Officials, 1; Injunction, 7.

1. *Pleadings—Examination of Party—Statutes—Appeal and Error.*—An appeal will not directly lie to the Supreme Court from an order of the Superior Court judge affirming the action of the clerk in ordering the examination of the defendant to elicit certain information, alleged to be not otherwise obtainable, and material to the filing of the complaint, C.S. 900, when it does not appear that the defendant will be prejudiced or injured by the examination. *Monroe v. Holder*, 79.

2. *Pleadings—Superior Courts—Justices' Courts—Statutes.*—Pleadings and proceedings in the trial of a cause should be liberally construed so as to prevent a failure of justice because of mere informality or irregularity, especially when the case is tried before a justice of the peace, where the statute expressly provides that the pleadings are not required to be in any particular form and are sufficient when they "enable a person of common understanding to know what is meant." *Wilson v. Batchelor*, 92.

PLEADINGS—*Continued.*

3. *Same—Appeal—Amendments.*—Where it appears from an entry on appeal from a justice of the peace, that the plaintiff has sued to recover of an employee the amount of an alleged overdraft, and the defendant has pleaded as a counterclaim that, under his contract of employment, he was to receive a larger amount in contemplation of an increase in the business justifying it; and that on the trial the only question presented was whether there should have been an increase in a specific sum which admittedly was sufficient to cover the defendant's demand; and it further appears from an entry made at the trial in the Superior Court on appeal thereto that the defendant admitted plaintiff's claim, but further claimed he was entitled to a credit to the amount of the promised increase of salary, leaving this the only disputed question: *Held*, the plaintiff was given sufficiently definite notice of the defendant's claim, and his objection to the insufficiency of the pleadings was untenable. *Ibid.*

4. *Same—Motions.*—Either in a court of a justice of the peace or in the Superior Court an objection to the insufficiency of the pleadings for indefiniteness should be motion to make them more specific. C.S. 537. *Ibid.*

5. *Same—Jurisdiction.*—On appeal from a court of a justice of the peace, the only limitation upon the power of the Superior Court to allow an amendment of the pleadings relates to the jurisdiction of the justice's court over the subject-matter of the action. *Ibid.*

6. *Pleadings—Issues—Evidence—Nonsuit—Demurrer — Trials.* — Where the complaint states a good cause of action to recover upon defendant's notes secured by chattel mortgage, and the chattels are taken into possession by claim and delivery, which in turn are delivered to an intervener under bond for possession, the answer of the intervener stating that the defendant's property had been taken upon his adjudication as a bankrupt and his property thereunder distributed according to their respective priorities, raises matters of defense and are pleas in bar, which may either be determined by motion as of nonsuit or on demurrer *ore tenus*. *Godwin v. Gardner*, 97.

7. *Pleadings—Misjoinder—Parties—Causes of Action—Severance—Statutes.* A demurrer will be sustained for a misjoinder of both parties and causes of action in the same action, and a severance thereof is not permissible. C.S. 516. *Taylor v. Ins. Co.*, 120.

8. *Same—Multifariousness — Related Transactions.* — In an action against a life insurance company and the beneficiaries, to recover upon a policy, the plaintiff alleged that the insured, then deceased, had previously assigned or transferred his policy to him, and the beneficiaries answered, setting up as a cross-action or counterclaim that the plaintiff and deceased had purchased lands in common, and that in their partnership dealings the deceased had assigned the policy upon certain conditions which the plaintiff had failed to perform. The insurance company paid the amount of the policy into court to await the final disposition of this controversy: *Held*, the matters alleged in the counterclaim or cross-action were not so unrelated and independent of each other as to make the defendant's pleading defective for multifariousness; and that the matters for adjudication arose out of the same transaction, or series of transactions, making a complete whole, and the plaintiff's demurrer thereto was bad. C.S. 507. *Ibid.*

9. *Pleadings—Demurrer—Admissions.*—A demurrer to the complaint admits as true every material fact alleged therein that is properly pleaded. *Trust Co. v. Wilson*, 166.

PLEADINGS—*Continued.*

10. *Same — Allegations Aliunde — Speaking Demurrer.* — A demurrer to a pleading upon the ground of the sufficiency of the allegations therein to constitute a cause of action must be confined to those allegations, and where it is necessary for statement of facts in the demurrer to be considered *aliunde* it is called a speaking demurrer, and will be overruled. *Ibid.*

11. *Same—Trusts.*—Where the complaint alleges that the plaintiff is the holder in due course of a negotiable note sued on, acquired for value, before maturity, without notice of any infirmity therein, and it further appears from the complaint that it was held in trust to collect certain certificates of deposit issued by a bank and apply the proceeds to the note, a demurrer stating that in fact the plaintiff was not such owner of the note acquired in due course, etc., is bad. *Ibid.*

12. *Same—Pending Action.*—A demurrer to the complaint stating that a similar action had formerly been commenced and was pending in another county, where such does not appear from the complaint as a fact, is bad. *Ibid.*

13. *Pleadings — Demurrer — Speaking Demurrer — Allegations Aliunde — Trusts—Actions—Parties—Principal and Agent.*—The trustees of an express trust may sue alone (C.S. 449), and where the holder of a promissory note in due course, etc., sues thereon, who as it appears is a trustee of an express trust to collect certain certificates of deposit, and apply the proceeds to its payment for the benefit of himself and the holders of the certificates, a demurrer stating that the plaintiff is, in fact, suing as the agent of the holders of the certificates, and that they are in truth parties, is a speaking demurrer, and bad. *Ibid.*

14. *Pleadings—Dismissal of Action—Questions for Jury—Statute of Frauds.* Where the complaint in the suit is sufficient for the plaintiff to recover of the defendant the purchase price of lands that he has paid under a parol contract of purchase, and for the improvements he has placed thereon to the extent they have enhanced its value, it is error for the trial judge to dismiss the action upon the pleadings; and the matters controverted by the answer are for the determination of the jury. *Carter v. Carter*, 187.

15. *Pleadings — Admissions — Railroads — Derailment — Negligence — Evidence.*—An admission in the answer of the defendant railroad company of the allegation in the complaint that the damages sought in the action were caused by a derailment while the plaintiff was a passenger in the defendant's coach, is competent as evidence of a separate fact relative to the issue as to the defendant's negligence, and does not require that further part of the answer, disclaiming negligence or fault, must also be introduced by the plaintiff. *White v. Hines*, 275.

16. *Same—Res Ipsa Loquitur—Prima Facie Case.*—Where the plaintiff alleges that his ward was injured by the derailment of a coach in which he was riding as a passenger, the proof of the plaintiff's qualification as guardian, the derailment of the train, and the ward's personal injury as the proximate result, nothing else appearing, makes a *prima facie* case of defendant's negligence. *Ibid.*

17. *Same—Burden of the Issue—Defendant's Further Evidence—Verdict.*—Where a *prima facie* case of negligence is made out the jury will be justified in finding for the plaintiff thereon, the burden of the issue remaining on the plaintiff, it being for the jury to determine whether upon the entire evidence the plaintiff has established the defendant's negligence by the greater weight of the evidence, leaving it for the defendant to determine whether it will introduce further evidence or take the chance of an adverse verdict on the issue. *Ibid.*

PLEADINGS—*Continued.*

18. *Pleadings—Scope of Inquiry—Instructions—Appeal and Error—Amendments.*—The plaintiff, in his action to recover damages of the defendant for a personal injury alleged to have been negligently inflicted on him, is restricted to those acts of negligence he has specifically alleged in his complaint, or amendments thereto allowed by the trial court, affording the defendant opportunity to amend his answer and prepare to meet the new phase of the case; and a charge of the court is reversible error when it goes beyond this, and into extraneous matters, to the defendant's prejudice. *Smith v. R. R.*, 290.

19. *Pleadings—Surplusage—Cause of Action—Dismissal.*—While the rules of pleading require that redundant allegations should be omitted, the courts will give them a liberal interpretation and not dismiss the action on that account, if by disregarding surplusage it appears that a good cause of action has been stated. *Hayman v. Davis*, 563.

20. *Same—Demurrer—Surplusage—Contracts—Quantum Meruit.*—A demurrer to a complaint, in an action to recover the reasonable worth of services rendered in consideration of the defendant's promise to will the plaintiff certain land at his death if she would perform specified services during his lifetime, which he failed to perform, admits the truth of these allegations; and where it appears from an interpretation of the complaint that the plaintiff, during defendant's life, after the latter had rendered further performance by the former impossible, elected to sue to recover the reasonable worth of the services already rendered, an allegation that the plaintiff was ready to receive a deed for the land will be considered as surplusage, as she was not entitled to the land until he died, and had elected to sue for the value of her services before that event occurred. *Ibid.*

21. *Pleadings—Amendments—Court's Discretion—Exceptions—Appeal and Error.*—Exceptions to the pleadings in partition proceedings as to sufficiency of allegations, etc., cannot be sustained on appeal when it appears that upon the plea of sole seizin the court has ordered new pleadings to be filed that have presented the clear-cut issue upon the evidence introduced at the trial. *Bowman v. Howard*, 662.

POISON.

See Assault, 1, 4.

POLICE.

See Appeal and Error, 43; Principal and Agent, 3.

POLICE POWERS.

See Public Accountants, 1.

POSSESSION.

See Mortgages, 3; Landlord and Tenant, 2; Criminal Law, 11; Intoxicating Liquor, 11.

POWERS.

See Judgments, 20; Mortgages, 1, 2, 8; Trusts, 5; Appeal and Error, 12; Drainage Districts, 9; Contracts, 11; Deeds and Conveyances, 17; Corporations, 3; Roads and Highways, 3; Constitutional Law, 26; Injunction, 8.

POWER OF ATTORNEY

See Deeds and Conveyances, 18.

PRECATORY WORDS.

See Wills, 16.

PREJUDICE.

See Instructions, 1, 4; Appeal and Error, 17, 21; Homicide, 3.

PRESCRIPTIVE RIGHTS.

See Waters, 1.

PRESUMPTIONS.

See Appeal and Error, 9, 17, 37, 78, 82; Municipal Corporations, 3; Statutes, 5; Easements, 2; Drainage Districts, 12, 14; Evidence, 24; Railroads, 15; Criminal Law, 12.

PRIMA FACIE CASE.

See Negligence, 2; Bailment, 1; Instructions, 7; Pleadings, 16; Cities and Towns, 1; Intoxicating Liquor, 11.

PRINCIPALS.

See Criminal Law, 29.

PRINCIPAL AND AGENT.

See Attorney and Client, 1; Automobiles, 1; Deeds and Conveyances, 2; Pleadings, 13; Vendor and Purchaser, 1; Appeal and Error, 43; Negligence, 11; Actions, 7, 8; Contracts, 30; Evidence, 30; Partnership, 4; Attachment, 8; Banks and Banking, 1.

1. *Principal and Agent—Contracts—Procurement of Purchaser—Evidence —Nonsuit—Appeal and Error.*—Where there is evidence that the agent, upon commission, has procured a purchaser for lands upon the terms of payment and within a specified time, and there is evidence that the purchaser refused the deed the day after, upon the ground that the period of his obligation to do so had expired, and there is further evidence that the delay was in accordance with a mutual agreement of the parties to the contract of agency, and acquiesced in by them: *Held*, a *prima facie* case was established by the agent, in his action against the owner for his profits, and a judgment as of nonsuit upon the evidence was erroneously granted. *Aycock v. Bogue*, 105.

2. *Principal and Agent—Damages—Scope of Agency.*—The principal is only bound by such acts of his agent as are within the scope of the duties the agent owes him, and which he has been authorized to perform, and none other, though the agent may have therein acted with the intent to benefit his principal. *Butler v. Mfg. Co.*, 547.

3. *Same—Special Police—False Arrest—Night Watchman.*—The responsibility of defendant for damages for false arrest and imprisonment of the plaintiff, in his action for damages, by a night watchman, whose duties to the defendant were confined to a certain area within an enclosure at defendant's mill and settlement, and for whom the watchman had been deputized as a special policeman, does not extend beyond the area restricted on the defendant's premises, and an arrest beyond them is not within the scope of the employment of the watchman, or within the scope of his duties to the defendant. *Ibid.*

4. *Same—Evidence—Nonsuit—Trials.*—Where there is evidence tending to show that defendant's night watchman was employed to perform his duties only within a certain enclosure at the defendant's mill; that he had also been deputized by the town authorities to act for defendant as special policeman; that he had arrested the plaintiff at a remote place on the mill settlement property, where he was not authorized by the defendant to guard, and caused his incarceration in the city jail; that the case was dismissed by the justice of the peace for the lack of evidence and the plaintiff finally discharged: *Held*, a question for the jury in plaintiff's action for damages for false arrest and imprisonment, of

whether the defendant's night watchman was acting within the scope of his employment at the time; and a motion as of nonsuit upon the evidence was properly denied. *Ibid.*

5. *Principal and Agent—Negligence—Insurance—Contracts—Breach—Damages.*—Where an insurance agent or broker undertakes to procure a policy of insurance for another to afford him protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the agreement he has assumed, and he may be held liable for the loss attributable to his negligent default within the amount of the proposed policy he has thus failed to secure. *Elam v. Realty Co.*, 599.

6. *Same—Parol Evidence.*—The principle upon which a written contract precludes evidence of prior or contemporaneous parol inducements in contravention of the writing has no application to an action against an insurance agent or broker who has undertaken to procure a policy covering a designated risk, and whose negligence therein has caused the loss complained of. *Ibid.*

7. *Same—Consideration.*—Where the want of the exercise of reasonable care on the part of the insurance agent or broker in procuring a policy of a designated kind has caused loss to the applicant, the undertaking of such agent or broker to procure this class of policy, and the promise of the applicant to take it, is a sufficient consideration to support a binding contract between them. *Ibid.*

8. *Principal and Agent—Negligence—Insurance—Contracts—Misrepresentation of Agent.*—Where a person of mature years of sound mind, or who can read or write, signs or accepts a written contract affecting his pecuniary interest, it is his duty to read it, and knowledge of its contents will be imputed to him if he has not negligently failed to do so, these principles, however, are subject to the qualification that he, as a man of reasonable business prudence and in the exercise thereof, has not been misled or put off his guard by the other party to the contract. *Ibid.*

9. *Same.*—Where an application for a policy of insurance on an automobile is for indemnity from loss against accident or collisions, etc., and has been accepted by an insurance agency, and the applicant has been informed by the agent, while presently engaged at his place of business, that he had delivered the policy of the designated kind to the keeper of a garage for him, where he kept his machine; and by his subsequent acts and misrepresentations made to the applicant and others in his hearing, has reasonably induced the applicant to think that the policy was of the kind agreed upon, the failure of the applicant to have read his policy and find that it did not cover the contemplated loss, which occurred within about a week, will not of itself bar his recovery on the contract, the question being for the jury to determine whether he had reasonably acted as a man of ordinary business judgment and prudence under the circumstances. *Ibid.*

10. *Principal and Agent—Brokers — Contracts — Commissions — Voluntary Abandonment of Contract—Vendor and Purchaser—Timber.*—Where the owner of standing timber enters into a written contract with another that upon the sale of the timber to an acceptable purchaser upon specified terms, and at a certain price, the agent or broker should receive an agreed compensation for his services to be rendered, the broker's right of compensation arises upon the procurement of such purchaser according to the terms agreed; and this is not affected afterwards by the owner's voluntarily abandoning this contract, or not insisting upon its performance by the said purchaser. *House v. Abell*, 619.

11. *Same—Modification of Contract—Arbitration and Award.*—Where the owner of standing timber has agreed with a broker that if he procured a pur-

chaser upon specified terms and price he should receive a fixed sum for the services thus rendered; and the broker has complied with his contract according to its terms, the owner may not avoid paying his broker by agreeing with the purchaser to submit to arbitration the question of the quantity of timber sold, and abandon his contract upon the disagreement between the arbitrators as to the rule of admeasurement of the timber. *Ibid.*

12. *Same—Deferred Payment of Purchase Price.*—Where the broker has procured a purchaser for the owner for his standing timber upon a large body of land for $135,000, to be paid $45,000 in cash, and the balance to be due yearly over a period of five years, the consideration to the broker being $3,000, the contract for the payment of the commissions to the broker, nothing else appearing, does not contemplate that he should await therefor during the period extended for the deferred payments to be made by the purchaser; but he is entitled to his compensation, at the time he has performed his obligations according to the contract. *Ibid.*

13. *Principal and Agent—Brokers—Contracts — Commissions — Conditions Precedent.*—Where a contract for the sale of the owner's timber through a broker sets forth the terms of the sale at length with which the purchaser shall comply and the broker's commission is predicated and made dependent upon the conditions that "the deal will go through," these words refer to the "deal" going through upon the terms agreed upon with the broker, and not to such terms as the owner may have thereafter agreed upon with the purchaser whom the broker had procured. *Ibid.*

PRINCIPAL AND SURETY.

See Judgments, 20; Bills and Notes, 5.

PRIORITIES.

See Deeds and Conveyances, 7, 8, 9.

PRIVIES.

See Judgments, 2.

PRIVILEGE.

See Physicians, 1.

PROBABLE CAUSE.

See Malicious Prosecutions, 2.

PROBATE.

See Corporations, 6; Courts, 6; Wills, 23, 26; Married Women, 3; Deeds and Conveyances, 11.

PROCEDURE.

See Judgments, 4, 9; Constitutional Law, 8; Evidence, 9; Statutes, 6; Taxation, 2; Appeal and Error, 40; Attorney and Client, 7; Railroads, 17; Drainage Districts, 12; Actions, 10.

PROCESS.

See Judgments, 9; Appeal and Error, 36; Guardian and Ward, 1; Parties, 2; Attachment, 7.

PROFITS.

See Statute of Frauds, 1, 10; Trusts, 8.

PROMISE OF MARRIAGE.

See Seduction, 1.

PROPERTY.

See Attachment, 3; Bailment, 1; Injunction, 2, 4.

PROSTITUTION.

See Appeal and Error, 71.

PROXIMATE CAUSE.

See Municipal Corporations, 9; Negligence, 8, 15.

PUBLIC ACCOUNTANTS.

See Injunction, 8.

1. *Public Accountants—Accountants—Statutes—Police Powers.*—Our statutes creating a State Board of Accountancy and giving them authority to pass upon applications and issue licenses to those qualified as public accountants, are within the exercise of the police powers of the State, in which the public are interested, as well as one to whom a certificate has been issued, and the State is also interested in the requirement that moneys collected and not necessary to the purposes of the act be turned into the State Treasury. C.S. 7008 to 7024, inclusive. *S. v. Scott*, 865.

2. *Public Accounts—Accountants — Statutes — Public Officers.* — The provisions of C.S. 7008 to 7024, inclusive, creating and incorporating the State Board of Accountancy, confers upon its members continuous *quasi*-judicial powers as an arm of the State Government in which the people of the State are interested, both as to their administration and to a certain extent in the funds of the board, the compensation of members being paid by fees fixed by law, any surplus to be deposited in the State Treasury, and in these, and in other respects, its members are to be regarded as State officials to the extent of their duties specified in the statute. *Ibid.*

3. *Same—Jurisdiction—Territorial Limits—State Officials.*—The exercise of the powers of the State Board of Accountancy, the members of which are to be regarded as State officials, is coextensive with the State boundaries, and may not be exercised beyond them, the word jurisdiction embracing not only the subject-matter coming within the powers of officials, but also the territory within which the powers are to be exercised. *Ibid.*

4. *Same—Quasi-Judicial Powers.*—The examination and granting license to applicants for certificates as public accountants, beyond the borders of our State, being the exercise of a *quasi*-judicial power, under the police powers of the State, is void, and an injunction will lie to prevent it, in a suit of the State *ex rel.* Attorney-General and an accountant holding a certificate from the board, who is also a citizen and taxpayer of North Carolina. *Ibid.*

5. *Same—Statutes.*—The legislative intent will not be construed by implication to extend the exercise of a *quasi*-judicial power by public officers to places beyond the State boundaries, as where the statute creates a State Board of Accountancy, gives it the power to examine and license applicants, and states that the board may do so "at such place as it may designate"; for the presumption being against the exercise of such extra territorial power, the discretion of the board in the exercise of this power will be confined to places within the boundaries of this State. *Ibid.*

6. *Same—Ultra Vires Acts—Courts.*—Where a statute prescribes the means for the exercise of a power granted by the act, no other or different means can be implied as being more effective or convenient, and the Legislature having incorporated a State Board of Public Accountancy, giving it the power to determine

upon examination whether applicants for license therein are qualified to receive them, it is for the courts of the State, upon proper action, to pass upon the question of whether the board acts *ultra vires* in holding an examination beyond the boundaries of the State upon the request of nonresidents desiring to obtain a certificate, and a declaration in the fixing of such place that it would be the last time the board would hold an examination outside the State is not binding or controlling on the question. *Ibid.*

PUBLIC ADMINISTRATORS.

1. *Public Administrators—Estates—Rights to Qualify—Statutes.*—The public administrator of a county has no right or interest in the estate of the deceased which would entitle him to administer, unless and until he has been appointed and qualified by the clerk upon the specific estate, C.S. 6, and after the period allowed for the relatives to qualify in the order specified by the statute, or some other person on their letter or renunciation. C.S. 20. *In Re Neal*, 405.

2. *Same—University of North Carolina.*—Where those claiming the estate of the deceased by descent and distribution have filed a caveat to a paper-writing purporting to be his will, and the questions at issue not only relate to the validity of the will, but the rights of the caveators as lawful claimants, the University of North Carolina, to whom the estate may eventually escheat, is a proper party, and not the public administrator. *Ibid.*

PUBLICATION.

See Attachment, 1.

PUBLIC CROSSING.

See Railroads, 13; Evidence, 26.

PUBLIC FUNDS.

See *Mandamus*, 1.

PUBLIC INSTITUTIONS.

See Guardian and Ward, 2.

PUBLIC OFFICIALS.

See Public Accountants, 2.

1. *Public Officials — Officials — Officers de Facto — Quo Warranto — Mandamus—Pleadings—Admissions—Actions.*—The exercise of official duties of an officer *de facto* can be impeached only by a proceeding properly instituted for that purpose; and in proceedings for *mandamus*, an admission by the defendant that the plaintiffs were exercising the powers and performing the duties of officials for a special school district created by statute, precludes them from insisting upon their want of authority to maintain the proceedings. *Alexander v. Lowrance*, 642.

2. *Public Officials—Officials—Trusts—Passive Trusts—Mandamus—Statutes —School Districts.*—Where the treasurer of an incorporated city or town refuses to turn over to the proper officials funds received from the sale of bonds for school purposes, contrary to the provisions of statute, such treasurer is not acting under an authorized judicial or discretionary power, but he is merely a simple or passive trustee against whom *mandamus* will lie. *Ibid.*

PUBLIC POLICY.

See Damages, 1; Wills, 17.

PUBLIC SALES.

See Bills and Notes, 2.

1. *Public Sales—Increase of Bid—Suppression of Bidding—Tenants in Common.*—Where tenants in common of lands sold for a division contract with a third person to raise the bid on the land in consideration that he is to receive a certain amount of the profits arising from an advanced price the lands should bring at the resale, their purpose was to increase and enhance the bids at the resale, and does not fall within the principle that contracts which stifle competition and chill bidding are void. *Jennings v. Jennings,* 26.

2. *Public Sales—By-bidders—Purchasers.*—There is an implied guaranty that all bids at a public sale of lands are genuine, and where by-bidders thereat are obtained, the purchaser who acts promptly may be relieved of his bid. *Ibid.*

3. *Same—Increase of Bids—Tenants in Common.*—Where the plaintiff has entered into a valid agreement with tenants in common to raise the bid on the land sold for division, upon a mutual consideration arising from the contemplated profits of a resale: *Semble,* it is a violation of an implied guaranty that all bids at public sales should be genuine; but in this case, there being no fraud and the parties having received a direct benefit from the contract, and there being no complaint from other bidders, it is assumed to be valid between them. *Ibid.*

4. *Public Sales—Assignment of Bid—Contracts — Breach — Suppression of Bids—Tenants in Common.*—Where the plaintiff has entered into a valid agreement with the defendants, tenants in common, whereby, for mutual consideration, he has raised the bid at a sale of lands for division among tenants in common, he and the tenants in common to share the profits of a resale; and without the knowledge of the defendants assigns his bid for a personal consideration to a third person, who otherwise would have paid a greater price, the effect of his so assigning his bid would be a breach of his contract sued on, and a violation of the principle as to the suppression of bids at a public sale, which he will not be permitted to do. *Ibid.*

PUNITIVE DAMAGES.

See Damages, 1, 3; Malicious Prosecution, 6.

PURCHASERS.

See Bills and Notes, 1; Judgments, 21; Principal and Agent, 1; Statute of Frauds, 5; Public Sales, 2; Trusts, 7, 8; Deeds and Conveyances, 11, 14; Constitutional Law, 19.

QUANTUM MERUIT.

See Commerce, 1; Contracts, 19; Pleadings, 20; Remedies, 1.

QUANTUM VALEBAT.

See Verdict, 3, 4.

QUESTIONS AND ANSWERS.

See Appeal and Error, 20, 72.

QUESTIONS FOR JURY.

See Accord and Satisfaction, 1; Negligence, 13, 18; Malicious Prosecution, 2; Railroads, 14; Attorney and Client, 4; Banks and Banking, 3; Actions, 5, 8; Employer and Employee, 1; Criminal Law, 13, 20, 26; Evidence, 5, 6, 17, 23; Assault, 2; Military, 3; Intoxicating Liquor, 6; Pleadings, 14; Homicide, 4; Railroads, 3, 7; Trusts, 4; Municipal Corporations, 7.

QUESTIONS OF LAW.

See Malicious Prosecution, 2; *Mandamus*, 2; Appeal and Error, 16; Intoxicating Liquor, 1; Homicide, 4.

QUO WARRANTO.

See Public Officials, 1.

RAILROADS.

See Appeal and Error, 17; Damages, 4; Employer and Employee, 6, 35, 36; Evidence, 17, 26; Judgments, 8; Municipal Corporations, 3; Pleadings, 15; Express Companies, 1; Negligence, 7; Vendor and Purchaser, 2.

1. *Railroads—Government Control—Personal Injuries—Negligence—Federal Decisions—Federal Law—Dismissal of Action.*—Under the present opinion of the U. S. Supreme Court, in *R. R. v. R. R.*, a recovery may not be had against a railroad company while under government operation for damages for a personal injury negligently inflicted upon an employee; and where the company and the Director General of Railroads have both been made parties defendant, the action will be dismissed, on appeal, as to the former. *Kimbrough v. R. R.*, 234.

2. *Same—Appeal and Error—Judgments.*—Where a railroad company and the Director General of Railroads have both been joined as parties defendant in an action to recover for a negligent injury, and issues have been submitted as to each, and adverse verdict rendered as to each, there can be no prejudice to the Director General in dismissing the action as to the railroad company and affirming it as to the Director General, and the same may be done under the provisions of C.S. 658 and 1412. *Ibid.*

3. *Railroads—Director General of Railroads—Government Control—Negligence—Evidence—Questions for Jury—Trials.*—Where there is evidence that the plaintiff was a passenger on defendant railroad company's "shuttle train" for carrying employees to and from work, that the coaches were frequently overcrowded, and that plaintiff, in consequence, was struck by a "switch target," placed six and one-half feet from the center of the track, as he was standing on the car step holding to the grab irons, and to the contrary, that his injury was caused by his attempting to board the moving train under the circumstances: *Held*, sufficient for the determination of the jury upon the issues of negligence, contributory negligence, and damages. *Gilliam v. R. R.*, 179 N.C. 508, cited and distinguished. *Franck v. Hines*, 251.

4. *Railroads—Director General—Parties—Government Control—Joint Judgment—Dismissal—Appeal and Error.*—In this action against a railroad company and the Director General of Railroads, under Government control, to recover for a personal injury to an employee alleged to have been negligently inflicted, the case is dismissed, on appeal, against the railroad and continued as to the Director General, under the authority of *Kimbrough v. R. R.* and *Wyatt v. R. R.*, at this term. *Ibid.*

5. *Railroads—Employer and Employee—Master and Servant—Personal Injury—Negligence—Evidence.*—Where there is evidence that the plaintiff was injured while discharging his duties to the defendant railroad company, in carrying freight from its train to a depot platform by a passenger train running between another passenger train, discharging passengers at the depot, contrary to the rules of the company, and coming up, without signal or other warning, where the plaintiff's view was obstructed, and under noisy surroundings, which tended to prevent the plaintiff's hearing its approach, it is sufficient to be submitted to the jury upon the issue of defendant's actionable negligence. *Wyne v. R. R.*, 253.

RAILROADS—*Continued.*

6. *Same—Contributory Negligence.*—Where an employee on a freight train engaged in his duties as such, under the immediate direction of his superior, has been injured by a collision with the defendant's passenger train under evidence tending to show that the negligence of the defendant proximately caused the injury complained of, the question of the plaintiff's contributory negligence is one for the jury, upon the issue, and a motion to nonsuit should not be granted upon that ground alone. *Ibid.*

7. *Same—Questions for Jury—Trials.*—The principal that requires one, before entering on a railroad track, to look and listen for approaching trains may be so qualified by the facts and circumstances of the particular case, when the defendant's negligence has been shown, as to require the question to be submitted to the jury upon the issue of contributory negligence, especially where the plaintiff, an employee, at the time was acting within the scope of his duty to the defendant, under the immediate order of his superior. *Ibid.*

8. *Railroads—Lessor and Lessee—Torts.*—A railroad company, by leasing its road to another such company for its operation, may not escape liability for the torts of the lessee, however many times the lease may have passed from one to another railroad, and notwithstanding the fact that the present company has absorbed the original lessor railroad company and has become its successor. *Williams v. R. R.*, 267.

9. *Same—Statutes.*—The mere fact that the lease by one railroad company to another for the purpose of its operation has been approved by statute does not alone change the liability of the lessor road for the torts of its lessee. *Ibid.*

10. *Same—Equal Liability.*—The liability of a lessor road for the torts of its lessee is joint and several in equal degrees, and an instruction of the court to the jury that the lessor would be only secondarily liable is reversible error. *Ibid.*

11. *Railroads—Lessor and Lessee—Absolute Assignments—Leases.*—Where a railroad company has contracted with another that the other company shall operate the road for a part of the unexpired term of its lease, requiring an indemnity against liability for its torts and providing for a forfeiture, etc., and that it should make no traffic affiliations with other railroads without its written consent, the contract is one of lease, and not one of absolute assignment. *Ibid.*

12. *Same—Leases Defined.*—An absolute assignment makes no reservation of rent or interest in the property assigned, differing from a lease of the subject-matter, in that the latter creates a lesser estate from the greater, reserves rent, and retains some interest or estate after the termination of the term, and recognizes ownership of the demised property by the lessor. *Ibid.*

13. *Railroads—Public Crossing—Negligence — Evidence — Trials.* — Defendant's exceptions to the evidence in this action to recover for the negligent killing of plaintiff's intestate by a collision with the defendant's train pushed forward by the locomotive through a cut, without signals or warnings, and where bushes had been permitted by the defendant to grow to obstruct the view of the engineer, are held untenable under the decision of *Perry v. R.R.*, 180 N.C. 295, wherein the rules governing such occasions are stated, and the charge is approved in conformity to that case. *Ibid.*

14. *Railroads — Negligence—Evidence—Automobiles—Crossings—Nonsuit—Questions for Jury.*—Where there is evidence that the defendant railroad company has left its track in an unsafe condition at a public crossing, and the plain-

tiff was injured in consequence while attempting to cross at night in an automobile, the issue as to defendant's actionable negligence should be submitted to the jury, and its motion as of nonsuit thereon is properly denied. *Vann v. R. R.*, 567.

15. *Railroads—Negligence—Crossings — Tracks — Presumption of Safety—Contributory Negligence.*—Where the negligence alleged in an action to recover damages against a railroad company for a personal injury, under supporting evidence, is that an additional railroad track at a public crossing, then being laid, was left unfinished at night, so that it projected above the crossties to such an extent as to have caused injury to the plaintiff in attempting to cross in an automobile, the opinion of one qualified as an expert, as to how the track should have been constructed, and under the existing conditions is competent evidence. *Ibid.*

16. *Railroads—Negligence—Contributory Negligence—Last Clear Chance.*—Where there is evidence tending to show that the plaintiff's intestate was killed at a public crossing while endeavoring to cross in front of the defendant railroad company's train while it was slowly moving away from its station, and that the defendant's engineer had his attention called to the dangerous position of the intestate in time to have avoided the injury, the contributory negligence of the intestate will not bar his recovery, it being dependent upon the answer to the issue as to the last clear chance. *Haynes v. R. R.*, 679.

17. *Railroads—Director General—War—Actions—Procedure.*—An action to recover damages against a railroad company for a personal injury negligently inflicted while operated by the Director General as a war measure, will not lie, and, on appeal, will be dismissed without prejudice to the plaintiff's right of action against the Director General of Railroads. *Lane v. R. R.*, 774.

RATIFICATION.

See Insane Persons, 1; Deeds and Conveyances, 15; Elections, 2.

REASONABLE TIME.

See Contracts, 25.

REBUTTAL.

See Evidence, 9.

RECEIPT.

See Evidence, 10.

RECEIVERS.

1. *Receivers—Appointment Before Judgment.*—Where the plaintiff makes it properly to appear to the court that he is in imminent danger of loss by defendant's insolvency, or that he reasonably apprehends that the defendant's property will be destroyed, removed or otherwise disposed of by defendant pending the action, or that the defendant is insolvent, and it must be sold to pay his debts, or that he is attempting to defraud the plaintiff, a receiver for his property may be appointed before judgment. C.S. 861. Other instances pointed out by WALKER, J. *Kelly v. McLamb*, 158.

2. *Same—Liens—Conditional Sales—Cost and Expenses—Equity—Law.*—Where it appears that the defendant is insolvent and has left the State to avoid his creditors, including the plaintiff, and that a part of his property consisted of a cotton gin and planing mill and machinery purchased by him under a conditional bill of sale, duly recorded and constituting a first lien thereon, and the seller has acquiesced in an order appointing a receiver, and that he insure the property or employ a watchman to guard against its destruction by fire, the preservation of

the property inures to the benefit of the seller holding the lien, and he may not successfully complain, either at law or in equity, of an order of court that he pay his proportion of the receivership cost and expenditure for the preservation of the property, especially as the receiver was appointed with his consent. *Ibid.*

RECEIVING.

See Criminal Law, 21, 22.

RECITALS.

See Deeds and Conveyances, 9.

RECORD.

See Appeal and Error, 1, 49, 51, 55, 61, 70, 77, 78, 81, 82; Evidence, 4; Judgments, 9; Parties, 2.

RECORDARI.

See Appeal and Error 74, 76.

REFERENCE.

See Appeal and Error, 56.

1. *Reference—Findings—Courts—Evidence—Appeal and Error.*—Where the trial judge, after reviewing the evidence, approves and adopts the referee's findings of fact thereon, it is sufficient, and his action will not be disturbed on appeal when there is evidence to support the findings so made. *Martin v. McBryde*, 175.

2. *Same.*—Conclusions of law in the report of a referee are not based upon the evidence, but upon the facts found therefrom, and an exception that a conclusion of law was based on an erroneous finding of fact, which was approved and adopted by the trial judge, is not reviewable on appeal, when there is evidence to support such finding. *Ibid.*

REGISTRATION.

See Contracts, 17; Elections, 1; Deeds and Conveyances, 4, 6, 8, 9, 11, 20.

REMAINDERS.

See Wills, 3, 5, 6, 21.

REMAND.

See Appeal and Error, 46, 55, 94.

REMARKS.

See Instructions, 1.

REMEDIES.

See Statutes, 6; Contracts, 20, 27; Equity, 6.

Remedies—Contracts—Quantum Meruit—Election.—Where plaintiff seeks to enforce a special contract to will the plaintiff property for services rendered, and damages are sought to be recovered on a *quantum meruit* at the same time for its breach, the remedies are inconsistent, and the plaintiff is put to his election between the two. *Hayman v. Davis*, 563.

REMOVAL OF CAUSES.

See Courts, 5.

REPUTATION.

See Deeds and Conveyances, 1; Witness, 1; Intoxicating Liquor, 9.

RES GESTÆ.

See Evidence, 36.

RESIDUARY CLAUSE.

See Wills, 7.

RES IPSA LOQUITUR.

See Negligence, 2; Instructions, 7; Pleadings, 16.

RESTRAINT.

See Estates, 1.

REVIEW.

See *Habeas Corpus*, 3; Appeal and Error, 10.

REVOCATION.

See Deeds and Conveyances, 17.

RIGHTS.

See Attorney and Client, 3; Constitutional Law, 6; Courts, 8; New Trials, 1; Appeal and Error, 64.

ROADS AND HIGHWAYS.

1. *Roads and Highways—Commissioners—Statutes—Constitutional Law—Local Laws.*—A statute that abolishes two boards of road commissioners in a county and gives to another board, created by the same act, entire control and management of the public roads and bridges of the county, for working, repairing, maintaining, altering, and constructing such roads as were then in existence or which may thereafter be built, does not violate Article II, section 29, of our State Constitution, prohibiting the passage of local, private, or special acts authorizing the laying out, opening, altering, etc., of highways, streets, or alleys, etc., and is a constitutional and valid enactment. *Huneycutt v. Comrs.*, 319.

2. *Same—Bonds—Taxation.*—An act that abolishes two boards of road commissioners of a county and substitutes one central board for the entire county, authorizing it to take care of the indebtedness theretofore incurred for such purposes, and to incur obligations for the continuance of this work and to borrow money in pursuance thereof not to exceed a certain amount, is sufficient to imply the power to issue bonds by the new boards to take care of this indebtedness incurred and to be incurred, at the rate of interest specified by the act, and to mature them within the forty years limited by C.S. 3768. *Ibid.*

3. *Same—Implied Powers.*—The construction and maintenance of public roads and bridges is a part of the necessary expenses of a county for which the proper authorities may issue bonds, when the existing conditions make them desirable and proper, consistent with business prudence. *Ibid.*

4. *Roads and Highways—Top Soil—Condemnation—Compensation — Damages—Value of Improvements—Statutes—Legislative Discretion — Constitutional Law.*—It is within the discretion of the Legislature to provide whether or not in assessing the damages of the owner of land, taken in condemnation for a public use, the increased value of the land may be considered in reduction; and where his top soil has been taken under the provisions of a statute, for the use or maintenance of a public road, providing for compensation, and there is no evidence as to the value of the soil so taken, the measure of his damages will be the difference in the value of the land before and after the soil had been removed. *Harrold v. Good Roads Com.*, 577.

5. *Roads and Highways—Counties—Roads—Statutes—Contracts — County Funds—State Highway Commission.*—Where the commissioners of a county hav-

ROADS AND HIGHWAYS—*Continued.*

ing control of the public roads and the funds available for that purpose, have agreed with the State Highway Commission to pay half of the cost of construction of a certain highway of the county, and before its completion are superseded by a county highway commission created by an act of the Legislature, to which the control of the highways and of the available funds for the purpose are to be paid, etc.: *Held*, the county highway commission should assume the balance of the obligation to the State Highway Commission on the public road in question, and relieve the commissioners of the county thereof. *Comrs. v. Highway Com.*, 617.

RULES.

See Evidence, 9.

RULES OF COURT.

See Appeal and Error, 40, 47, 68.

RULES OF PROPERTY.

See Appeal and Error, 39.

RULE OF PRUDENT MAN.

See Banks and Banking, 4; Employer and Employee, 4, 8; Negligence, 14; Actions, 8.

RULE IN SHELLEY'S CASE.

See Wills, 2.

RURAL COMMUNITIES.

See Corporations, 12, 14.

SAFETY DEPOSITS.

See Banks and Banking, 4, 5.

SALES.

See Mortgages, 1, 6, 7, 8, 11; Intoxicating Liquor, 4, 9; Appeal and Error, 11, 12; Vendor and Purchaser, 1; Contracts, 8, 11, 25; Judgments, 15, 20, 21; Trusts, 5, 10; Deeds and Conveyances, 10; Receivers, 2; Statute of Frauds, 10; Public Sale.

SCHOOLS.

See Appeal and Error, 46; Constitutional Law, 16, 18, 20; Elections, 1, 2.

Schools — Bonds — School Committees — County Treasurer — Injunction. — Where it has been judicially determined that the treasurer of an incorporated city or town has unlawfully retained and refuses to pay over to a school district funds in his hands, received from the sale of bonds for school purposes, the city or town will be restrained from proceeding to use the funds in the construction of schoolhouses, at the suit of the members of the board of school districts having the right thereto. *Alexander v. Lowrance*, 646.

SCHOOL DISTRICTS.

See Constitutional Law, 13, 14; Public Officials, 2; Statutes, 12; Corporations, 12.

1. *School Districts—Bonds—Statutes—Sinking Fund—Taxation.*— Where a statute authorizes a school district to issue bonds for school purposes, and requires that a sinking fund at a certain rate of taxation be provided for the retirement of the bonds at maturity, and the taxable property in the district is not sufficient to pay the interest and provide an adequate sinking fund, the retirement of these bonds is as vital to their validity as the authorization to issue

them, and their issuance will be permanently enjoined at the suit of a taxpayer within the district. In this case the bonds had not been issued and the rights of purchasers had not intervened. *Proctor v. Comrs.*, 56.

2. *School Districts—Counties—Education—Statutes—Constitutional Law—High Schools—Divisions—Segregation of Pupils.*—Our statutes providing that the county board of education shall divide the townships, or the entire county, etc., into convenient school districts, etc., C.S. 5469, and authorizing and empowering the board to redistrict the entire county and consolidate school districts, etc., C.S. 5473, was passed in pursuance of Article IX, section 3, of the State Constitution, and refers to the establishment, consolidation, etc., of districts in the sense of territorial or geographical regions, and not to the dividing or segregation of the pupils; and an attempt of the county board of education thereunder to form a high school district in a territory comprised of several public school districts, is without authority and invalid. As to whether this may be done under the Public Laws of 1921, ch. 179, is neither before the Court nor decided on this appeal. *Woosley v. Comrs.*, 429.

3. *School Districts—Bonds—Taxation—Counties—Statutes—Constitutional Law—Local Laws—Injunction.*—An act which authorizes a high school district, sought to be established under an invalid resolution of the county commissioners, to issue bonds and levy taxes for school purposes, is itself invalid to confer such authority; and an act for the purpose of ratifying such ordinance, passed since the adoption of Const., Art. II, sec. 29, is a local, private, or special act thereby prohibited; and the issuance of such bonds and levy of such taxes, will be permanently enjoined. *Ibid.*

4. *School Districts—Taxation—Statutes—Elections—Less Than Two Years.* C.S. 5533, requiring that "no election for revoking a special tax in any special tax district shall be ordered and held," within less than two years from the date at which the tax was voted and the district established, "nor at any time within less than two years after the date of the last election on the question in the district," invalidates any election on the question of taxation held within two years after the last election, the second proposition being independent from the first as to "revoking" a special tax in the district, otherwise the second provision would be identical with the first, and meaningless. *Weesner v. Davidson*, 604.

5. *School Districts—Taxation—Statutes—Elections—Computation of Time.* Computing the two years period in which an election may be had with regard to taxation in a special school district under the provisions of C.S. 5533, the time should be computed from the last valid election on the subject. *Ibid.*

SECRETARY OF STATE.

See Corporations, 12, 14.

SCIENTER.

See Intoxicating Liquor, 5.

SEDUCTION.

See Trials, 3.

1. *Seduction—Promise of Marriage—Supporting Evidence—Statutes.*—Evidence that the defendant, indicted for seduction under the promise of marriage, was engaged to the prosecutrix at the time of the alleged offense, and so held himself out and as such had gone with her, is sufficient supporting evidence of the testimony of the prosecutrix that he had seduced her under promise of marriage to be submitted to the jury. *S. v. Meares*, 809.

SEDUCTION—*Continued.*

2. *Same—Inferences for Jury.*—The acts and conduct of the defendant, tried under the statute for seducing the prosecutrix under promise of marriage, may be sufficient for the jury to infer the promise independently of the testimony of the prosecutrix thereto, and are *held* sufficient under the whole evidence in this case. *Ibid.*

3. *Same—Instructions.*—Where, under the evidence, the court has instructed the jury that the State must show the guilt of the defendant, tried for seduction under a breach of promise of marriage, beyond a reasonable doubt, and properly upon the other elements of the offense, a further charge, upon the evidence, that the promise must be either express or implied, is not erroneous, taken in connection with his charge that the promise must have been the sole inducement to the act without "other motive." *Ibid.*

4. *Seduction—Breach of Promise of Marriage—Fault of the Woman—Statutes—Innocence and Virtue.*—In order to convict of crime of seduction under a breach of promise of marriage, the woman should have previously been both innocent and virtuous, and should she have committed the act of adultery induced by her own lascivious desire, with or without the promise, her conduct is not such as to bring her within the intent and meaning of the statute as an innocent and virtuous woman. C.S. 4339. *S. v. Johnson*, 883.

5. *Same—Instructions—Appeal and Error.*—Where there is evidence upon the trial for seduction under breach of promise of marriage that the woman had consented to the act, induced solely by her own lascivious desire, irrespective of the promise to which she has testified, the jury may disregard her testimony as to the promise, and render a verdict acquitting the defendant of the charge; and a requested instruction is erroneously refused which leaves out the element of seduction and bases the defendant's innocence or guilt on the finding as to whether the woman had been solely induced by her own desire. C.S. 4339. *Ibid.*

6. *Same—Subsequent Chastity.*—Upon the trial for seduction under a breach of promise of marriage, there was evidence that the woman, a widow, had had sexual intercourse with her husband before her marriage, which had also been induced under promise thereof: *Held*, the woman does not come within the intent and meaning of the statute as having been "innocent and virtuous"; though however often she may have committed the act with her husband before the marriage, yet had she remained faithful to him thereafter, and had not had sexual intercourse with any other man until that with the defendant, it would render the defendant guilty under the provisions of the statute if he had violated them. C.S. 4339. *Ibid.*

SENTENCE.

See Appeal and Error, 94; Criminal Law, 30.

SEPARATION.

See Divorce, 1.

SERVICE.

See Appeal and Error, 62.

SEVERANCE.

See Actions, 2; Pleadings, 7; Easements, 1; Criminal Law, 21.

SEWERS.

See Injunction, 3.

SHEEP.

See Evidence, 18.

SHERIFFS

See Drainage Districts, 1; Statutes, 4.

SIDEWALKS.

See Municipal Corporations, 7.

SIGNALS.

See Evidence, 26.

SIGNATURE.

See Wills, 24.

SINKING FUND.

See School Districts, 1.

SLAVES.

See Descent and Distribution, 1.

SPECIAL LAWS.

See Constitutional Law, 14.

SPECIFIC PERFORMANCE.

See Statute of Frauds, 5, 9; Mortgages, 5

SPIRITUOUS LIQUORS.

See Criminal Law, 14; Intoxicating Liquor, 1, 3, 4, 5, 6, 7, 9, 11, 12; Witness, 1; Appeal and Error, 95; Constitutional Law, 27.

STARE DECISIS.

See Appeal and Error, 39.

STATEMENTS.

See Evidence, 35.

STATUTES.

See Appeal and Error, 4, 11, 44, 46, 64, 71, 76, 85; Married Women, 2, 3, 4; Courts, 2, 5, 10; Drainage Districts, 1, 6, 9; Actions, 1, 4, 10, 11; Discovery, 1; Attachment, 1, 3; Contracts, 17, 24; Constitutional Law, 1, 4, 7, 10, 11, 15, 16, 24, 25; Corporations, 1, 2, 5, 12; Evidence, 3, 7, 9, 18, 20, 29, 35; Mortgages, 1, 8; Instructions, 1; Equity, 3; Judgments, 3, 13, 14, 15, 17; Accord and Satisfaction, 3; *Mandamus*, 2; Pleadings, 1, 2, 7; School Districts, 1, 2, 3, 4, 5; Waters, 2; Statute of Frauds, 3; Municipal Corporations, 5; Railroads, 9; Attorney and Client, 10; Roads and Highways, 1, 4, 5; Commerce, 1; Homicide, 5; Deeds and Conveyances, 13; Guardian and Ward, 1, 2; Insane Persons, 1; Wills, 16, 23, 26; Limitation of Actions, 3; Public Officials, 2; Seduction, 1, 4; Elections, 1; Criminal Law, 2, 4, 8, 9, 11, 14, 17, 25; Intoxicating Liquor, 7, 9, 10, 11, 12; Indictment, 1; Fish Commission, 1, 2; Physicians, 1; Assault, 1; Public Accountants, 1, 2, 5; Escheats; Public Administrators.

1. *Statutes—Interpretation—Courts—Legislature—General Assembly* — The bringing forward of sec. 13, ch. 67, Laws 1911, in C.S. 5369, providing that 2 per cent shall be allowed sheriffs "for collecting the drainage assessments as hereinbefore prescribed," is a legislative construction of section 13 of the prior law, and was intended to restrict the compensation of the sheriff to 2 per cent of the amount of the assessments in drainage districts collected by him, and not to allow him a commission of 5 per cent as in case of taxes collected for general governmental purposes. *Comrs. v. Davis*, 141.

2. *Same.*—While the interpretation of a statute is a judicial function, a legislative construction may be considered by the courts, though it is not binding on this. *Ibid.*

3. *Same.*—Where an act applies indiscriminately the terms "tax" and "assessment" to the assessment imposed for maintenance of a drainage district for

STATUTES—*Continued.*

the special benefit of the lands therein, the Court will construe the word "tax" as "assessment," the word "tax" having evidently been used inadvertently. *Ibid.*

4. *Statutes—Interpretations—In Pari Materia—Drainage Districts—Sheriffs—Commissioners.*—The relevant sections of the various statutes upon the subject of the collection of assessments on lands in drainage districts by sheriffs and tax collectors, and their compensation therefor, being *in pari materia*, should be construed together by the courts in ascertaining the legislative intent. *Ibid.*

5. *Statutes—Interpretation—Presumptions.*—When there are two or more statutes on the same subject in the same or successive Legislatures, the presumption is against inconsistency, and they should be so construed as to harmonize with each other, and as a whole, in the absence of express repealing clauses, and each and every part allowed significance if this can be done by fair and reasonable interpretation. *Young v. Davis*, 200.

6. *Same—Conflict—Additional Remedies—Procedure—Pleadings—Judgment—Courts—Clerks of Court.*—Ch. 156, Laws 1919, dealing with the procedure before the clerk as to service of process, the filing of pleading and rendering judgments by default, upon uncontested actions to recover upon bills, notes, bonds, and other forms of indebtedness, deals particularly with that class of actions, and is construed to be an additional remedy given, and not repealed by the provisions made applicable to the general procedure and remedies passed later at the same session of the Legislature, or by the amendment expressly referring to it, passed as ch. 96, Special Session of 1920; and ch. 156, Laws 1919, is in force as a permissive and selective method of procedure in the class of actions to which it refers. *Ibid.*

7. *Statutes—Interpretation—Codification of Laws—Legislature.*—In the interpretation of statutes upon the same subject-matter at the same or a subsequent session, on the question of whether they have been repealed by a later act, the codification of the laws and its adoption by the Legislature thereafter, when relevant, may be considered by the courts. *Ibid.*

8. *Statutes—Federal Law—Controlling Decisions—Parties—Director General—Verdict Set Aside.*—The decision of the Supreme Court of the United States controls in the interpretation of Federal laws, and, thereunder, an action against a railroad and the Director General to recover for a personal injury inflicted upon an employee of a railroad, under Government operation, improperly joins the railroad company, and the action as to it will be set aside on appeal. *Wyne v. R. R.*, 253.

9. *Statutes — Bond Issues — Road Districts — Requirements of Statutes — Void Bonds—Municipal Boards.*—Where there are provisions in the statute authorizing an issue of bonds by the road commissioners of a county, making it the duty of the commissioners either to begin the retirement of the bonds within five years or create a sinking fund for their retirement at maturity, and that interest on the bonds be paid annually, the commissioners issuing the bonds may not by contract or otherwise render ineffectual the power of future such boards to exercise the discretion imposed on them by statute within the stated period; or in contradiction of the express provision of the statute, require the semiannual payment of the interest; and these statutory requirements reaching to the vitality of the bonds, their issuance otherwise will be declared invalid. *Ballou v. Road Com.*, 473.

10. *Statutes—Interpretation—Captions.*—The caption of an act may be called in to aid its interpretation only in case of doubt, and not when the legislative

STATUTES—*Continued.*

meaning or intent is clearly expressed in the body of the act; especially so when the caption has been prepared by compilers and not voted on by the legislative body as a part of the act. *Weesner v. Davidson*, 604.

11. *Statutes—Interpretation—In Pari Materia.*—All statutes relating to the same subject will be compared and construed by the courts with reference to each other, so as to effectuate all of the provisions of each, if it can be reasonably and fairly done, so that effect will be given to the legislative intent. *Alexander v. Lowrance*, 642.

12. *Same—Municipal Corporations—Cities and Towns—Bonds—School Districts.*—C.S. 5684, 5686, giving authority to the governing bodies of incorporated cities and towns to issue bonds for school purposes upon the submission of the question to, and the approval of their voters, and section 5690, construing these powers to be in addition to or coördinate with those given or which may thereafter be given by statute to such corporation, do not deprive a school district created under a special act from exercising control over the schools in the district specially conferred, or the trustees of such district of their right to the funds received by the city or town from the sale of the bonds issued for the schools of the district, in disregard to the directions of a prior act creating the special school district. *Ibid.*

13. *Statutes—Amendments—Recorders' Courts—Actions—Abatement—Constitutional Law—Appeal and Error.*—Where the question of the constitutionality of C.S. 1536, establishing recorders' courts by a general act is the subject of the action, and pending the appeal the Legislature has withdrawn the effect or operation of the statute from a certain county wherein the establishment of the court was the subject of injunctive relief, the cause of action abates and the appeal will be dismissed at the cost of each party, and the order restraining the establishment of the particular court will continue to be effective. *Coffey v. Rader*, 689.

STATUTE OF FRAUDS.

See Contracts, 10, 22; Instructions, 10; Pleadings, 14; Trusts, 1.

1. *Statute of Frauds—Actions—Contracts — Parol Agreements — Lands — Profits.*—A contract between the plaintiff and defendant that certain land was to be bid in at a sale, paid for by the defendant, and resold in lots for a division of profits, is not such an interest in the lands that will require a writing, etc., under our statute of frauds. C.S. 988, but relates only to the profits upon the lands, and may be enforced as a valid agreement by parol. *Newby v. Realty Co.*, 34.

2. *Same—Trusts—Parol Trusts.*—The English statute of frauds, requiring a written contract to establish a trust in lands, was never adopted in this State, and a parol agreement that one of the parties should pay for certain lands, to be bid in at a sale, and held for a resale and a division of the profits between both of the parties, is valid, and is enforceable where one of them has accordingly bid in the land, but has taken title to himself. *Ibid.*

3. *Same—Written Memoranda—Statutes.*—Our Statute, Rev. 976, providing that contracts to sell or convey lands shall be void unless some sufficient memorandum thereof be reduced to writing, applies to those cases alone in which, as a result of sale, exchange or some other form of bargaining, a conveyance of land is contemplated from one of the contracting parties to the other; and not to contracts whereby two persons agree to purchase lands, whether generally or as a single venture, for the purpose of reselling it for the division of the profits. *Ibid.*

STATUTE OF FRAUDS—*Continued.*

4. *Same.*—Where a defendant, without plaintiff's knowledge, has breached his valid parol agreement to purchase land for the use and benefit of the plaintiff and himself, to be afterwards sold for a division of the profits, and has taken title to himself alone, and has associated other and innocent purchasers to forestall the plaintiff in the enforcement of the trust, the plaintiff may assert his right to recover damages for a breach of the trust or contract, or in equity to follow any fund received by the defendant for the land. *Ibid.*

5. *Same—Election—Damages—Specific Performance—Innocent Purchaser.* Where the defendant has breached his valid parol agreement for the purchase of land and a division of the profits upon a resale, and has associated others with him, the plaintiff may elect to sue for specific performance, making the new associates parties, if they were not *bona fide* purchasers for value, without notice, and if they were, so that he cannot compel performance by them, he may recover damages for a breach of the contract, or a violation of the trust. *Ibid.*

6. *Statute of Frauds—Contracts to Convey Lands—Memorandum.*—Where the mother has contract and agreed with her children to add her separate property to that of her deceased husband and divide it among them, reserving a life estate, and one of them being a minor son, she has proceeded before the court upon verified petition reciting the facts, for the conveyance of such minor's property, the recitation in her petition of the agreement is a sufficient memorandum under the statute of frauds, C.S. 988, and her contract in respect to all the children is valid and enforceable under the statute. *McCall v. Lee*, 114.

7. *Same—Parol Agreement—Subsequent Writing.*—The written memorandum required of the statute of frauds (C.S. 988) for the conveyance of lands need not necessarily be made at the time of the agreement, and when reduced to writing thereafter, and otherwise sufficient, it will be valid. *Ibid.*

8. *Statute of Frauds—Vendor and Purchaser—Contracts—Parol Agreements—Payment of Purchase Price—Betterments.*—A purchaser under a parol contract to convey lands, who has entered into possession thereof after paying the purchase price, and put valuable improvements thereon, may recover the purchase price from the vendor and the enhanced value of the lands by reason of the improvements, upon the vendor's refusal to convey the lands under the plea of the statute of frauds. *Carter v. Carter*, 186.

9. *Same—Specific Performance.*—A vendor of lands under a parol agreement may not keep the purchase price thereof, and retain the improvements placed thereon by the purchaser in possession, and repudiate the agreement under the plea of the statute of frauds, though the purchaser's suit for specific performance may not be successfully maintained. The legal and equitable remedies discussed by WALKER, J. *Ibid.*

10. *Statute of Frauds—Contracts—Lands—Resales—Division of Profits.*—A parol contract for the resale of lands for a division of the profits is not within the statute of frauds, and is enforceable. *Pinnix v. Smithdeal*, 410.

11. *Statute of Frauds—Deeds and Conveyances—Timber.*—A contract for the sale of timber standing upon the lands concerns such an interest therein as is required by the statute of frauds to be in writing. *Wilcox v. McLeod*, 637.

SAFE PLACE TO WORK.

See Employer and Employee, 1.

STENOGRAPHER.

See Appeal and Error, 48.

STREAMS.

See Injunction, 1, 2.

STREETS.

See Constitutional Law, 4; Judgments, 14; Municipal Corporations, 1, 2, 4, 7; Cities and Towns, 1, 2.

STREET RAILROADS.

See Constitutional Law, 4; Municipal Corporations, 4, 5.

STRIKES.

See Injunction, 6.

SUBROGATION.

See Equity, 5.

SUBSCRIPTIONS.

See Corporations, 1.

SUBSTITUTION.

See Appeal and Error, 44.

SUITS.

See Corporations, 13, 14.

SUMMONS.

See Attachment, 1; Guardian and Ward, 1.

SUPERIOR COURTS.

See *Habeas Corpus*, 1, 3; Pleadings, 2; Appeal and Error, 39, 74.

SUPREME COURT.

See Appeal and Error, 13, 24, 73; Parties, 3.

SURFACE WATERS.

See Waters, 1, 2; Injunction, 1.

SURPLUSAGE.

See Pleadings, 19, 20.

SURVEYS.

See Evidence, 32.

SURVIVAL.

See Actions, 11.

TAXATION.

See School Districts, 1, 3, 4, 5; Constitutional Law, 5, 11, 13, 18, 20; Drainage Districts, 3, 5; Roads and Highways, 2; Appeal and Error, 46; Elections, 1.

1. *Taxation—Counties—Equalization—Statutes — County Commissioners — Officers—Functus Officio.*—Our statute, Laws 1921, ch. 38, provides for the revaluation of property for purposes of taxation by the commissioners of a county, that their action be certified to and approved by the State Tax Commission, etc., and specifies, in the various sections, the dates "not later than which" these things shall be done: *Held*, the dates so fixed are mandatory and not directory, and the county commissioners are *functus officio* thereafter. *Williams v. Comrs.*, 135.

2. *Same—Elective Procedure.*—After the board of county commissioners have met within the time prescribed by statute, and have elected, upon investigation, to make a horizontal cut in equalizing the value of property, and have certified the same to the State Tax Commission, which has been approved, etc., ch. 38, Laws 1921, secs. 28(a) and (b), they may not in lieu of these sections proceed under sec. 28(c), to increase the tax value of some of the towns and townships, the remedy being elective at their former meeting, and it being required

TAXATION—*Continued.*

by this section that the work shall be completed "not later than" 1 July, and reported "not later than 15 July" to the State Tax Commission, their attempt to do so in August was *functus officio*, and their act will be restrained. *Ibid.*

TELEGRAPHS.

See Appeal and Error, 41.

TELEPHONES.

See Corporations, 3.

TENANT.

See Insurance, 2.

TENANTS FOR LIFE.

See Wills, 21.

TENANTS IN COMMON.

See Public Sales, 1, 3, 4; Deeds and Conveyances, 3, 5; Sales.

1. *Tenants in Common—Parol Division—Limitation of Actions—Adverse Possession.*—To bar the rights of a tenant in common to land under a parol division of the land, the possession must be adverse, open, and notorious, etc., for twenty years. *Bradford v. Bank*, 226.

2. *Same—Deeds and Conveyances—Collection of Rents—Ouster.*—The deed of a tenant in common to his part of the land allotted to him under a parol agreement for a division, and the collection of rents by himself and those claiming under his deed, for less than twenty years, will not bar the other tenants in common, or those having acquired title under registered deeds, or their rights, and the statute as to seven years under "color" has no application. *Ibid.*

TERMS.

See Judgments, 6; Ejectment, 2; Constitutional Law, 11.

THREATS.

See Contempt, 2; Assault, 3.

TIMBER.

See Deeds and Conveyances, 16, 17; Principal and Agent, 10; Statute of Frauds, 11; Election, 1.

TIME.

See Judgments, 13; Wills, 10, 23; School Districts, 5; Appeal and Error, 63; Criminal Law, 27.

TITLE.

See Mortgages, 3; Deeds and Conveyances, 2, 4, 10, 11, 19, 25; Landlord and Tenant, 2; Trusts, 2; Evidence, 29; Easements, 1.

TORTS.

See Judgments, 3; Married Women, 1; Railroads, 8; Actions, 7.

TRACKS.

See Municipal Corporations, 6; Railroads, 15.

TRANSACTIONS.

See Pleadings, 8.

TRANSCRIPT.

See Appeal and Error, 65.

TREASURER.

See Constitutional Law, 1; *Mandamus*, 1; Drainage Districts, 6, 8.

TRESPASSER.

See Negligence, 5.

TRIALS.

See Courts, 3, 7, 12; Constitutional Law, 8. 10; Automobiles, 1; Attorney and Client, 4; Instructions, 2, 5, 11; Contracts, 5, 30; Malicious Prosecution, 2; Wills, 25; Pleadings, 6; Appeal and Error, 18, 25, 72, 80; Evidence, 5, 17, 20, 23, 28; Actions, 8; Military, 3; Employer and Employee, 9; Railroads, 3, 7, 13; Principal and Agent, 4; Trusts, 4; Discovery, 2; Vendor and Purchaser, 1; Municipal Corporations, 1; Negligence, 7; Nuisance, 3; Partnership, 2; Criminal Law, 11, 13, 20, 26; Intoxicating Liquor, 1; Assault, 2; Homicide, 2, 3, 4.

1. *Trials—Parties—Witnesses—Comment of Counsel—Court's Discretion—Appeal and Error.*—Where a party to an action does not go upon the stand to prove or disprove material facts within their knowledge, remarks of opposing counsel to the jury as to their failure to have done so are allowable in the discretion of the trial judge, and where it does not appear that he has not abused this discretion, his action in allowing them to be made is not reviewable on appeal. *Maney v. Greenwood*, 580.

2. *Trials—Misconduct of Juror—Courts—Discretion—Appeal and Error.*—Where, without the knowledge of either the court or the attorneys for the parties, a jury, after taking the case, views the land to which the title is in dispute, and the attorneys are informed of the fact about four hours before the verdict was rendered, and have not called the fact to the attention of the judge, it is in his discretion to set aside the verdict for the misconduct of the jurors, and his action in not so doing is not reviewable on appeal. *Bowman v. Howard*, 663.

3. *Trials—Remarks of Counsel — Seduction — Improper Remarks — Appeal and Error.*—Where an attorney has been arguing to the jury for the conviction of the defendant on trial for seduction under a breach of promise of marriage, in conformity with the evidence in the case, he is within his rights in generalizing upon the enormity of the offense, and the necessity of protecting the virtue of our women from designs and practices of this character upon them. *S. v. Meares*, 810.

TRIAL BY JURY.

See *Mandamus*, 2; Constitutional Law, 6.

TRUSTS.

See Bills and Notes, 1; Instructions, 10; Evidence, 1, 29; Statute of Frauds, 2; Mortgages, 7, 8, 11; Contracts, 8; Corporations, 3; Pleadings, 11, 13; Wills, 15; Public Officials, 2.

1. *Trusts—Parol Trusts—Statute of Frauds.*—A parol trust may be established against the one holding the legal title, our statute not having enacted and being silent with regard to the seventh section of 29 Charles II., requiring that "all declarations or creation of trusts or confidences in any lands, etc., shall be manifested and proved by some writing signed by the party," etc. *Lefkowitz v. Silver*, 339.

2. *Same—Evidence—Legal Title.*—Where one of the parties to a parol agreement, acting upon the confidence he placed in another has orally agreed with him to purchase certain lands, to be held by them both jointly or in common, through their agent, chosen by the former, if it could be done at a price not exceeding a certain sum, and that other, acting independently and secretly, has fraudulently acquired the title through another source at the contemplated price, pending these negotiations, and has, himself, paid the purchase money, these facts may be shown by parol evidence, and engraft upon the legal title the

TRUSTS—*Continued.*

trust that the owner hold it upon the terms of the parol agreement pending at the time of its acquisition. *Ibid.*

3. *Same—Ex Malificio—Fraud—Intent—Contracts.*—It is not required to engraft a parol trust *ex malificio* upon a legal title held by another, that a consideration be shown, for this is done by the law itself to prevent the holder of the legal title acquired by his own fraud or wrong from taking advantage of his unconscionable act. *Ibid.*

4. *Trusts—Ex Malificio—Evidence—Deeds and Conveyances—Quantum of Proof—Questions for Jury—Instructions—Trials.*—In order to engraft an ordinary parol trust, or a trust *ex malificio* by parol, upon the legal title to lands, it must be established by strong, cogent, and convincing proof, which is to be determined by the jury upon the evidence under a proper instruction from the court. *Ibid.*

5. *Trusts—Powers of Sale—Duty of Trustee.*—Lands may be conveyed to a trustee in trust for sale, and it is not only his right, but his duty to sell when the terms of the power authorize and require it to be done. *Wells v. Crumpler*, 351.

6. *Same—Deeds and Conveyances—Consent of Cestui Que Trust.*—Where a trustee for the sale of lands coupled with an interest has not executed the power in conformity with its written terms, it is a valid conveyance of the title when the *cestui que trust*, the only other person having an interest, concurs with him in approving it. *Ibid.*

7. *Same—Failure of Consideration—Mortgages—Foreclosure—Trustee a Purchaser.*—Where there is a trust created for the sale of lands coupled with an interest in the trustee, and the consideration for the interest of the *cestui que trust* has not been paid by him according to his agreement, or there is a complete failure thereof, and the land, being under a mortgage made by the trustee, has been sold at a foreclosure sale and purchased by the trustee, the failure or refusal of the *cestui que trust* to help carry the property longer, and his declaration that the trustee sell the property so acquired by him and have the whole profit therefrom, is an abandonment of his right thereto, based upon a sufficient consideration. *Ibid.*

8. *Trusts—Interests—Purchase of Lands—Prospective Profits—Evidence—Appeal and Error—Objections and Exceptions.*—Where the land subject to trust to be resold for a division of the profits and the loss between the parties, has been mortgaged by the trustee, who also has an interest therein, to secure the balance of the purchase money, and the *cestui que trust* has failed to contribute his part of the cash payment and has obliged the trustee, who has paid his part, to assume all of the burden of the mortgage debt, and at the foreclosure sale the latter has become the purchaser: *Held*, exceptions to parol evidence, tending to show these facts, are untenable. *Ibid.*

9. *Same—Verdict.*—Where the written contract to buy land for the purposes of a division of profits at a resale or the sharing of loss, provides that the title shall be in one of the parties, who thereafter buys at a foreclosure sale of a mortgage which he had given to secure the balance of the purchase price, and where, upon the evidence and proper rulings of law, the jury has found that there were no profits after all expenses had been paid by the trustee, it concludes the *cestui que trust* in his action to recover his alleged part of the profits, if any, he was to have received under the terms of the agreement. *Ibid.*

TRUST—*Continued.*

10. *Trusts—Charities—Sales—Wills—Courts—Equity.*—Upon a devise of a remainder in lands to trustees of a church to be held as a home for needy widows of the ministers of that denomination, an order of court for the sale of a portion of the lands when necessary to preserve the property and effectuate the purposes of the trust is valid in the exercise of the equitable jurisdiction of the court, when otherwise the charity would fail or its usefulness be materially impaired. *Ex parte Wilds*, 705.

TRUST COMPANIES.

See Constitutional Law, 1.

ULTRA VIRES ACTS.

See Injunctions, 8; Public Accountants, 6.

UNDERTAKINGS.

See Attachments, 3, 5.

UNDUE INFLUENCE.

See Attorney and Client, 9.

UNIVERSITY.

See Escheats; Public Administrators.

VALUE.

See Mortgages, 4; Municipal Corporations, 4; Deeds and Conveyances, 11; Roads and Highways, 4.

VARIANCE.

See Criminal Law, 28.

VENDOR AND PURCHASER.

See Contracts, 5; Statute of Frauds, 8; Principal and Agent, 10.

1. *Vendor and Purchaser—Sales—Principal and Agent—Commissions—Parties—Pleadings—Demurrer—Evidence—Nonsuit—Trials.*—An agent for the sale of land upon commission had the land platted into lots and sold to the highest bidders at public outcry, and brings his action against the highest bidder on two of these lots, to recover his commissions, who refused to take the lots in accordance with the terms of sale and a memorandum made at the time. Upon the allegations of the complaint: *Held*, on demurrer, a good cause of action had not been stated, no sale having been consummated, and there being evidence on the trial that the owner himself was not insisting on bidder taking the lots, a judgment as of nonsuit was properly rendered. *Faison v. Marshburn*, 133.

2. *Vendor and Purchaser — Contracts — Railroads — War — Stipulations Against—Damages for Delayed Shipments.*—Where there was a stipulation in a written contract of sale of seed potatoes made during governmental control of railroads as a war measure, that the vendor would not be "liable, or responsible" for delays in the delivery of the shipment for causes beyond his control, and it appears that the shipment was delivered beyond the time agreed upon and to a different line of carriage, but solely caused by war conditions, and the necessities of the Government in the prosecution of the war, the purchaser in the vendor's action to recover the purchase price may not avoid liability therefor by having refused to accept the shipment, the provision of the contract in plaintiff's favor being reasonable, nor can he successfully contend that the shipment having been made by the plaintiff under "an order notify" bill of lading attached to draft,

VENDOR AND PURCHASER—*Continued.*

even though as a matter of law it reserved the title in him, made the carrier liable to the plaintiff, and not the defendant. *York v. Jeffreys*, 452.

3. *Vendor and Purchaser—Contracts—Warranty—Conditions Precedent.*—Where under a written contract for the sale of machinery the purchaser has agreed that his receipt thereof and retention for more than thirty days shall be considered an absolute acceptance, his retaining them beyond the time specified will be regarded as an admission that the machinery was as warranted, and conclude his right of action thereon, in the absence of fraud, accident, or mistake. *Fay v. Crowell*, 532.

4. *Same—Waiver.*—Where there is a stipulation in a written sale of machinery that it shall be returned by the purchaser in case it was not as represented, the purchaser is entitled to no redress in the event of a breach by the seller of his warranty, unless he has first offered to perform the condition, in the absence of fraud or of such conduct as amounts to a waiver by the seller. *Ibid.*

5. *Same—Inferior Quality.*—A contract for the sale of machinery, free from ambiguity or fraud, accident or mistake, is binding upon the purchaser under conditions requiring him to return the machinery if not as warranted, within a stated time, or providing that its retention beyond that period would be regarded as an absolute acceptance; and this applies when the purchaser has retained the machinery beyond the stated time and attempts to claim damages for the seller's breach of warranty in sending a different machine, or one of inferior quality, to that agreed upon. *Ibid.*

VENUE.

See Contracts, 18; Courts, 3.

VERDICT.

See Appeal and Error, 7, 8, 16, 41; Judgments, 5, 7; Jurors, 1; Statutes, 8; Damages, 2; Instructions, 3; Pleadings, 17; Trusts, 9; Instructions, 12; Appeal and Error, 60, 86; Criminal Law, 18; Intoxicating Liquor, 10.

1. *Verdict—Issues—Instructions.*—The answer to an issue should be interpreted in the light of instructions thereon; and an affirmative answer to an issue as to plaintiff's employment may not be increased by an amount claimed to be due by defendant to plaintiff's wife, when the issue as to the amount found on a separate issue has been confined by an instruction to that due the plaintiff alone. *Croom v. Lumber Co.*, 217.

2. *Verdict—Interpretation—Instructions—Evidence—Appeal and Error.*—A verdict of the jury will be interpreted by reference to the pleadings, the facts in evidence, and the charge of the court. *Snody v. Anderson*, 630.

3. *Same—Limitation of Actions—Quantum Valebat.*—In an action against an administrator to recover the value of services rendered to decedent for thirty-five years prior to and up to the time of his death, and the issue is answered in a certain amount under a charge restricting the recovery to within a period of three years, objection of the defendant, based on the running of the statute of limitations, is untenable. *Ibid.*

4. *Verdict—Consistency—Contract—Quantum Valebat.*—Where the plaintiff alleges in an action against the administrator that the deceased had agreed to pay her for services rendered him, and a separate cause is alleged as to a recovery for the value of her services, a recovery upon the latter issue, with adverse verdict to her on the first, are not inconsistent and will not preclude her recovery or affect the verdict giving damages for the value of her services. *Ibid.*

VESTED RIGHTS.

See Evidence, 9; Wills, 27; Constitutional Law, 19.

VICE PRINCIPALS.

See Employer and Employee, 3.

VOTERS.

See Constitutional Law, 16.

WAIVER.

See Jurors, 1; Drainage Districts, 11, 13; *Mandamus*, 2; Judgments, 22; Attachment, 5, 7; Vendor and Purchaser, 4; Constitutional Law, 9; Contracts, 12, 15; Courts, 4; Equity, 7; Appeal and Error, 62; Criminal Law, 16.

WAR.

See Evidence, 17; Vendor and Purchaser, 2; Railroads, 17.

WARRANTS

See Courts, 12; Intoxicating Liquor, 12.

WARRANTY.

See Contracts, 5, 7; Deeds and Conveyances, 9; Vendor and Purchaser, 3.

WATERS.

See Injunctions, 1; Fish Commission, 1.

1. *Waters—Surface Waters—Drainage—Canals—Prescriptive Rights—Damages.*—Where the users of a canal by prescriptive right enlarge the same, and thereby place water upon the lower proprietor to his damage, they are liable therefor, and, upon conflicting evidence, the issue should be submitted to the jury. *Armstrong v. Spruill*, 1.

2. *Waters—Surface Waters—Enlargement of Canal—Costs—Statutes.*—The method by which the users of a canal by prescriptive right may enlarge or deepen it with an apportionment of the costs, is provided by our statute. C.S. 5274. *Ibid.*

WILLS.

See Deeds and Conveyances, 18; Guardian and Ward, 3; Trusts, 10.

1. *Wills—Devise—Estates—Fee—Contingencies—Words and Clauses—"Or" Construed as "And."*—In a devise to the testator's son of certain lands, and in the event he "should die during his minority, or childless . . . the remainder" over to the trustees of a certain church, the words "or childless" will be construed "and childless," so as not to deprive the son, the primary object of the testator's bounty, of the right and title to the land upon his coming of age, when not in clear contravention of the purpose of the testator elsewhere expressed in his will. *Patterson v. McCormick*, 177 N.C. 448, cited and distinguished. *Williams v. Hicks*, 112.

2. *Wills—Deeds and Conveyances—Rule in Shelley's Case.*—The rule in *Shelley's* case is one of law and not of construction, and where the language of the instrument brings the disposition of land within its operation, the intent of the grantor or devisor does not control. *Reid v. Neal*, 192.

3. *Same—Estates—Remainders—Defeasible Fee.*—A devise of land to testator's daughter for life, and at her death to her "bodily heirs, if any, and if none, to return to my estate," does not come within the meaning of the rule in *Shelley's* case so as to give to the daughter a fee-simple estate, in disregard of

WILLS—*Continued.*

the intent of the testator; and will be construed, nothing else appearing, as giving her the fee simple, defeasible upon her dying without issue; and upon the happening of this contingency, with remainder over to the heirs general of the testator. *Ibid.*

4. *Same—Testator's Intent—Interpretation.*—When permissible from the language employed, a will should be construed with reference to the meaning of every word and clause, to harmonize them with each other, when the effect is not inconsistent with the general intent and purpose of the testator as gathered from the entire instrument. *Ibid.*

5. *Same—Remaindermen—"Estate."*—Where the rule in *Shelley's* case is inapplicable to a devise of lands, and it appears from the interpretation of a will that it was the intent of the testator to give his daughter a fee simple, defeasible upon her dying without issue, in which event it was "to return to his estate," the limitation over to "his estate" is not void for uncertainty, the intent of the testator being that it return to his estate for distribution among his general heirs. *Ibid.*

6. *Wills—Estates—Remaindermen—Heirs at Law.*—In accordance with the intent of the testator, as gathered from the words he has used in his will, the word "estate" may be interpreted to mean the quantity of interest to be taken, or the thing devised, or the circumstances or conditions in which the owner stands in regard to his property, or the person or persons to take it; and may refer to personal or real property, or exclude real property. *Ibid.*

7. *Wills—Residuary Clause—Purpose.*—The purpose of a residuary clause in a will is to provide for the ultimate disposition of legacies and devises which are void, or have lapsed, or have been refused; and, in the absence of an effective residuary clause, a lapsed or void legacy or devise will go to the next of kin, or to the heirs of the testator, as in case of intestacy. *Ibid.*

8. *Wills—Evidence—Witness to Will.*—The importance attached by the law to the testimony of a subscribing witness to a will, and their duty to observe the condition of the testator and to prevent fraud, is confined to the time of their attestation of the will, and their observation at other times, especially at a subsequent date, has only the force of that of other witnesses who may testify thereto. *In re Edens*, 398.

9. *Same—Instructions.*—Where the subscribing witnesses to a will have not only testified as to the mental condition of the testator at the time, but have also testified to their observations at other times, a request for instruction that places all of this testimony upon the same probative footing as to the weight to be attached to the testimony of witnesses of the law, is erroneous and properly refused. *Ibid.*

10. *Wills—Mental Capacity—Evidence—Time of Execution.*—The evidence of the mental capacity of a testator to make a will must, upon the trial, when at issue, be relevant to the time of its execution and attestation, and while ordinarily a few days difference will not be regarded as vitally important, it is otherwise if his mental and physical condition and old age makes it material. *In re Ross*, 477.

11. *Same—Appeal and Error—Reversible Error.*—Where there is evidence that the testatrix was sixty-eight years of age, in bad physical health, and subject to spells of weeping and melancholy despondency, and that she and her sister were in consultation with a lawyer for the purpose of his drafting her will, and it appears that she executed as her will the draft he had mailed to her, more

than five days thereafter, an instruction to the jury that made the issue as to mental capacity rest alone upon the evidence thereof at the time of the consultation, is reversible error. *Ibid.*

12. *Same—Acts and Conduct of Testator.*—Where the sufficient mental capacity of a testatrix to make a valid will is in question upon the trial, her acts and conduct may be competent only when they have a proper bearing upon her mental condition at the time of the execution of the paper-writing propounded as her will. *Ibid.*

13. *Wills—Legal Execution—Burden of Proof—Instructions—Appeal and Error—Reversible Error.*—The burden of showing legal execution of the paper-writing purporting to be a valid will is upon the propounders, and an instruction that relieves them of this burden is error prejudicial to the caveators. *Ibid.*

14. *Wills—Mental Capacity—Evidence—Aid and Suggestions—Instructions—Appeal and Error—Reversible Error.*—The sufficiency of the testator's mental capacity to make a valid will depends upon whether his mind at the time of its execution was sufficiently clear to know the character of his property, those whom he wished to benefit and to the extent thereof, and an instruction that goes further and makes this to depend upon aid or suggestions given by a relative for the drafting of the instrument caveated, constitutes reversible error to the prejudice of the caveator. *Ibid.*

15. *Wills—Letters—Devises—Fee—Trusts.*—Where a holograph will, unnecessarily witnessed and bearing a seal after the testator's signature, in positive terms gives all of the testator's real property to his sister, to be held by a designated person in trust for her until her twenty-third birthday, and the testator has written a letter to her (without attestation or seal, but on the same sheet of paper) expressing a wish that when she should become aware of the contents of his will, she would make one, leaving "all your property" to a certain nephew, so that in the event of her dying without children the nephew should have it, and in case of her marriage she could destroy her will: *Held*, the words in the letter were precatory and not mandatory; and should it be considered a part of the will, which is at least doubtful, and the clerk has admitted the facts to probate, the words employed in the letter are insufficient to evidence the intent of the testator to impose a trust thereby upon the unqualified gift in the writing he declared to be his will. *Springs v. Springs*, 484.

16. *Same—Precatory Words—Statutes.*—For precatory words used in a will to be regarded as mandatory to create a trust in lands devised, the intention of the testator to that effect must clearly appear by interpretation of the instrument, for otherwise these words must be given the ordinary significance of those of that character, both under our modern decisions and C.S. 4162, providing that a devise of lands shall be construed to be in fee, unless the terms of the will clearly shows the testator's intent to pass an estate or less dignity. *Ibid.*

17. *Wills—Restraint on Alienation—Public Policy—Void Clauses.*—A devise of land to testator's daughter and her husband for life, then to their daughter, who takes a defeasible fee upon contingency that she die leaving heirs, with provision that the devisees shall not sell or convey the "said land or any part thereof to any individual or incorporated company," and for a division among the testator's children should the daughter die without leaving heirs, is void as an attempted restraint on alienation and in contravention of public policy. *Pilley v. Sullivan*, 493.

18. *Wills—Interpretation—Intent—Repugnancy—Words—Clauses.*—The entire will should be construed to give effect to the testator's intent, reconciling

WILLS—*Continued.*

clauses apparently repugnant, and effectuating whenever possible every clause and word. *Ibid.*

19. *Same—"Or"—Words and Phrases.*—Where the disjunctive meaning of the word "or," used in a will, is contrary to the testator's intent under a proper construction of the instrument, it will be construed as "and" when such appears to have been the testator's intention; and where there is a contingent limitation of an estate over should the beneficiary "die without heirs or intestate," this construction of the word "or" will apply when the testator evidently intended the limitation over to take effect upon the happening of both events, and not one of them. *Ibid.*

20. *Wills—Restraint on Alienation—Next of Kin—Explanatory Clauses.*—A devise of lands for life and then in remainder, and upon the contingency that the lands be divided between the testator's children, should the remainderman die without heirs and intestate, and after attempting to impose a restraint upon alienation the testator adds "but the same shall descend to her next of kin," these words will be interpreted as indicating the testator's reason for the attempted restraint, and not so much as directing the course of descent. *Ibid.*

21. *Wills—Estates—Tenants for Life—Limitations—Contingencies — Heirs —Remaindermen.*—A devise of land to the testator's daughter and her husband for life, remainder to their daughter, "and if either or both of them should die intestate without heirs," then to be equally divided between all of the testator's children: *Held*, the meaning of the words "either or both" could not reasonably apply to the life tenants, whose interest would in either event terminate at their death, vesting the remainder in their child specifically mentioned in the will. *Ibid.*

22. *Wills — Estates — Limitations — Contingencies — Defeasible Fee — Fee Simple.*—An estate for life to testator's daughter and her husband, with remainder to their daughter, but in the event either or both should die without heirs or intestate, then it shall be equally divided among all of the testator's children, share and share alike: *Held*, the word "heirs" should be construed as "children," and the grandchild of the testator took a remainder in fee, defeasible in the event of her dying intestate and without children, and not an absolute fee-simple estate. *Ibid.*

23. *Wills—Probate—Statutes—Time of Discovery of Fraud—Laches.*—Our statute allowing three years from the time of the discovery of a fraud within which an action thereon must be commenced, applicable to an adversary proceeding between litigants, is not necessarily controlling upon the hearing upon petition before the clerk of the Superior Court to set aside for fraud or imposition on the court, the proceedings admitting a paper-writing to probate as a will; and were it otherwise, it is required that the petitioner show that he could not sooner have discovered the fraud by the exercise of ordinary care, which in the instant case he has failed to do. *In re Johnson*, 522.

24. *Wills—Witnesses—Attestation— Signature of Testator — Requisites.*—Upon the trial of an issue of *devisavit vel non* submitted in accordance with the statutes appertaining to the subject, and authoritative decisions construing the same, an instruction is correct upon relevant evidence that it was not required that the witnesses to the will should sign in the presence of each other, or that the will should be manually signed by the alleged testatrix if her name was signed thereto by some one in her presence, by her direction, or if such a signature was acknowledged by her as her signature to the instrument presented as her last will. *Ibid.*

WILLS—*Continued.*

25. *Wills—Fraud—Trials—Issues — Appeal and Error — Limitation of Actions.*—On this appeal from the trial of *devisavit vel non*, there was conflicting evidence as to whether the testatrix signed the paper-writing and had it attested at the time thereon appearing, when her mind was sufficient to make a valid will, or a year thereafter, when she did not have sufficient mentality; or whether the signature was an outright forgery or procured by fraud: *Held*, the trial was free from error, leaving only the question of the bar of the statute of limitations also presented on the record, before the court. *Ibid.*

26. *Wills—Probate—Caveat—Statutes — Limitation of Actions — Laches — Fraud.*—By ch. 862, Laws 1907, now C.S. 4158, the Legislature recognized that it is against the sound public policy to allow probate of wills and settlements of property rights thereunder to be left open to such uncertainties for an indefinite length of time, and required that caveats to a will should be entered at the time of application for probate in common form or at any time within seven years thereafter, etc., excepting cases of infants, married women, or insane persons; and where none of these disabilities are shown, the right to enter a caveat is barred after the seven-year period, without regard to the time the caveator should have, by ordinary care, discovered the fraud upon which he relies to invalidate the writing. C.S. 441, subsec. 9. *Ibid.*

27. *Wills—Estates—Contingencies—Vested Rights.*—After devising and bequeathing his real and personal property to his children, the testator directed his executors to keep his estate intact until the death of his wife, and "after the death of my wife, to distribute and divide my estate among all of my children, share and share alike, the children of any deceased child of mine taking his or her share, provided that if any of my children are dead without lineal descendants, the share of such child or children shall go to my other children, equally": *Held*, the contingency determining those who should take was the death of the testator's wife, or the children or grandchildren of the testator then living, the latter taking under the testator's will, and not as heirs at law of their deceased parent. *Cilley v. Geitner*, 714.

28. *Same—Husband and Wife—Descent—Husband's Interest—Curtesy.*—Where the grandchildren of the testator have taken as survivors, after a life estate of their mother, under the terms of the will of their deceased grandfather, their father cannot be entitled to take any interest therein as representative of his deceased wife, or as tenant by the curtesy, or agree with the guardians of his minor children to any extent that would affect their rights under the will. *Ibid.*

WITNESS.

See Evidence, 11, 15, 16, 18; Instructions, 5; Wills, 8, 24; Trials, 1; Courts, 12.

Witness—General Reputation—Evidence—Spirituous Liquors — Intoxicating Liquors.—A defendant in an action for violating the prohibition law may not show the general reputation of a witness who has testified in his favor, under contradictory evidence, by another witness who says he does not know it. *S. v. Haywood*, 815.

WORDS AND PHRASES.

See Wills, 1, 18, 19; Appeal and Error, 44; Fish Commission, 2.

WRITTEN INSTRUMENTS.

See Contracts, 13, 14, 15, 16; Evidence, 3; Statute of Frauds, 3, 7; Appeal and Error, 47; Limitation of Actions, 3.

WRONGFUL DEATH.

See Evidence, 7; Actions, 12.